



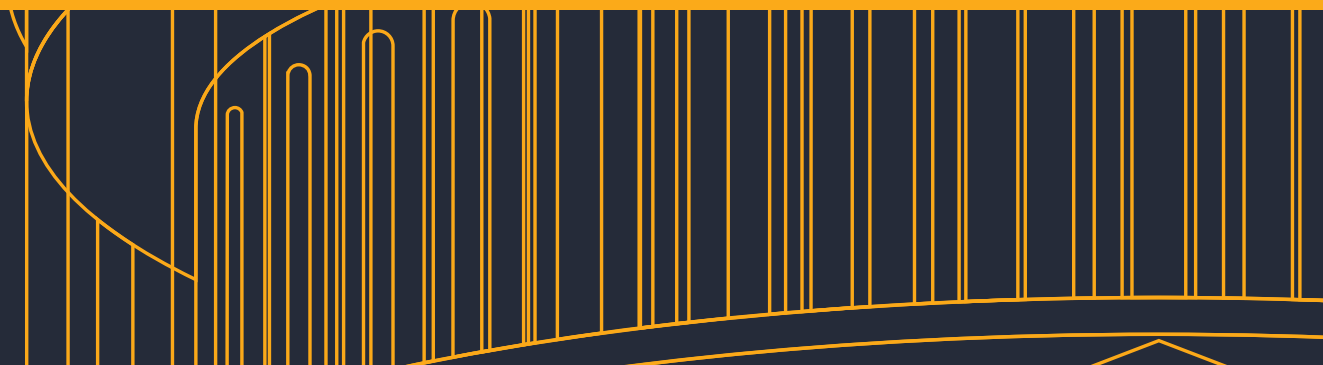
INVESTIGATION / OVERSIGHT / QUESTIONS / ACCOUNTABILITY / BIPARTISAN / RESPONSIBILITY / WHISTLEBLOWERS / EFFECTIVE

THE ART *of* CONGRESSIONAL OVERSIGHT

A USER'S GUIDE TO DOING IT RIGHT

SECOND EDITION

PROJECT ON GOVERNMENT OVERSIGHT



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CONTENTS

Acknowledgments	1
Introduction	2
Chapter 1: Recognizing Responsibility and Power	3
The legal basis for congressional oversight	4
Key principles of congressional oversight	5
Measure Your Congressional Powers IQ	7
The Right Balance of Power: The Responsibility of Congressional Oversight	9
Additional Reading	14
Chapter 2: Beginning Your Investigation	15
Deciding what type of oversight investigation you want to pursue	16
Checking your committee's rules	16
Studying what is already available	17
Narrowing your search	18
Using case studies to exemplify systemic failures	19
Finding the instances of wrongdoing (waste, fraud, or abuse)	19
Getting ahold of the documentation	20
Cultivating contacts within the agencies and companies you cover	20
Listening to insiders and whistleblowers.....	21
Getting out of the office	21
Utilizing the media.....	22
An Investigation Case Study: Not Sweeping It Under the Rug	23
Chapter 3: Utilizing Resources	25
Tapping into other investigators' reports	26
Working with insiders and whistleblowers.....	27
Reaching out to other experts.....	30
Finding publicly available information	32
Chapter 4: Conducting the Investigation and Prepping for a Hearing	33
Keeping your boss engaged	34
Being mindful of potential procedural objections to your investigation.....	35

Deciding on your media strategy ahead of time.....	35
Expecting some unexpected adversaries	36
Considering legislative fixes before and after the hearing	36
Consulting with House or Senate Legal Counsel	36
Establishing a process.....	37
Being patient	37
Knowing your issue.....	38
Interviewing your subject ahead of time	39
Giving the subjects of your investigations zero excuse for not cooperating	39
Not being fooled by pseudo-classifications.....	41
Exerting Congress’s right to information	41
Using Congress’s oversight arsenal.....	43
Chapter 5: The Hearing and Beyond	49
Engaging the media	50
Scripting the hearing	51
Not letting the hearing be the end	58
Endnotes	61
Additional Resources	63
Resource A: Useful Databases and Other Resources for Conducting Oversight	63
Resource B: Tip Sheet on Congressional Access to Classified, Sensitive, or Privileged Information	70

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Danielle Brian

Executive Director

Danni Downing

Editor

INTRODUCTION

1. Who You Are

This handbook is intended for congressional staffers. You work in the House or in the Senate. You work in personal offices, you are committee staff, you are Republicans, Democrats, and Independents...

2. Who We Are and Why We Wrote This

The Project On Government Oversight is a nonpartisan independent watchdog that champions good government. POGO's investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. Founded in 1981, POGO (which was then known as Project on Military Procurement) originally worked to expose outrageously overpriced military spending on items such as the \$7,600 coffee maker and the \$436 hammer. POGO is nonpartisan and desires nothing more than a good government.

The bottom line is that Congress is equal in power to the executive branch, just as it is to the judicial branch. Congress has the right to information and should demand it. The oversight functions of Congress are essential to creating an accountable federal government and upholding our democracy's system of checks and balances. We have written this guide because we have discovered that Congress has lost sight of these essential points and has forgotten its strength.

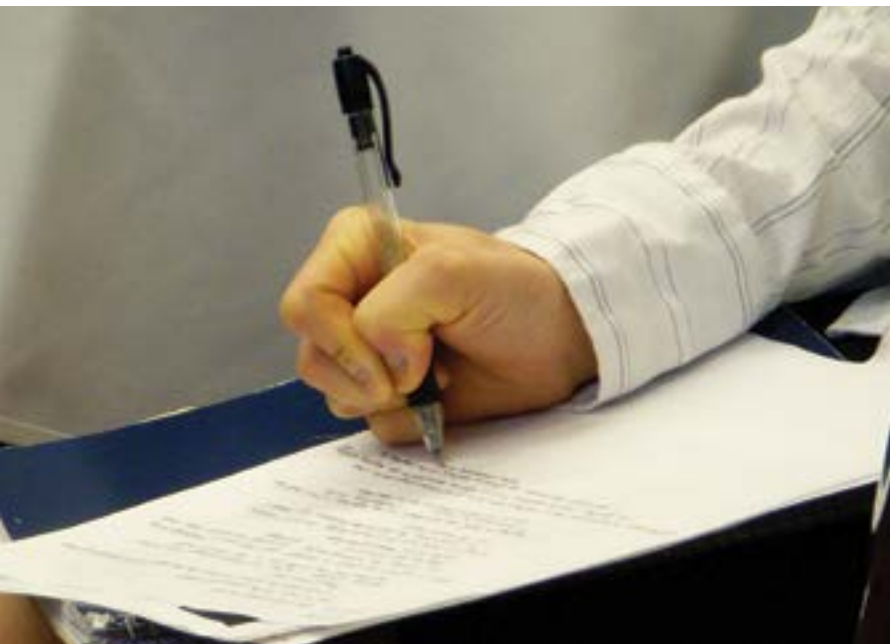


Photo by Pam Rutter

In 2006, we started the Congressional Training Program to help inform and educate Hill staffers about their authorities and responsibilities. One of the most frequent questions from interested staffers is "Do you have one resource that sums up all of this information?" Our initial answer was "No, but we should." Thus, this handbook was born.

This handbook is a compilation and extension of the Training Program seminars. It also documents some of the rich tradition of oversight on the Hill and seeks to inspire and empower a new generation of staffers to pick up the baton from many of the oversight greats who have retired or otherwise left Congress.



1.

RECOGNIZING RESPONSIBILITY & POWER

INVESTIGATION / OVERSIGHT / QUESTIONS / ACCOUNTABILITY / BIPARTISAN

In this chapter you will learn:

1. The legal basis for congressional oversight
2. Key principles of congressional oversight

Also, Measure Your Congressional Powers IQ, and “The Right Balance of Power: The Responsibility of Congressional Oversight”

A core idea that lays the foundation for congressional oversight is that Congress not only has the *right* to conduct oversight of the executive and judicial branches—as well as of private companies and other institutions affecting the public’s welfare—but also the *responsibility* to do so.

YOU MAY BE THE PUBLIC'S ONLY HOPE FOR THE TRUTH

The investigation into the shoot-down of the U.S. Blackhawk helicopters by two American F-15s, an event that killed twenty-six people over northern Iraq, was done because the father of a young lady—who was killed on one of the helicopters, she was an Air Force second lieutenant—was an active duty Air Force colonel and was one of my classmates. He wrote the Chairman and said, “I’m not getting a straight answer on what happened. You’re the only people I know of who will get me a straight answer.”

Former Republican House and Senate Committee investigator

1. The Legal Basis for Congressional Oversight

While the Constitution does not expressly provide for Congress’s oversight authority, investigating the actions of those governing and those governed is an implied authority for maintaining the balance of authority between the three branches. Indeed, the Supreme Court recognized Congress’s oversight authority in the case of *McGrain v. Daugherty* (1927), stating unanimously that:

The power of inquiry with process to enforce it is an essential and appropriate auxiliary to the legislative function.... 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.¹

For more on the legal basis for congressional oversight, see “The Right Balance of Power: The Responsibility of Congressional Oversight” at the end of the chapter, or the remarks of Morton Rosenberg from POGO’s July 18, 2008, Training Program seminar.²

BALANCE OF POWER: A HISTORY LESSON

Congressional oversight—everybody talks about it but I don’t think it’s as well understood as it should be in this era.... It dates back prior to the time of the formation of the Republic to the fight between the English Parliament and the King, and the ultimate victory of the Parliament over the King in wresting the power of the purse—something that we can probably take a few lessons from.

The power of the purse, the power to tax, the power to declare war, were seen as the most oppressive powers that the King had over his subjects, so Parliament spent 200 to 300 years wresting that power from the King and vesting it in itself.

By the time of the formation of the American Colonies, and ultimately the Constitutional Convention, it was an article of faith that Congress had the power to review executive branch actions, to call for papers and documents, to see how the people they delegate authority to were carrying out their duties....

Stanley Brand, founder of Brand Law Group and former General Counsel to the House of Representatives under Speaker Thomas P. “Tip” O’Neill, Jr. (D-MA)

2. Key Principles of Congressional Oversight

- **Congressional oversight need not be limited to committee hearings.** While it is true that Members by themselves cannot hold hearings, there are other means through which they or their staff can take action.
 - » **Correspondence:** Members can write letters to agencies and develop inside sources within agencies to access information.
 - » **Research:** Members can send detailed requests for information to the Congressional Research Service, the Law Library of Congress, and the Government Accountability Office.
 - » **Referral:** Members can approach colleagues from the committee with jurisdiction with their concerns, an action that would be strengthened by going armed with the information gained from the above two methods. They can also refer matters to Inspectors General, the Office of Special Counsel, or the Department of Justice (in those cases where there might be criminal activity).
 - » **Media:** Members can contact the press to express their concerns, encouraging reporters to call agency officials and draw attention to the issue.

Remember: Should your concerns result in a hearing, and you're not on committee staff, it can't hurt to draft a few possible questions for them.

HEARINGS AREN'T THE BE-ALL END-ALL

For God's sake, do not think that hearings are the be-all end-all of your oversight.... We find it not to be a very helpful tool for oversight. We think our letters, getting material, getting that out to the public, having a public discussion about what they're doing, and getting detailed answers is often a much more successful way to get things accomplished.

Dean Zerbe, former Counsel and Investigator for the Office of Senator Charles Grassley (R-IA)

- **Congressional investigators should work together.** This means you should be building relationships with other staffers doing meaningful oversight across the aisle or in the other Chamber. They may be your best sources of advice, documents, and contacts. They may even drop a completed investigation into your lap—it's been known to happen that a Member halts their staff's investigation, and that colleague may need someone else to take over.
- **Investigators should not get intimidated.** Meaningful congressional oversight is hard work. It is time- and resource-consuming. Given that you are trying to address fraud, waste, and abuse, people will become defensive and may even go on the offensive against you. You will need to develop a thick skin. Taxpayers, and even those within the federal agencies you may be investigating, rely on Congress to root out misconduct and mismanagement.

EXPECT PERSONAL ATTACKS

I remember my first investigation. The guy had a lawyer who came up to me and said, “I find you very laughable.” I said back to him, “Three months from now, I want to see how funny you think I am.” Three months later, he wasn’t that amused.

Franklin R. Silbey, former Democratic House and Senate oversight staffer and Staff Director



Photo courtesy of U.S. Senate Historical Office

INVESTIGATING THE TEAPOT DOME SCANDAL, SENATORS ARE SENT A MESSAGE TO STOP SNOOPING

While there was still little public attention focused on the issue, conservationists remained concerned with the secrecy of the Sinclair [oil] lease—there had been no official announcement of it. [Senator] La Follette [R-WI] introduced resolutions on April 21 and 28, calling for the Senate Committee on Public Lands and Surveys to look into all leases on naval lands. He then pleaded with Senator Walsh [D-MT] to assume leadership of the investigation. Although the Senator agreed, he was appalled by the drudgery which the task would involve and stunned by the amount of material he would have to examine ... [yet] several suspicious events caused him to continue plodding through the reams of documents. For example, shortly after La Follette introduced his

resolutions calling for an investigation, La Follette’s offices were ransacked. Then, Walsh discovered that someone had been investigating his own past, and he had reason to suspect that his phones were tapped and that his mail was being read.³

Hasia Diner, *Congress Investigates: A Documented History, 1972–1974*

- **Congressional oversight is stronger and more credible when it’s bipartisan.** While it’s a given that certain issues will, by their nature, lead to partisan disagreements, there are some issues that should transcend politics. For example, ensuring that the executive branch is correctly enforcing and executing the law or that companies are not grossly over-charging the government or otherwise harming the public is in the interest of both parties and the country in general. Those types of issues shouldn’t be allowed to become partisan.

OVERSIGHT: IT’S ABOUT INVESTIGATION, NOT IDEOLOGY

Here I was my whole life, a conservative Republican, and I was always bombarded with “You’ve got to spend more on defense, and stop spending so much money on domestic programs,” and then all of a sudden, here I am trying to find out if you can or cannot freeze the defense budget, and if that would be bad or good. And with my paradigm of “More money for defense is good,” to switch gears and turn that paradigm on its head, and act on it as somebody with a certain amount of power in the government—that’s a gut-wrenching experience.

Former Republican Senate staffer, 19 years

Remember: Although it may sound counter-intuitive, one of the best things you can do for your party if it is in the White House is conduct rigorous and regular oversight of the executive branch. This can prevent the growth of problems that may generate media attention and can negatively impact your party in the next election cycle.

PROBLEMS CAN GO DEEPER THAN JUST ONE ADMINISTRATION

A lot of times the problems in some administrations are so deep in the bowels of the executive branch that the idea they are somehow assignable to this party or that party is not accurate. With some of the investigations we've done, it's usually innately a problem in the bureaucracy that's been there a long time. Obviously, that's not true of everything, but it's sometimes useful to recognize that. It makes you better at looking for a solution, as opposed to thinking, "Once we get rid of these son-of-a-guns, everything will be solved," which will probably not be the case. It's helpful to ask yourself: "What are the cultural issues in an agency that are leading to the problems within the agency?" Then, identify those cultures and try to tackle and change them.

Dean Zerbe, former Counsel and Investigator for the Office of Senator Charles Grassley (R-IA)

Measure Your Congressional Powers IQ

A QUIZ BY FORMER REPRESENTATIVE MICKEY EDWARDS (R-OK), 1977-92

1. What sorts of limitations should guide what the President does in another country when they have stepped out of the role as Head of Government and are acting as the official Head of State?
2. People from the executive branch come to provide Congress with an intelligence briefing. They only allow a couple of Members—"No staff." What should be the process that the House and Senate follow after that meeting in order to properly act on legislation?
3. When the President wants to do something of questionable constitutionality, should they be required to first have a formal authorization from the Department of Justice's Office of Legal Counsel?

THEY'RE TRICK QUESTIONS.

1. The President is not the Head of Government. The President is the Head of State. They are the head of only one of the three separate and completely *equal* branches of government.
2. What gives the executive branch the authority to tell the legislative branch who it can have in a meeting? Why can the President, or a group of people in the executive branch, say “We’re going to tell Members of Congress where they can take their staff and what they can let their staff hear”? There is no authority in the executive branch to tell Congress who can or cannot have the information it seeks.⁴
3. If [former House Counsel] Stan Brand, who is really a very good attorney, gave me the authority to jaywalk, does that give me the authority to jaywalk? The Office of Legal Counsel is just a lawyer advising the President. It has no legal basis for conferring authority.⁵

I make these points because there seems to be a pervasive—in this institution, in the House and in the Senate, in the Republican Party and in the Democratic Party, in the rank-and-file and in the leadership, and with the Members and the staff—and complete unawareness of the role of Congress as an equal, not just separate, branch of government.



The Right Balance of Power: The Responsibility of Congressional Oversight

COMMENTS BY STANLEY BRAND AND MICKEY EDWARDS⁶

STANLEY BRAND: I want to briefly speak about three things. I come at this from a different perspective than a national security perspective. I don't think there's anything different about the analysis of Congress's powers when it comes to oversight in the national security area than it is in any other area. If you start at the constitutional level, the basis for Congress's oversight power is clear, and it's the same whether it's on the domestic policy area or national security. Congress has the power to investigate and the power to use process, namely subpoenas, to enforce its demands for evidence, being documents and testimony on any subject upon which legislation can be had. And so if you look in Article I, and you see the enumeration of all the powers of Congress, it's very broad: From raising armies and navies, to declaring war, to post offices, to coinage of money, the regulation of immigration and nationalization, on and on and on. And as if that weren't enough, at the very end it [adds] all powers necessary and proper in carrying those into execution. And my friend Mickey Edwards wears a button that says, "Article I: There's a reason that Congress is Article I, it's first!" And that means that every statute passed in furtherance of Congress's power under national security comes from the wellspring of Congress. It's not invented in the executive branch, it's not specified in Article II, it's an Article I power. So this vast array of national security statutes and things that control the operation of the intelligence agencies were created in the first instance by Congress. And the basic element of the Law of Agency is that a principal controls the actions of its agents. In this case, the principal is Congress, and the agents are the agencies and instrumentalities that Congress has set up to carry out its policies. The classification system is not a system invented by the President, it's a system invented by the Congress.

Now, when you get within the framework of the internal rules of the Congress, you have to parse how jurisdiction has been allocated by Congress to its committees. So once you have the constitutional power, then you have to look to see which committee does it belong in, has the subject been delegated to that committee, and is the specific inquiry under debate, are the documents or the testimony being sought—are those things pertinent to that subject? And that's pretty much the end of it. And if that is established vis-à-vis any agency, Congress has a right to those materials.

Now previous speakers talked a little about executive privilege. And again, I'm giving you the CliffNotes version of all of this. Understand that there are fully developed legal positions on each of these things available from the Congressional Research Service, the House and Senate legal counsels, outside of talking heads like me, and Mickey, and others. Executive privilege, again, is an overblown, overstated doctrine. If you look at the Nixon case, and read it, you'll see it was basically a judicially invented doctrine. It's not in the



Photo by Pam Rutter



Photo by Pam Rutter

Stanley Brand presenting at POGO's congressional training seminar, January 23, 2009.

Constitution. The court found it inherent in the protection of the prerogatives of the President, but limited it very severely. Executive privilege—presidential privilege—is the right to talk to his or her closest advisers. It's only a presumptive privilege. It's not an absolute privilege. In the law, that makes all the difference in the world, because a presumptive privilege can be overcome by a countervailing showing of constitutional power or need. Enter the Congress.

Now, while there is no Supreme Court case directly on point that applies that doctrine to Congress, every single source and indication that we have is that if a Grand Jury can demand telephone conversations or tapings of a President and his or her closest advisers in connection with a Grand Jury investigation, surely Congress's Article I powers can overcome a presumptive claim of privilege in a specific case. And we may get an answer to that, as the House moves forward in the Miers case, which is left over from the last administration but which the House is authorized to continue. The Congress...the House won that first round in front of the District Court to everyone's amazement, including my own, given that it was a Republican-appointed judge who happened to have been a former head of the civil division. And he wrote, what I can only say and commend all of you to read, the best judicial analysis of the constitutional power of Congress that I've ever read.⁷ It's a phenomenal decision.

Now, as the previous speaker also said—and I subscribe to this theory fully—when you're elected to Congress, you get your security clearance because after all, Congress is the one with the constitutional power in this area. What I've spent the better part of thirty years doing is trying to de-mythologize the classification system and the over-deference to the executive branch when it comes to national security. And I do believe as [the previous speaker] said, that we've done an insufficient job of educating incoming Members and incoming staff on the constitutional basis for Congress's powers in this area. I wrote an article on a blog last year with respect to an episode that involved Senator Rockefeller. The gist of it was that Senator Rockefeller was so fearful of discussing a classified matter in his role as ranking member (at that time) on the Intelligence Committee—that is the Committee on whom Congress devolved responsibility for this—was so reticent that he wrote a note to Vice President Cheney on his private personal stationary, *not* on Committee stationary, for fear that he would be charged for revealing classified information had he taken a more official route.

Now, to me, the greatest axiom that you all have here is "Those who don't read history are doomed to repeat it." When I came here in 1972, there was a fellow from Alaska named [Senator] Mike Gravel. Mike Gravel took a copy of the Pentagon papers, which was the Pentagon's study of the war in Vietnam: the

causes, the execution and conduct of the war, all of which was classified, cover to cover. Somehow he got a copy of that study and he introduced the full text of it into a midnight hearing record of the Public Buildings and Grounds Committee which he chaired. His aide, Dr. Rodberg, whom he hired the day before the hearing, was subpoenaed to the Grand Jury of Boston which was investigating the publication of the study and possible crimes committed in connection therewith. The Supreme Court held that Senator Gravel's preparation for the committee hearing, his introduction of the Pentagon Papers into the hearing record and communications with his staff about the hearing were all absolutely privileged from inquiry under the Constitution's Speech or Debate Clause. The Court blew away all the arguments that the Justice Department advanced to justify piercing the privilege that Senator Gravel had acted in violation of a criminal statute barring the disclosure of classified information.

This is one more indication that Congress's oversight role over national security is paramount and immune from executive branch interference.

The last note I want to end on is only a personal one—and taking to hear the fact that this is a non-partisan exercise and I take it that way—this room is a famous room.

There have been some great hearings here, including the Watergate hearings, including the hearings into the Titanic disaster. So you're in the right place to hear this. One of the reasons why Congress's powers have atrophied over the last twenty to thirty years is because both parties, in my judgment, have mistaken the institutional interests of their branch for the political interests of their party.

The very first executive privilege fight I got into [was] as a young pup in the Clerk's Office as a lawyer for [Representative] Toby Moffett from Connecticut when he subpoenaed records on the oil import fee in 1979. And I had arrayed against me Lloyd Cutler (former President's Counsel), the oil industry, the Attorney General, the Solicitor General, and a bevy of others, and we pursued that successfully and got those records. The short answer was the oil import fee went down in flames as a result of that. And the point being, that was a Democratic White House and a Democratic Congress. Now, I'm a Democrat, I got my job through Tip O'Neill, not through *The New York Times*, and I understand party politics and national politics. But what I think is critical is that when Congress is pursuing its oversight role it has to strip away all of that. And go after the things that are within your jurisdiction. Not in a political way, not in a harsh way, but to keep everybody honest. Because the only way people will stay honest on either side of the divide is if Congress is looking over their shoulder.

And so, the pitch I would make to you is, despite the euphoria over a new President—rightfully so—historic nature of what has happened, you still have to do your jobs and you still have to look at these agencies in a way to make sure that they are complying with the delegation of power that you have given them. That's true of the national security area as it is with every other area. Even more so, based on what we've been through over the last eight years.



Photo by Pam Rutter

MICKEY EDWARDS: First of all I just want to say to [POGO's] Danielle [Brian] and Ingrid [Drake] that it is so great that they put this together, that they give me a chance to come here and talk about this because there's nothing actually more important than this topic, and I want to pick up on what Stan said, that it's not partisan. If you're sitting here thinking of yourself as a Democrat or Republican, you ought to leave. There is a time in my life—I, and you know, I'm a Republican—there was a time when I was running for office, and I was a Republican activist and I was a conservative activist. And then I got elected, and something happened: I stepped across an invisible line. And I left it behind until the next election cycle whether I was a Republican or a Democrat, and I was a Member of Congress.



Photo by Pam Rutter

Mickey Edwards presenting at POGO's congressional training seminar, January 23, 2009.

And I want to tell you sometimes in the last several years I've come back to this place, and I come back a lot, usually to use the House gym, but I come back and frankly I have found myself embarrassed by what has become of the Congress of the United States. If it is true that in order to keep an eye on what the government is doing—and people talk about smaller government or bigger government, you know it is a ridiculous divide, because we have nearly three hundred million people and if the federal government only does those things specifically mandated in the Constitution, you know, the post office, the highways, the military, it's a big government. And it spends a lot of money, and it makes a lot of rules. And it does a lot of things that affect the lives of every single American. And if the government is not being checked, the executive branch is not being checked, by the Congress, the Congress is not meeting its responsibilities under the Constitution.

Everybody, I do too, talks about the power of Congress. *Forget* the power of Congress. It's not about power. It's about obligation; it's about responsibility. When you work for the Congress, whether you're a Member or a staff member, you have taken on an awesome responsibility

to perform the functions that the Constitution gives to the legislative branch of government. And if the only way we can do that, if the only way we can have a check on spending, and a check on mismanagement, and a check on abuses of power is to have one party in charge of the White House, and the other party of Congress, then James Madison was wrong and our whole system is a *sham*. Because our system is based on not party, but one branch of government checking the other.

There is a lot of talk about American exceptionalism, and usually that causes people to cringe a bit, because they think when you talk about American exceptionalism, what you're talking about is that we're smarter than anybody else, we're better than anybody else, we're richer than anybody else. This building, and the other Senate buildings, and the House buildings are the exceptionalism. The idea that we created a system of government in which we took every single power—*every* major power that had ever belonged to any king or dictator—and took them away from the President and gave them to the people through their representatives, is what is American exceptionalism. And we took away—the Founders took away—from the President, the power to decide whether to go to war, the tax rates, the power to determine spending priorities. Every one of those is here! *Not* downtown!

Anybody in here with Senator Whitehouse? OK, I'm going to tell this story anyway, so it wouldn't make any difference. I was testifying before the Senate Judiciary Committee not long ago and one of the...about expansions of executive power. And one of the questions that came up was from Senator Whitehouse, and he said, "What do you do..." He was very frustrated by the fact that members of the executive branch may come to the Hill, they brief a number of Members of the Senate, and they may choose—they have the power to declassify—you know, they may share this classified information then they may go back themselves and declassify it and give this information to the world if it serves their purposes, whereas as Senator Whitehouse said, "We can't do that! It's against the law for us to say it!" Well, what's the answer? If it's against the law, *change the law!*

MAN INTERRUPTS: It's not against the law if he says it in a committee hearing...

MICKY EDWARDS: That's right, but even if it were! Even if it were, the Congress writes the laws! Not the executive branch! You know, if the idea that the executive shares information with only a Gang of Eight is because Congress passed legislation that said that! It's probably wise. It's probably unwise to change that and share the information with all the Members of the House and Senate. But it is still a decision to be made by the Congress.

There are a couple of good things that happened, little noticed. Yesterday, when Admiral Blair was being questioned for his confirmation to be head of National Intelligence, Senator Feinstein did something I thought was terrific. She posed the number of traditional, very standard questions to Admiral Blair: will you promise to tell the truth, to fully inform...the Gang of Eight...and all that stuff, I don't remember the exact question. Then she said, "And now I want to ask you a question that is not standard. But I hope it will become standard." And she said, "Do you promise to fully inform all the members of this committee, not just the chairman and ranking member?" And he said "yes." And I was listening on the radio, and I said, "Dianne, that's great, good for you."

Now let me just close with this. Harriet Miers and Josh Bolton, in the last administration, refused to obey a congressional subpoena. Nothing happened. When members of the executive branch refuse to give information to the Congress, nothing happens. The broadening of the executive power and the reduction of the power of the people—that's what the Congress is, it's the power of the people—is not because Presidents have exercised some sort of supreme authority. It's because the Congress has surrendered it. It is because the Congress does not do its job.

As was mentioned earlier, you have subpoena power. You have the power of the purse. What happens if a President refuses to obey a law? Or a member of the White House refuses to obey a subpoena? What can you do? Say "Mr. President, first of all, we're not gonna go drag them down here. We can't, you know, force them. We'll just cut off the funding this week maybe you know for the Secretary of the Interior... Well, maybe this week we'll cut off the money for your Press Secretary. Will that get your attention?"



Photo by Pam Rutter

You've got the money! You've got the power! What's happened is that the Congress has simply surrendered it as though this were a part—you know, a very nice part, lots of marble, beautiful facility—for White House staff. You're not White House staff. It is your obligation to keep a check and use *all* the powers that exist in the Constitution and your power over spending and subpoenas and appointments—all of it—to make sure the people control the government, not whoever of either party happens to be ensconced downtown.

BIOGRAPHIES

STANLEY M. BRAND

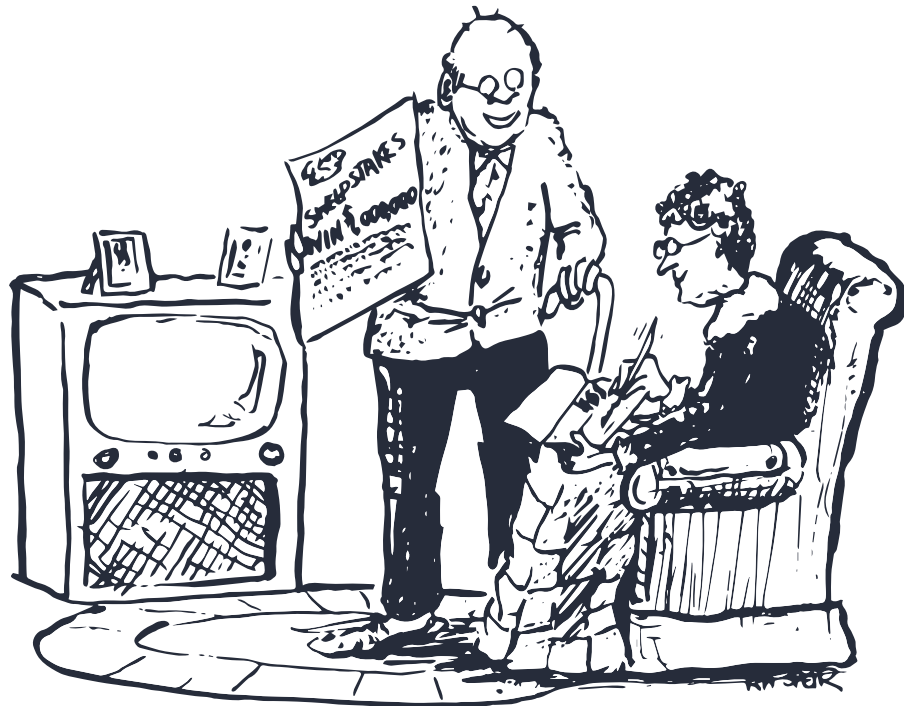
Since founding a Washington, DC-based law firm in 1983, Stanley Brand has “specialized in cases at the intersection of politics, criminal law and communicating in the Washington echo chamber.”⁸ From 1976 to 1983, Mr. Brand served as General Counsel to the U.S. House of Representatives under Speaker Thomas P. “Tip” O’Neill, Jr., and was the House’s chief legal officer responsible for representing the House, its Members, officers, and employees in connection with legal procedures and litigation arising from the conduct of their official activities.

MICKY EDWARDS

Mickey Edwards is the Executive Director of the Rodell Fellowships in Public Leadership, the Vice President of the Aspen Institute, and a lecturer at Princeton University’s Woodrow Wilson School of Public and International Affairs.

ADDITIONAL READING

- Dolan, Alissa M., Elaine Halchin, Todd Garvey, Walter J. Oleszek, and Wendy Ginsberg. *Congressional Oversight Manual*. Congressional Research Service. Order code RL30240. Updated December 19, 2014. This comprehensive guide provides information about Congress’s authority to conduct oversight, as well as a thorough sourcing of congressional oversight tools.
- Fisher, Louis. *The Politics of Executive Privilege*. Durham: Carolina Academic Press, 2004. This book contains very practical examples of how Congress uses such powers as appropriations, impeachment, appointment, subpoenas, contempt, and House resolutions of inquiry to conduct oversight.
- Hamilton, James. *The Power to Probe: A Study of Congressional Investigations*. New York: Random House, 1976. This book is out of print, but you can request it from the Library of Congress, or there may be used copies for purchase online.
- Rosenberg, Morton. *When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry*. The Constitution Project, 2009. <http://www.constitutionproject.org/manage/file/142.pdf>



2.

BEGINNING YOUR INVESTIGATION

INVESTIGATION / OVERSIGHT / QUESTIONS / ACCOUNTABILITY / BIPARTISAN

In this chapter you'll discover the importance of:

1. Deciding what type of oversight investigation you want to pursue
2. Checking your committee's rules
3. Studying what is already available
4. Narrowing your search
5. Using case studies to exemplify systemic failures
6. Finding the instances of wrongdoing (waste, fraud, or abuse)
7. Getting ahold of the documentation
8. Cultivating contacts within the agencies and companies you cover
9. Listening to insiders and whistleblowers
10. Getting out of the office
11. Utilizing the media

Also, learn the start-to-finish investigation process in "An Investigation Case Study: Not Sweeping It Under the Rug"

Let's say you find yourself working for a congressional office and your responsibilities include conducting oversight and investigations. You know that something smells fishy at an agency, but you just can't quite figure out what to investigate. Relax, this is perfectly normal.

Often, your boss will already have their own ideas of what to look into, and you can turn to them or others for direction. Sometimes, however, you will be left on your own and you'll have no choice but to narrow the scope. As either a full-time career investigator or a temporary, part-time overseer, you will reach a point in your career where you won't know where to start, what to look at, or who to talk to. What do you do then?

1. Deciding What Type of Oversight Investigation You Want to Pursue

- **Reactive investigations:** Inquiries launched in response to a timely issue or incident, often learned of through a news report.
- **Routine oversight investigations:** Inquiries to answer questions raised through day-to-day oversight of an agency, program, or policy.
- **Proactive investigations:** Inquiries into specific allegations or concerns of fraud, corruption, negligence, waste, or other malfeasance that were not previously reported. These can be triggered by a whistleblower’s allegations, a lawsuit, or administrative complaint that is under the radar.

Obviously, the higher-profile, “fire-alarm” nature of the reactive investigation can be much sexier than the others, but there are occasions for all three, and eventually the long-haul oversight will pay off—once you know in-depth about an agency, you are better equipped to know where to look to find problems. Also, these substantive reform-minded investigations may gain the interest and support of your colleagues across the aisle. Keeping these colleagues in the loop, and even inviting a staffer on any travel that may come up as part of the investigation, can create strong oversight working relationships that withstand election cycles and changes in party control of your Chamber.

Remember: It’s also important to remember there is a difference between the *quantity* of investigations and the *quality* of investigations.

BIPARTISANSHIP CAN FORTIFY INVESTIGATIONS

[The Majority and Minority on our Committee] work together. One side or the other takes the lead. If we’re taking the lead, there’s at least one person on the other staff who’s assigned to our investigation. They attend all the meetings. They’re welcome to do as much document review as they can manage; a lot of times they leave that to us, because it’s our investigation. After we get key documents and summarize them, we tell them all about it. Our counterparts are always fully informed and we find that circumvents a lot of problems. Some people we investigate try to go to the other party and cause trouble, but if we’re working together, that doesn’t happen.

Elise Bean, former Democratic Staff Director and Chief Counsel for the Permanent Subcommittee on Investigations

2. Checking Your Committee’s Rules

Consider whether your committee’s procedural rules are sufficient to obtain the kind of information you will need to conduct your investigation. Are you able to subpoena documents, and under what process are subpoenas issued? Are you able to compel testimony? If the rules do not provide a path to obtain necessary documents and testimony, consider discussing with your Member how to change committee rules at the beginning of the next Congress so that you may eventually be able to do so.

Amending your committee’s rules in this regard is most appropriately done at the first business meeting your committee convenes at the start of every Congress rather than during an investigation lest you open your committee to the charge that it is unfairly changing the rules in the middle of the game.

Remember: It's important to have a clear rationale for how the investigation falls under your jurisdiction. This does not mean, however, that you have to walk away from an investigation that may be more obviously in the purview of another committee. If the other committee is not interested in the topic, or in doing rigorous oversight, you should find language in your committee's jurisdiction to ensure that your committee can tackle the problem.

SUBPOENAS MAY BE AN OPTION FOR YOUR COMMITTEE

We use a lot of subpoenas. On a lot of subcommittees it's harder for them to arrange mostly because they have never thought of the rules and changed the rules in such a way that would make it easier to use subpoenas. We wish a lot of committees would correct the rules, so they would have the option of issuing a subpoena.

Elise Bean, former Democratic Staff Director and Chief Counsel for the Permanent Subcommittee on Investigations

3. Studying What Is Already Available

When looking for an issue to investigate, check out what problems have already been identified as needing attention.

Great places to start are:

- Congressional Research Service (CRS)
- Government Accountability Office (GAO)
- Inspectors General (IG)
- Google News™, LexisNexis®, and other news searchers

If reports raise concerns or issues that you believe have not been adequately addressed or can be looked into more thoroughly, then you can launch your own investigation using the framework they have provided. Keep your eyes open for the one sentence buried in a paragraph that points to an issue not well covered or not covered at all in the report. Likewise, there may be hidden gems in agency appropriations requests that have changed dramatically over time, company annual reports that don't seem to add up, or other such comparable accountings.

Also, look at Annual Plans of IG offices to see what they plan to investigate over the next year. This may point to issues that are worth pursuing yourself.



Photo by Pam Rutter

LOOK TO THE PAST

If you want to get into this work, I think you have to examine the record of congressional oversight hearings, of some of those great Senate and House investigations [initiated by Representatives John Moss and John Dingell, and Senators Philip Hart and Carl Levin].... As an example, I heard from a 92-year-old gentleman who worked for Senator Gaylord Nelson of Wisconsin many years ago who called to compliment something we were doing and said, "You need to look at the work we did thirty-five years ago on these pharmaceutical companies. You'll find it's exactly the same situation as it was then—you need to go after it."

Jack Mitchell, former Democratic committee investigative chief, former journalist, and former FDA senior investigator

DON'T FORGET OTHER ORGANIZATIONS

Don't be afraid to reach out to other organizations or state entities when conducting investigations. For example, while performing investigations in the past on private entities, the Better Business Bureau was helpful in providing consumer complaint information, as well as company responses. This is something they started to publish online as well. Additionally, if any entity has a license provided by the state, there may be consumer complaint information or other company-related documentation that was filed with the state that can be helpful. In my experience, the state agencies can be very accommodating and turn requests around quickly. Additionally, because we work for the federal government, they will typically not charge to obtain paper copies of documents.

Mark Kopelman, former Democratic Counsel for the Senate Special Committee on Aging

4. Narrowing Your Search



Photo credit: Gordon L. Freedman

Investigator for the House Committee on International Relations Investigation of Korean-American Relations takes a rest.

As mentioned before, your boss may ask you to look into an issue that is so broad you will need to narrow it down significantly in order for an investigation to be feasible. In doing so, you should keep an open mind, remembering that you are going into this with theories that you must either substantiate or refute. Don't get so caught up on one avenue that you miss other possibilities.

CONSTITUENTS HELP SURFACE REAL-LIFE EXAMPLES

Members of Congress are helped in the task of oversight because they have very close contact with their constituents and that gives them special opportunities to observe on a day-to-day basis the strengths and weaknesses of federal programs as they are being carried out.⁹

Former Representative Lee Hamilton (D-IN), who served from 1965 to 1999

CONSULT HOME-STATE STAFF

Working on Capitol Hill, you might have proximity to officials and decision-makers, but you likely don't have access to people who are most directly affected by the agencies and programs you're overseeing. Your colleagues back in state and district offices do, though. They hear from them every day: the veteran who can't get health care, the local resident who had his house seized by law enforcement, the disabled elderly who cannot obtain benefits. Stay in touch with those colleagues; they can be great resources for information about what isn't working and could use better oversight.

Justin Rood, former Republican committee investigative chief, former journalist, and current POGO Congressional Oversight Initiative Director

5. Using Case Studies to Exemplify Systemic Failures

A powerful method for narrowing the scope of your inquiry is to use case studies, specific examples that represent the success or failure of a system at large. A wonderful example is the Senate Homeland Security and Government Affairs Committee Permanent Subcommittee on Investigations' 2004 report, *Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act—Case Study Involving Riggs Bank*.¹⁰ The staff was initially tasked by Senator Carl Levin (D-MI) with evaluating the effectiveness of anti-money laundering provisions in the PATRIOT Act, and staff decided to use Riggs Bank as a case study.

6. Finding the Instances of Wrongdoing (Waste, Fraud, Abuse)

As you research, research, research, keep an eye out for the examples that will put a human face on the problem or otherwise make it tangible. Find the Department of Defense's \$640 toilet seat or the \$68,000 worth of dog booties purchased in response to Hurricane Katrina—these are the details that garner interest and make any hearing that results from your investigation memorable.

			
\$7,600	\$644	\$436	\$640
COFFEE URN	SMALL GEAR	HAMMER	TOILET SEAT

Remember: Using examples to highlight the problem also helps reporters cover your investigation. In an era of 24/7 news coverage, it is important to focus on specific, recognizably fraudulent examples in order to bring attention to the larger issue. Whenever possible, bring in the victim and the villain to bring the problem to life.

LOCAL REPORTERS MAY KNOW THE SCOOP

The Investigative Reporters and Editors website [www.ire.org]—people should go there. I think some of the most interesting stuff out there is actually what a local reporter writes on. Trust me—if the weasels are doing it at the local level, they're going to do it on the national level.

Dean Zerbe, former Counsel and Investigator for the Office of Senator Charles Grassley (R-IA)

7. Getting Ahold of the Documentation

Using congressional oversight authorities, which we will outline in detail in the next chapters, investigators should be on the lookout for the memos, emails, and other documents that illustrate the problem. These documents can be used dramatically in hearings, as well as to entice reporters to do a story.

DOCUMENTS ARE ALLURING

The press love documents and the American people love to see the stuff we unearth.

Mark R. Paoletta, former Republican staffer, and former Chief Counsel for Oversight and Investigations for the House Committee on Energy and Commerce, who served from 1997 to 2007

PARTNER WITH JOURNALISTS TO GET INFORMATION TO THE PUBLIC

I had a source from an agency slip me the unreleased, unsanitized version of the agency's research report full of industry documents. I gave the docs to a House investigator and a Staff Director to put into their hearing record to make them protected documents. The industry was threatening to sue to prevent blockage of the documents in any media story. [The Committee] put them in the record, and I was able to write a story based on these documents.

Reporter

8. Cultivating Contacts Within the Agencies and Companies You Cover

Many times, contacts may reliably provide you with information that you simply will not be able to get from formal channels. Or they will be able to get you the information faster than the agency's legislative affairs office would.

Remember: It is critically important to attend lunches, seminars, conferences, and other meetings around town—or even sometimes outside the beltway—about your areas of interest. These are golden opportunities to meet—away from handlers and congressional affairs staff—people who work for federal agencies or contractors who could become key sources of information down the road.

YOU CAN BE LOST WITHOUT AN INSIDE SOURCE

For at least 90 percent of our investigations we had an insider or a whistleblower. Without one, you can waste a whole bunch of time trying to figure out what is going on in an agency or a corporation.

Peter Stockton, Democratic House staff investigator from 1969 to 1994

9. Listening to Insiders and Whistleblowers

Most offices will frequently get tips from constituents, concerned and disgruntled employees, or anonymous sources. Obviously, you will not be able to follow up on all leads, so you will need to:

- **Sift** through these sources while considering what is most important to your boss.
- **Check** the accuracy of any information to limit the chances of investigating something that turns out to be bogus.

In later chapters, we'll discuss how to both attract and work with insiders and whistleblowers once you've started your investigation.

10. Getting Out of the Office

Often whistleblowers will not be able to meet you in your office—you're going to have to go to *them* if you want to get the crucial information for the investigation. Similarly, although the Internet is a fabulous tool, sometimes you'll have to leave the office to get those hard-to-find interviews or documents.

When attending large conferences, pick up literature from agencies and contractors that detail their programs and services. Again, this may kindle specific investigations into the programs or contracts the contractors are supporting.

In some rare cases it may even be appropriate for staff to go undercover. Be sure to check with your counsel to get sign-off from them and your boss. Let's say you're investigating credit card companies. Apply for one of their credit cards. Through the experience, a staff member can be an expert witness at a hearing.

AND SOMETIMES, YOU'VE GOT TO GO TO GREECE FOR ANSWERS...

We had an insider from the board of directors of General Dynamics, the largest government contractor at the time, with board meeting tapes basically saying, "How are we going to screw the Navy?" and how they were going to manipulate their stock.... You'd never get that stuff without an insider, and when you have a corporate insider, you want to know if the corruption rises as high as the board.

The way I made contact with him was after I noticed a little article in the back pages of The Wall Street Journal about a former member of the board of directors from the company making the Trident submarines who fled to Greece after being indicted in the southern district of New York for taking kickbacks.

I call Athens and get a number for his name from information. I call. An older woman answers the phone, and when I ask for him, she says, "I don't know who that is." I say, "I'll leave my number anyway, if he happens to come by." He called an hour later. I had to go to Greece four or five times. He could not come back to the U.S. without being arrested.

He ended up providing the Committee with thousands of documents and more than 100 hours of tape. We spent a year leaking documents to the press.

Eleven months later, we had two hearings with the Chairman of the Board and the Chief Financial Officer. They both resigned soon after the hearing, and two Grand Juries were impaneled.

Peter Stockton, Democratic House staff investigator from 1969 to 1994

11. Utilizing the Media

It is important to remember that working with the media is a two-way street. Just as they're not afraid to get their investigative leads from Congress, you should not be afraid to look into issues that were first brought to light in the news. In later sections we'll discuss the importance of engaging the media in your investigations in order to mobilize public support.

An excellent example of congressional investigators taking their cue from the media is the case of the National Security Agency's warrantless domestic surveillance program. The program was first reported by *The New York Times* on December 15, 2005,¹¹ which in turn led to congressional inquiries starting with the Senate Judiciary Committee.¹²

Keep in mind that your contact with a reporter may be a give-and-take relationship. If they tip you to a story or issue and you decide to investigate it, they will most likely expect an exclusive.

Using terms like "off the record" or "deep background" can result in problems if you don't explicitly define what they mean in advance. Use plain English and don't hesitate to clarify ground rules up front. "I'm happy to speak with you as long as it's clear none of this can be reported." "I cannot be named or quoted, but you can use this information in your reporting if it's helpful." "I can be quoted as a Democratic congressional aide" (assuming you are, in fact, a Democratic congressional aide).

An Investigation Case Study: Not Sweeping It Under the Rug



Photo courtesy of Linda Gustitus

Linda J. Gustitus, Democratic Staff Director of several oversight subcommittees in the Senate for more than 20 years, including the Permanent Subcommittee on Investigations (PSI), shares one of her favorite investigations—sweepstakes solicitations. The investigation resulted in legislation that eliminated the problem PSI identified.

How did the issue come to your desk?

Interestingly enough, this issue came to my attention through my father who was a victim of the sweepstakes scams. He was getting a large number of sweepstakes solicitations each week and buying magazine subscriptions and video tapes and jewelry that he didn't need or want in order to try to win one of these sweepstakes. When I saw the amount of money he was spending—that is, losing—on these sweepstakes solicitations, I asked Senator Levin if we could investigate them. He said yes.

How did you research the topic?

We used the U.S. Postal Service, which had received numerous complaints and done a fair amount of work in this area; we used AARP, which was in a similar situation; and we used the state Attorneys General, who are responsible for consumer fraud.

How did you break through barriers?

You use people and organizations who have credibility with the people you are trying to interview. This is important if the people you want to interview are reluctant to be open with a congressional committee. It is important to build a relationship of trust with the various groups, organizations, and people with whom you work over the years.

For the hearing, how did you help tell the story of the problem?

A good formula for an oversight or investigative hearing is to first have a panel of witnesses who can relate individual stories that exemplify the problem. For sweepstakes, we had three people who each had a heart-wrenching story to tell about how they had been taken advantage of by the sweepstakes companies. Then, you need a panel of validators—organizations or entities that can affirm that the individual stories presented by the first panel are indicative of a larger problem. At the sweepstakes hearings, for example, we had the AARP, the Post Office, and the state Attorneys General testify to the large number of people who had been cheated and duped by the sweepstakes companies.

After you have established the nature and scope of the problem with these two panels, it is time to bring in the top people responsible for the problem—the CEO's of the sweepstakes companies—and present them with the documents and testimony against them.

What are your tips for preparing for oversight hearings with only a few days' notice?

I would avoid doing this if at all possible. Good oversight, good investigations, take time. There's no way around it. You have to get all the facts and you have to know what the witnesses are going to say.

If I were forced to do an oversight hearing with only a few days' notice, I would present as witnesses the work product of other organizations and agencies that had investigated the problem and use their work to challenge alleged wrongdoers. I wouldn't make any claims I couldn't personally back up.

What is the general time-line you follow for investigating an issue?

It really depends upon the complexity of the subject and the number and resources of the committee staff. PSI investigated some of the most sophisticated financial transactions Wall Street had ever seen during the Enron investigations, and that took us eighteen months to two years. Our initial sweepstakes investigation took three months, with the longer, more detailed investigation into sweepstakes taking closer to six months. On the whole—it usually takes three to six months to do a serious, thorough oversight investigation.

Any strategies in terms of timing?

You always want to think about the timing of any hearing with respect to your investigation. And there are a number of factors to consider:

- Availability of key witnesses
- Preparation time for and adequate attention of the committee chair
- What else is happening in the committee or the Chamber
- What else is happening with respect to the issue you are investigating
- When the media is likely to be most attentive
- When you will know what you need to know to go forward
- The window of opportunity available for fixing the problem by legislation, if that's the best response

What is the best approach for follow-up of the issue or hearings?

There are several options:

1. If the agency or entity that is the subject of the hearings agrees to change its ways, then the hearing may be all you need—with staff follow-up to make sure they do what they promised to do.
2. The committee can issue a report, including a complete analysis of the issue (because the brevity of hearings never lets you get out all the information you have). The report can also contain findings and recommendations. The release of the report—even several months after the hearing—is another opportunity for a press hit and bringing more pressure to bear on the problem.
3. The committee chair can introduce legislation to fix the problem. This can be challenging if the legislation is referred to a committee other than the committee conducting the oversight, but that is not an insurmountable problem. If the oversight investigation, hearing, or report is done well, the argument for change and passage of the chair's legislation can be compelling.
4. If during the investigation the committee came across actions of individuals or entities that were likely criminal, the committee chair should refer the matters to the Department of Justice or the appropriate agencies for further investigation. This can also be done for matters that, while not criminal, merit consideration by executive branch agencies for further action—maybe civil fines or sanctions.



3. UTILIZING RESOURCES

INVESTIGATION / OVERSIGHT / QUESTIONS / ACCOUNTABILITY / BIPARTISAN

In this chapter you'll discover the importance of:

1. Tapping into other investigators' reports
2. Working with insiders and whistleblowers
3. Reaching out to other experts
4. Finding publicly available information

You've done the hard part by deciding the type, topic, and scope of your investigation. Now it's time to find your sources. You are not alone, and as you begin your research, there are a few resources to keep in mind.

1. Tapping Into Other Investigators' Reports

As mentioned in the previous section, Congressional Research Service (CRS), Government Accountability Office (GAO), and Inspector General (IG) reports can be good places to look for topics. Once you have your topic, these sources can again be useful.

- You can request CRS, GAO, or IG reports and staff briefings in order to get as much background information as possible. As these reports do not often contain specifics, such as the name of people and companies, or dollar values of contracts, a quick call to one of the investigators can provide this information. Investigators at these agencies may also be more capable than people on your own staff at letting you know whether or not the problem is systemic and where past legislation has failed. But, while these resources are invaluable in helping you get started, commissioning reports is a lengthy process so you need to consider what time constraints your boss has set.

Remember: When you do commission reports, it may be a good practice to check in with the investigative team every three weeks to ensure that the investigation has not veered off your topic.

- As a requester of a GAO report, you can also access specific working papers such as interview transcripts before the report is released. If you are interested in a specific angle or set of data, you can ask the staff involved in the report what other information there might be on those topics. When an IG, CRS, or GAO official is a witness at your hearing, you can also get copies for the hearing of some of those working papers that contain juicy information that was left out of the final report.



Photo by Pam Rutter

DON'T OVERLOOK WORKING PAPERS

We never had a hearing where we didn't meet first with the IG or GAO to get additional background information. Both agencies are marginally risk-averse. Their reports have one-third of the findings they actually made in their investigations. So, we always wanted to look at their working papers—the interviews and documents they collected. We would spend the better part of a day going through that material and interviewing the investigators. We always found incredible information in there—way beyond what's in the report. And, the investigators are really very excited to do it because they worked so dang hard and only a third of what they found got into the report.

Peter Stockton, Democratic House staff investigator from 1969 to 1994

- If you encounter an uncooperative IG, you may get a better response if your Member grills the IG about the matter the next time the IG is testifying on the Hill about another topic. Your Member can also demand that the IG come to the office for a meeting to discuss their differences.

IGS HAVE TWO MASTERS

Congressional overseers should not hesitate to remind IGs that they work equally for both the Administration and Congress. In part, that means that IGs should always be willing to tell Congress anything they may have shared with the agency. In recognition of the IG's independence and to emphasize the fact that they also work for Congress, IGs should not be seated on the same panel as their agency representatives during testimony.

Earl Devaney, former Interior Department Inspector General

2. Working With Insiders and Whistleblowers

Your best source of information about an agency or company will come from people who are currently working there, or even better, from those who have recently left. Whether they tip you off to the topic of your investigation or provide you with insider details later in your investigation, whistleblowers and insiders are an invaluable resource. However, there are some special considerations you should be aware of in order to create a positive working relationship.

- **Make sure people know why and how to contact you.** People who might not otherwise come forward with tips may be more inclined to do so if they know your intentions. Your goal should be to make what you are doing well-known within the agency or company. You can do this in a variety of ways:
 - » When sending a letter to an agency or company, not only address it to the top-level management but also copy (“cc”) a number of mid-level staff in the trenches of the agency to get the word out about your investigation.
 - » Work with the relevant trade press.
 - » Put a whistleblower disclosure page or hotline number on your website.
- **Know your sources.** Just because a person has baggage or an ulterior motive for giving you information, such as being the losing bidder on a contract, does not mean that the information cannot be useful to you. If their information is valuable, their motives should only dictate whether or not they are credible as a hearing witness.
- **Don't overpromise.** It is imperative not to promise whistleblowers too much. Despite your best efforts, you cannot always protect them or fix the problem. Make that very clear from the outset.
- **Make sure your source knows the stakes involved.** Often an agency's or company's first priority will not be to remedy the problem that is under investigation, but instead to find the leak. The whistleblower should be aware that they will be under intense scrutiny.

PUT WHISTLEBLOWERS' WELL-BEING FIRST

Never believe you can protect a whistleblower, because you can't...

There is no amount of time you can spend that will be what they think is enough for their case....

Put them first, because you can really screw up their lives. One of our witnesses never worked again in a full-time job. He had been ostracized, he had been blackballed. He helped our investigation, he helped our hearing, but it ruined his life.

Former Republican House and Senate Committee investigator

- **Make sure your boss and counsel know the promises you're making.** Your boss needs to be on board before you make promises to a whistleblower or source because any such promise will likely require your boss to exercise authority or take official action.
- **Be sympathetic.** In coming to you, whistleblowers are making a huge break from the places they work and the lives they have established there. Arriving to the point where they need to bring a problem to outside resources will likely have been a difficult journey.

KEEP IDENTITIES CONFIDENTIAL

The important thing when you're talking to whistleblowers and insiders is to assure them you're going to keep their identities confidential. Assure them you're not going to leak any details of who they are or what they've told you to their bosses, to the press, to others on the Hill, to their colleagues.

Michal Ilana Freedhoff, Ph.D., Director of Oversight and Investigations for Senator Edward J. Markey (D-MA)

- **Provide a safe place.** Whistleblowers will by nature be cautious and may want to avoid meeting with you at your office or providing you with information in traditional ways (through faxes and emails), fearing that these methods can be traced back to them. Be creative and work out a system with which they are comfortable. It will almost certainly become more difficult for your sources if their employers discover that they are working with you.
 - » Find out if they are already known internally so you can decide on the appropriate degree of secrecy under which to work.
 - » Protect confidential sources. Doing so both helps them in their professional lives and ensures that they will continue to have access to internal documents.
 - » Advise your source not to email or, in some cases, phone from their office in order to prevent the entity under investigation from figuring out who they are.

DESPITE YOUR BEST EFFORTS, WHISTLEBLOWERS REMAIN VULNERABLE TO RETALIATION

Whistleblowers may think the call to Congress will magically solve all of their problems, and that they don't have to worry anymore. It's not true. My boss has fought for a number of whistleblowers, and has won for some and lost for others. When you're dealing with an agency or administration that really wants to make these people's lives miserable, they're going to make them miserable, whether you're a Member of Congress, Chair, they don't care.

Michal Ilana Freedhoff, Ph.D., Director of Oversight and Investigations for Senator Edward J. Markey (D-MA)

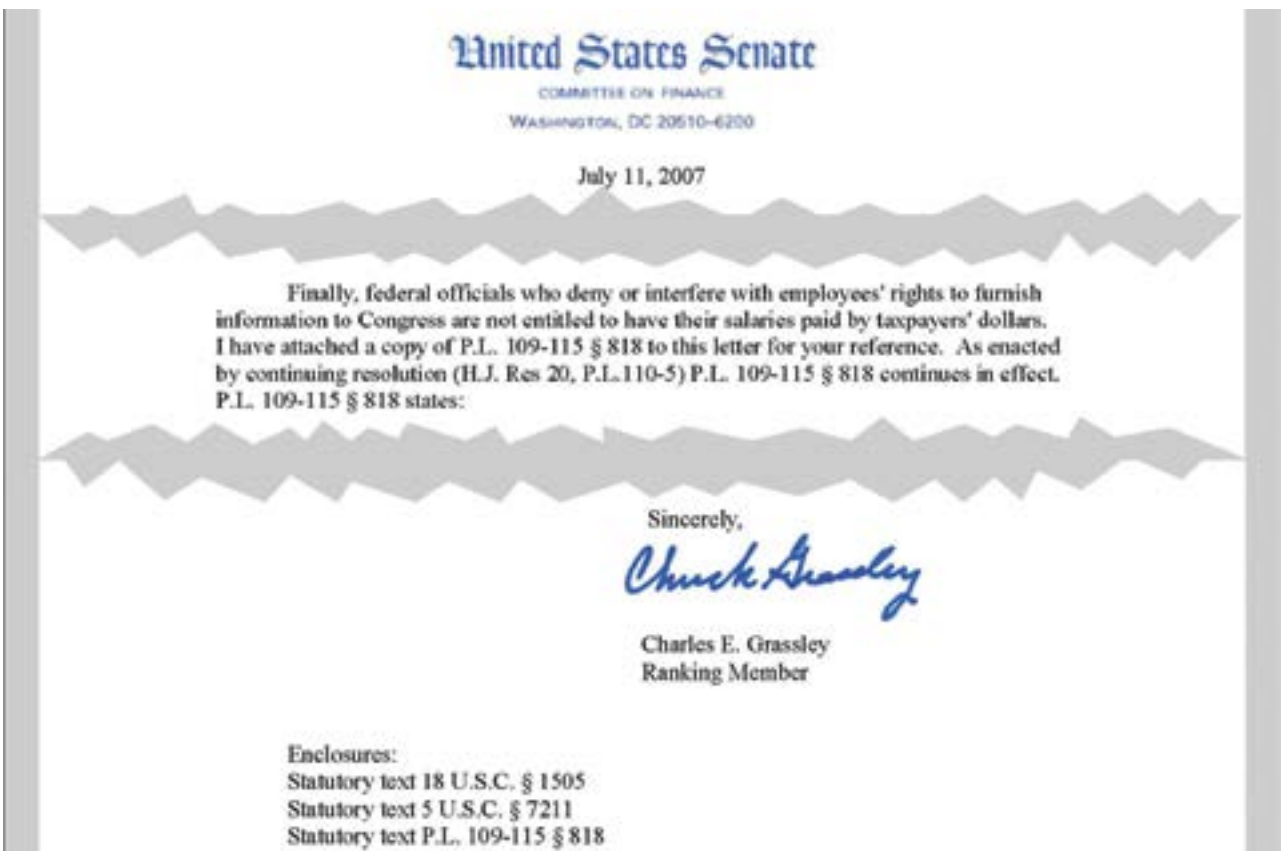
- **Stand by the whistleblower.** If the whistleblower becomes known, have your boss write a letter on their behalf explaining that they are cooperating in a congressional investigation and that any negative actions against the whistleblower will be considered retaliation and an interference with congressional business.

COMMITTEES HAVE A ROLE TO PLAY PROTECTING WHISTLEBLOWERS

You can warn agencies and admonish companies that are under your scrutiny that should you find them punishing or retaliating against sources or whistleblowers, that the committee would take some form of action or enforcement whose ramifications can be very wide-ranging. I know, for example, the staff of Representative John Dingell—whose oversight hearings are near-legendary—had often warned federal agencies that they better never try to intimidate or keep government or private sector witnesses from coming to, or speaking to, his Committee. All congressional investigative committees should protect their witnesses, including whistleblowers.

Jack Mitchell, former Democratic committee investigative chief, former journalist, and former FDA Senior investigator

- **Don't let officials get away with whistleblower retaliation.** If an agency officer or employee threatens federal government whistleblowers or prohibits them from communicating with Congress, you can make life difficult for the agency until it clamps down on the retaliator. You can:
 - » Write a letter to the head of the agency, pointing out the retaliation and demanding that the retaliation be stopped
 - » Work with sympathetic offices in the Senate to slow down any nominations affecting that agency
 - » Alert the appropriations subcommittee with jurisdiction



Send a copy of the law, so agency officials know their salaries are in jeopardy with whistleblower intimidation.

The Whistleblower Protection Act, as amended, prohibits agencies from retaliating against federal employees for speaking with Congress, and from having non-disclosure agreements that inhibit communications with the legislative branch. Under this law, claims of prohibited personnel practices can be filed with the Office of Special Counsel (OSC). Claims of reprisal can also be taken to the Merit Systems Protection Board if OSC closes a case or if, 120 days after a claim has been filed with OSC, the OSC hasn't let the employee know it will seek corrective action.¹³ Congress can direct employees to OSC to file complaints and ask for status updates on cases.

Senator Grassley also introduces a yearly appropriations rider to protect congressional communications by government employees and contractors, including those in the intelligence community.¹⁴ However, this rider does not establish a due process remedy for its enforcement. While, at the time of publication, Congress has not yet enforced this rider, just citing it can often halt any problems your witnesses are experiencing at their workplaces.¹⁵

In addition, you should be aware of protections for defense contractor employees and contractor employees outside of the intelligence community provided by the National Defense Authorization Act,¹⁶ of anti-retaliation provisions in the False Claims Act for employees who seek to stop or report practices that defraud the government,¹⁷ and limited protections for intelligence community and national security whistleblowers.¹⁸ Your counsel, Senate or House Legal Counsel, and CRS are good places to go to learn about these and other whistleblower protections.

There is also a law—Division E, Sec. 713 of the FY 2015 Omnibus—that states federal employees who block another government employee from speaking with Congress can be removed, suspended from duty, or have their salary payment stopped. However, this law does not establish a due process remedy for its enforcement. As with Senator Grassley's rider above, Congress hasn't enforced this law at time of publication, but citing it could halt related workplace problems your witnesses are experiencing.

3. Reaching Out to Other Experts

While insiders are always the ideal, there are other experts you can turn to for helpful information on your topic:

- **Reporters** who have covered the issue can help by providing both the information they have come across and sources who have helped them in the past.
- **Former employees** of the entity under investigation can provide information without the threat of retaliation current employees face.
- **Competitors and subcontractors** in the private sector can be potential leads.
- **Investigators** with Inspectors General or other oversight bodies may have more to say.

OTHER INVESTIGATORS MAY BE ITCHING TO TALK

We got into [the False Claims Act legislation] because the Department of Justice—the administration under Reagan—was not doing its job prosecuting defense contractors who were committing fraud. When the contractors were getting squeezed by the investigative units—the Inspector General—the contractors would go to their political contacts and stop the investigation....

We would generally get people from inside the IG office who were frustrated because DOJ would

not prosecute their cases. They had all this info about bad activity, and DOJ would not do anything, and the IG office would come to us. We would take the info, get it out, get newspaper stories, create enough of a rationale within the public that this stuff has to stop, and that's what we did.

Former Republican Senate staffer, 19 years

- **Other committees** with overlapping jurisdictions may have more experience investigating your topic.

BICAMERAL OVERSIGHT

I think one of the things that is not done enough is bicameral oversight. I think that can really help you send strong signals. I think House people should think about it more, having a Senator help something through. One of the best ways to force action—and no one wants to talk about it—is when you have nominees coming through. Nothing focuses an agency more on their failure to respond to your letters. The House doesn't have that ability. But, if you're teamed up with a Senator, it can be very helpful.

Republican Senate staffer

- **Nonprofit and academic institutions** that specialize on a variety of issues will often be more than happy to share their knowledge to assist your investigation.

For example, leading up to its April 25, 2006, report, *Updating Nuclear Security Standards: How Long Can the Department of Energy Afford to Wait?*, the House Subcommittee on National Security, Emerging Threats, and International Relations used POGO's research, analysis, and communications with employees of nuclear weapons facilities.

POGO's staff had numerous follow-up conversations with Subcommittee staff about the persistent security lapses at facilities. The Subcommittee, under the leadership of then-Chairman Christopher Shays (R-CT), requested several GAO investigations and conducted hearings at which POGO's staff testified, sharing inside information from whistleblowers. POGO also provided a whistleblower as a witness and garnered numerous stories in the media on the issue. As a result, the Department of Energy was pressured to significantly increase security standards and to launch a far-reaching plan to dramatically shrink the footprint of nuclear materials across the country.



Photo Credit: Ray Lustig

Joan Claybrook, then-President of Public Citizen, testifies at the Transportation Subcommittee oversight hearing on the Firestone ATX and Wilderness AT tire recall, September 6, 2000.

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NONPROFIT PARTNERS' RESEARCH CAN BE INVALUABLE, AND LIFE-SAVING

I was deeply involved in investigating product safety. We passed a whole bunch of laws, including the creation of the Consumer Product Safety Commission (CPSC). But the newly created CPSC was not taking action.

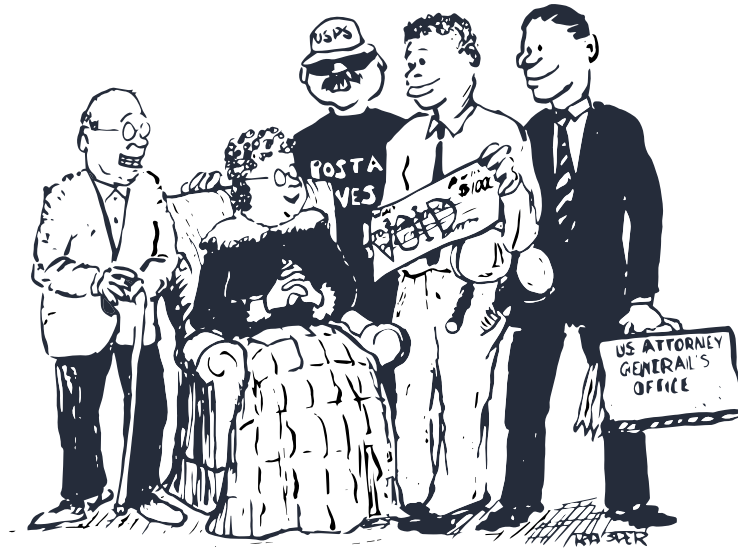
I was working closely with the American Pediatric Association.... We knew substantial numbers of newborns were dying of strangulation by getting their heads wedged between the slats of those cribs. We knew the CPSC had formulated a ruling, but were simply withholding placing it into the Federal Register, which would have started the process of formalizing the new rule. They were sitting on it.

Instead of wasting time and sending letters, I called up [the CPSC staffer] and told her that we would issue subpoenas for a hearing, and that I would get every reporter I knew on the story. I told her, "You've got 48 hours. You're on notice." She asked, "Are you threatening me?" "Yes I am," I replied.

Franklin R. Silbey, former Democratic House and Senate oversight staffer and Staff Director

4. Finding Publicly Available Information

Not all of the information you are looking for requires interviews or subpoenas. There is a wide variety of information available online. The trick is knowing where to look. See Resource A for a list of places that might be a good place to start.



4.

CONDUCTING THE INVESTIGATION & PREPPING FOR A HEARING

INVESTIGATION / OVERSIGHT / QUESTIONS / ACCOUNTABILITY / BIPARTISAN

In this chapter you'll discover the importance of:

1. Keeping your boss engaged
2. Being mindful of potential procedural objections to your investigation
3. Deciding on your media strategy ahead of time
4. Expecting some unexpected adversaries
5. Considering legislative fixes before and after the hearing
6. Consulting with House or Senate Legal Counsel
7. Establishing a process
8. Being patient
9. Knowing your issue
10. Interviewing your subject ahead of time
11. Giving the subjects of your investigations zero excuse for not cooperating
12. Not being fooled by pseudo-classifications
13. Exerting Congress's right to information
14. Using Congress's oversight arsenal

Now that you have your topic, hopefully some solid background information, and an insider or two, it's time for the fun part—digging into your investigation. In all likelihood, when faced with a challenging investigation, your subject will be uncooperative and potentially hostile. It's important that you know what tools are in your arsenal and what your options are.

1. Keeping Your Boss Engaged

- You are the filter and you know why this issue is important, so be prepared to explain to your boss why the topic at hand should be investigated.
- If your boss does not seem too excited about pursuing an investigation that you believe is of crucial importance, you can try leaking some juicy details to a journalist. Perhaps after seeing it in print, your Member may be more interested in making the investigation a priority.

REPORTERS CAN HELP MOVE THE INVESTIGATION FORWARD

When I was a young reporter, I learned from the older generation of great investigative journalists such as Jack Anderson, his partner Les Whitten, and Clark Mollenhoff of the Des Moines Register. They all were masters not only of covering congressional oversight, but furthering it by going back to the committees and saying, "I'm writing a story about your investigation. What more are you doing? And if you don't do more, I may write a story criticizing you for not following through and getting to the bottom of the issue." That was a way savvy reporters could further a congressional investigation and expand the attention that it might otherwise have received.

Jack Mitchell, former Democratic committee investigative chief, former journalist, and former FDA senior investigator

- Once you've convinced your boss of the investigation's merits, make sure to keep them fully aware of what you are doing. However, some seasoned staffers say to use your discretion about informing your boss of the details of your investigation, as some Members are more risk-averse than others and may slow down your efforts.
- It's your responsibility to make sure your Member does not lose interest as the process goes on—doing the job only half way is bad for your credibility, as well as for your boss's.
- Companies and agencies with something to hide are going to try anything they can to intimidate you or discredit you. YOU need to make sure that your boss is fully behind you.

Remember: If your boss is not excited, there may be no hearing or follow-up on the investigation.

FOR CONTROVERSIAL INVESTIGATIONS, STAFF NEED BACK-UP

Chairman Dingell was unusual in that he backed you up. A lot of Chairs didn't. The contractors would hire seventeen different law firms to try to lobby the Committee to get us off the investigation. They tried to drive a wedge between the Chair and his Committee staff, claiming we were acting recklessly and playing unfairly. Dingell just laughed at them. Most Members of Congress would fade in a situation like that.

There was one Chair of the Aging Committee who went after nursing home corruption and it got on ABC News. The companies came after the Committee and ABC too. The Chair didn't back the staff at all and they all got canned. They were some of the best investigators on the Hill. Doing controversial investigations is a high-risk venture.

Peter Stockton, Democratic House staff investigator from 1969 to 1994

2. Being Mindful of Potential Procedural Objections to Your Investigation

Not properly thinking through such issues as how you interview or depose witnesses, or how you compel the production of documents or testimony, may compromise your ability to enforce your committee's entitlement to documents and testimony, and complicate the Justice Department's ability to prosecute cases against offending witnesses (such as for congressional contempt, lying to Congress, or obstructing congressional investigations).

Typical procedural issues that come up in the course of an investigation include:

- Those relating to the jurisdiction or scope of the investigation
- The sufficiency of notice provided to Members for voting on subpoenas and conducting other business related to the investigation
- Adherence to quorum requirements on votes related to the investigation

Remember: Especially in high-profile investigations, counsel representing witnesses before your committee will likely look closely at whether the committee is conducting its investigation in accordance with its own and Congress's standing rules when considering available objections. Thus, not looking closely at those rules yourself could seriously hamper your investigation.

INVESTIGATING THE PENTAGON? IT CAN FIGHT BACK.

It's a very difficult process because the resources there are almost unlimited. I'm a service academy graduate, and had been in the Air Force.... I had a lot of really good friends in the Pentagon, in senior levels, who really cared about doing things right.... I had a lot of sources. But, the effect of embarrassing the service is a very strong one. And they will come back at you.

We did a lot of work on the C-17.... There were tremendous financial problems, as well as problems with the air frame. Among other things, I was accused by the Air Force of short-selling McDonnell Douglas stock and that's why I was doing this investigation.

For the record, I have never owned McDonnell Douglas stock in my life. I'm not that stupid. Nor did I have any extra income to invest in stock [laughter]. That story was given to The Washington Post. Fortunately, I knew the reporter and he called me and asked. I gave him a straight answer, he knew I'd tell him the truth, and that was the end of the story.

Former Republican House and Senate investigator

3. Deciding on Your Media Strategy Ahead of Time

Early on, someone on the communications staff needs to help you decide what role the media will play: simple reporting on your work, or working alongside you during your investigation. If the latter, the reporter will likely expect an exclusive on your findings, which will help you determine with whom you want to work.

Once you start working with a reporter, you need to establish a shared understanding about such things as what "off the record" or "on background" mean, what goes public and when, negotiating an exclusive story, and how your Member will be attributed. If such ground-rules are in place, it will be easier to build a strong long-term working relationship with a reporter.

DON'T PROMISE WHAT YOU CAN'T DELIVER

Always be straight with the press. They expect you to put forward your side, but never lie to them. Never mislead them—your case should be strong enough that you don't even have to think about that. Try and be fair. If you promise someone an exclusive, make it an exclusive. If you can't do that because the Chair doesn't want that, then tell them. They'll appreciate knowing it. Never tell them, "You're the only one I'm giving this to," and then hang up the phone and tell the next reporter the same thing. I knew staffers who did that. They were despised. Nobody trusted them.

Former Republican House and Senate investigator

4. Expecting Some Unexpected Adversaries

Keep in mind that many experienced and skillful congressional staffers have left the Hill to advise and represent those who you may be investigating. They know the game as well as, and maybe even better than, you do. Don't let them have an edge.

5. Considering Legislative Fixes Before and After the Hearing

While the goal of an investigation is to learn about the nature of the beast, one goal of Congress is to figure out the proper way to reform the government for the better—to put the beast on a leash or fence it in, so to speak. While the problem may be the initial focus, the ultimate outcome should be a solution.

ENCOURAGE PROBLEM-SOLVING

We try to get who we are investigating to come forward with their own solutions. To be honest, at times it's probably not exactly what we would do, but they'll have buy-in and believe in it. And if it's 75 to 80 percent of what we would have them do, we'd rather have them do something they have ownership of as opposed to us forcing something on them, and having to come right back again to them.

Dean Zerbe, former Counsel and Investigator for the Office of Senator Charles Grassley (R-IA)

6. Consulting With House or Senate Legal Counsel

House and Senate Legal Counsels are excellent resources, and may be called upon to defend Congress's prerogatives in any formal proceedings should the need arise. They are well versed in precedent and know the history of arguments made and accommodations allowed by the legislative and executive branches to facilitate congressional oversight and investigations. You can call on them to advise on the wording of requests and subpoenas for documents or testimony, and they can participate in negotiations over compliance with the same. They may represent Members or staff in matters arising from an investigation, such as conducting interviews in connection with criminal prosecutions for lying to Congress, or any proceedings where "speech or debate" immunity or privilege needs to be asserted.

7. Establishing a Process

There is no need to be overly confrontational from the beginning. Establish a process with the counsel of the entity you're investigating for getting documents—they will likely be willing to work to some extent in order to avoid a subpoena. If you are reasonable with your requests and give those you are investigating an opportunity to explain themselves, you are more likely to get their cooperation. On the other hand, if this proves not to be the case, you always have other options.

PUSH FOR THE INFORMATION YOU NEED UNTIL YOU GET IT

Often, an agency would claim that they dearly wanted to give us the information but it was part of an ongoing criminal investigation, or it would become part of one. The thing to do at that point is to not fold, but to say, "What can we do to negotiate some sort of memorandum of understanding so we can use the information internally?"

In our case, we had a safe. Only one person, not me, knew the combination of the safe. We did negotiate little agreements with the agency saying how we would use the information and on what day. The main thing is not to take 'No' for an answer, and to say, "If you don't want us to have it now—you know we have every right to this information, as the power of the government to investigate is pretty much unlimited if you look at the court cases—let's negotiate something and see how far we can get that way."

Ruth Fleischer, Adjunct Professor of Law, and former Democratic House and Senate committee Counsel and personal staff Counsel

CONGRESSIONAL LIAISONS ARE NOT (NECESSARILY) YOUR FRIENDS

You might think that congressional liaisons, who field inquiries for a living, would be experts on their given agency. Too often they are professional know-nothings, by design. Who better to shield an agency from difficult questions than someone who can profess to know nothing, but promise to diligently seek answers on your behalf?

They do not work for you, and they do not have your boss's interests first in mind. They will help when it is helpful to their agency head, but when it is not they will often struggle to return phone calls, profess failure in obtaining documents you need, or take weeks to schedule interviews. They can be an imposing presence during meetings with agency employees who may have important facts or insights to share.

Maintain your relationship as long as it is productive, and invite their presence in meetings as long as you believe it does not impair your work. If they are not being useful, do not hesitate to go directly to the offices whose assistance you require, often the agency's counsel, or the head of the agency. Just make sure your boss is fully briefed on your oversight and your frustrations, and is willing to back you up.

Justin Rood, former Republican committee investigative chief, and current POGO Congressional Oversight Initiative Director

8. Being Patient

Quality investigations can take months, if not years. Agencies and companies will try to test your resolve by giving you just a little bit of the puzzle at a time, hoping that your interest and the pressure to comply will drop off. Resistance is part of the process and you cannot take it personally or be overly cautious about employing firm tactics.

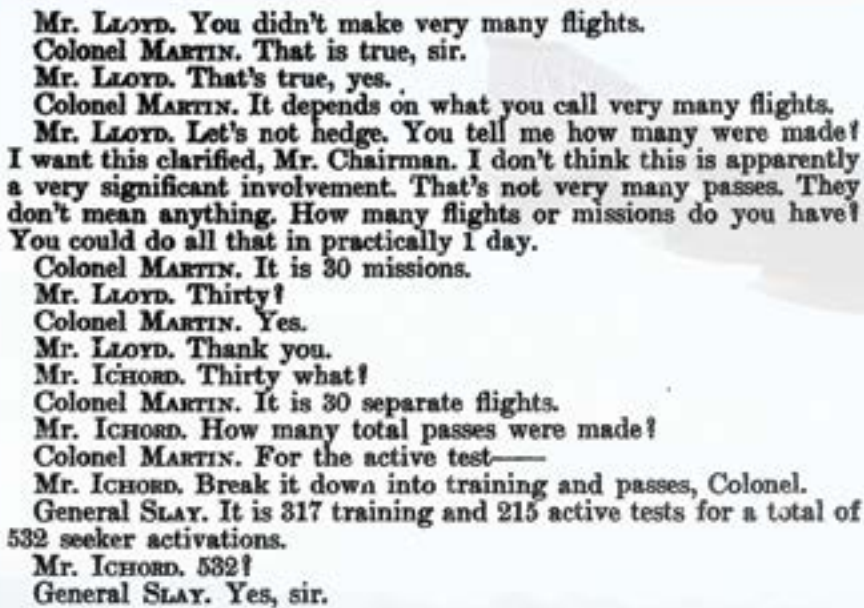
DON'T RUSH THE INVESTIGATION

If it's not ready to go to hearing, you don't go to hearing. There's no judge telling you "You have to go to hearing." If your Chairman is telling you to go to hearing on the tenth of June because of XYZ, you need to talk with your Chairman and say, "We are not ready to go with this thing. We need two more weeks."

Mark R. Paoletta, former Republican staffer, and former Chief Counsel for Oversight and Investigations for the House Committee on Energy and Commerce, who served from 1997 to 2007

9. Knowing Your Issue

You want to make sure that you have a thorough grasp of your issue—who does what, who they report to, what the divisions are, what their procedures are, and what the internal jargon is. This is especially key when Members probe for details during hearings.



Mr. LLOYD. You didn't make very many flights.
Colonel MARTIN. That is true, sir.
Mr. LLOYD. That's true, yes.
Colonel MARTIN. It depends on what you call very many flights.
Mr. LLOYD. Let's not hedge. You tell me how many were made? I want this clarified, Mr. Chairman. I don't think this is apparently a very significant involvement. That's not very many passes. They don't mean anything. How many flights or missions do you have? You could do all that in practically 1 day.
Colonel MARTIN. It is 30 missions.
Mr. LLOYD. Thirty?
Colonel MARTIN. Yes.
Mr. LLOYD. Thank you.
Mr. ICHORD. Thirty what?
Colonel MARTIN. It is 30 separate flights.
Mr. ICHORD. How many total passes were made?
Colonel MARTIN. For the active test—
Mr. ICHORD. Break it down into training and passes, Colonel.
General SLAY. It is 317 training and 215 active tests for a total of 532 seeker activations.
Mr. ICHORD. 532?
General SLAY. Yes, sir.



Photo by Flickr User Expert Infantry

The 1978 hearing before the House Armed Services Committee on the FY 1979 Defense Authorization Act regarding the Maverick missile shows what happens when staff has, or has not, prepared the Member on the key details.¹⁹ Representative Lloyd's imprecise questioning let Colonel Martin get away from providing key information into whether there was improper testing. Likely as a result of thorough hearing preparation by his staff, Representative Ichord used the correct jargon that demonstrated how the Air Force had cheated in its testing of the weapon.

10. Interviewing Your Subject Ahead of Time

Interviewing the subject before the hearing should help prevent unexpected answers that could blindsides your boss during the hearing.

- **Informal setting.** The subject of your investigation is likely to be more forthcoming and relaxed in an informal setting, which could lead them to let something slip that they did not intend to.
- **Witnesses and note-takers.** Be sure to bring colleagues along. Not only can they help to take notes—you want to make it very hard for your witness to wiggle out of earlier statements during a hearing—but, they can also serve as witnesses for the hearing. Having a staffer from the other party join you can also create buy-in and foster greater collaboration for future investigations.

MEET WITH WITNESSES MULTIPLE TIMES

We often meet with the witnesses multiple times after we send them a witness letter.... We tell them everything we're concerned about because we want to hear their response, and actually we want to get educated as to whether we understand things correctly or if there's something we've missed. Very often, a witness will point out something you haven't thought about and you realize you're simply wrong.

Elise Bean, former Democratic Staff Director and Chief Counsel, for the Permanent Subcommittee on Investigations

TRANSFORM WITNESSES' EFFORTS TO THWART THE INVESTIGATION INTO AN OPPORTUNITY

Some witnesses used to try to come in and meet with the Chairman [to try to sway him]. Make sure you never let that happen. If they are going to try one of these "courtesy" meetings, a day before or a week before the hearing, go in there and make it very difficult. We had 20 questions that we wanted to ask the [witness], and we started to ask them during this "courtesy" meeting.

Mark R. Paoletta, former Republican staffer, and former Chief Counsel for Oversight and Investigations for the House Committee on Energy and Commerce who served from 1997 to 2007

11. Giving the Subjects of Your Investigations Zero Excuse for Not Cooperating

Agencies and other respondents will often try several arguments before agreeing to produce information. Consider them carefully, and consult with your counsel and with your Chamber's counsel. There are legitimate reasons information can be withheld in whole or in part, or access should be negotiated. Be reasonable—but don't take no for an answer if you deserve a yes.

- **The information is classified.** You can provide someone from your staff with the appropriate clearance to receive, handle, and review the material. Another option is to ask the agency to produce the material in unclassified form.
- **The information has already been provided to investigators for other committees.** That's good news. It should be easy for them to produce a copy for you quickly.

- **Some of the information or documents were produced by another agency, and cannot be released without its permission.** Ask the responding agency to identify the agency and to coordinate a meeting between the three of you to discuss the production. If they do not cooperate with scheduling, contact the White House and ask for their assistance.
- **The material you request does not pertain to the subject of your investigation.** It's not up to the responding agency to determine the scope of your investigation, nor does any statement of scope limit a Chairman's ability to request information if he or she believes it is relevant to the inquiry.
- **The material pertains not to the investigation, but to our responses to the investigation.** This comes up when information provided to Congress or the public in the course of an investigation appears to have been incorrect, and Congress is attempting to discover whether they were willfully misled or the subject of an honest mistake. Agencies may decline to cooperate with what they like to call "an investigation of the investigation." This is a variant of the previous argument. It's not up to the agency to decide what you can and cannot investigate.
- **The material contains sensitive information.** This is not a reason to withhold documents from Congress. However it is reasonable for an agency to be concerned that Congress may release that information, creating an unintended disclosure or vulnerability. If the confidential information is not pertinent to your investigation—for instance, personal information contained in employee records—you may consider requesting two sets of documents, one unredacted and the other with that information blacked out. Agree that you will use the first set for your investigation, but when compiling exhibits to be released as part of a report or hearing, you will use the redacted version if it is sufficient for your needs.

DO YOUR HOMEWORK ON RECORD-KEEPING

It can be tedious, but always ask not only if the information you seek is documented, but how the documentation occurs. Find out what systems they use, when they began using them, how information is organized and sorted, what fields are used, how the data is stored, where it is physically stored, who is responsible for storing it, and how many backup disks are kept and for how long. It is harder to avoid producing documents in response to a request for specific records, kept by specific people in specific locations, than to a general request. That's the most boring and the most useful piece of advice I was ever given.

Justin Rood, former Republican committee investigative chief, and current POGO Congressional Oversight Initiative Director

YOU MAY NEED TO GO INTO THE AGENCY BOWELS FOR THE DOCUMENTS

Relating to classified material, an important point on seeking sensitive documents from an agency is this: Don't assume the head of the agency, or even their most senior staff, know the facts when they assure the committee that "We've looked everywhere and there are no documents still in existence on the topic you requested." They may well be telling the truth, as they know it. So may those staffers who reported to them. But in the actual operating levels of the agency or in a storage site for material retained beyond routine file destruction periods of the agency, there may well be relevant documents.

A good example occurred when I was investigating allegations that the CIA, under President Eisenhower, had plotted to assassinate Patrice Lumumba, the first prime minister of the Congo after it had gained independence from Belgium. I located the cables sent by the CIA to the Station Chief in the Congo about Eisenhower's direction to assassinate him, after the CIA Director had assured the Church Committee—I believe in good faith—that they had searched everywhere and there were no such cables extant. I received a tip that there might be copies in an off-site storage facility in the Mid-Atlantic region, saved for communication security purposes. There were....

Lesson learned: While it may not always bear fruit, when the stakes are high enough, congressional investigators should go behind even sworn assurances by agency heads that no files or documents remain. Without questioning the integrity of those assurances, they should insist on talking to a variety of line personnel including records maintenance people and persons in non-obvious offices that might have had enough interest in the matter to have been cc'd on memoranda, etc. Obviously the whole world of retrieving material from "erased" computer files can be a critical aspect.

Burt Wides, former Democratic House and Senate judiciary and national security investigator, including senior investigator for the Church Committee

12. Not Being Fooled by Pseudo-Classifications

Agencies have increasingly used markings broadly categorized as Controlled Unclassified Information (CUI). These markings include "Sensitive Security Information," "Sensitive but Unclassified," "Controlled but Unclassified," "Law Enforcement Sensitive," and "For Official Use Only." They were created to manage information that requires safeguarding or dissemination controls, but are often abused to hide embarrassing information rather than truly sensitive information. Such a marking does not prevent the information from being released to you (via a statutory or discretionary release to Congress or based on a request letter) or to the public (via a FOIA request). The markings do not carry the same weight as classified information. That said, tread carefully with these markings, like the Department of Energy's "Unclassified Controlled Nuclear Information" (UCNI). They can involve sensitive information and potentially place a source at risk despite the recent holding by the Supreme Court in *Homeland Security v. MacLean*, which held that CUI markings do not remove a government employee's whistleblower protections.

For more information on CUI, classified, proprietary, and other information, see Resource B at the end of this handbook.

13. Exerting Congress's Right to Information

Congress has the authority to access nearly all kinds of information. However, at times it is important that you are very careful and seek legislative counsel. Here is a broad overview of your powers and how to exert your access over common roadblocks:

- Congress is not bound to judicial branch restrictions in its pursuit of information, such as attorney-client privilege and proprietary data restrictions.
- Don't automatically back down when the executive branch claims the information is national security-related. While it is important that you are sensitive to not releasing information that would damage the national interest, there have been excesses in which the executive branch withholds such information from Congress.

NATIONAL SECURITY: CONGRESS HAS A SEAT AT THE TABLE

I'd like to see a bit more push back in Congress on the terrible acquiescence by national security-related committees to executive requests to limit briefings to only the Chair and Ranking, or a few members. When Judiciary Chair Conyers refused to be briefed on the warrantless wiretapping program on that basis, I surveyed the House and Senate Foreign Relations, Armed Services, Homeland Security and Appropriations, as well as Intelligence, Committees, all of whom said they frequently agreed voluntarily to such limits (in the naive hope they would thereby learn more, or because of committee leaders' pride in being exclusively informed). This should be resisted strongly for a variety of reasons, and can be accomplished using congressional authorization, appropriations, and, where available, confirmation leverage.

Burt Wides, former Democratic House and Senate judiciary and national security investigator, including senior investigator for the Church Committee

- When requesting information from the executive branch, Congress does not need to file a FOIA. The Freedom of Information Act specifically states that the executive branch cannot use FOIA to withhold information from Congress. The problem is that the DOJ has defined the Congress “as a body (or through its committees and subcommittees),” and that “Individual members of Congress possess merely the same rights of access as those guaranteed to ‘any person.’”²⁰ As a result, a practice has developed where agencies only recognize requests from the Chair, or in some cases from a Member acting in conjunction with the Chair, as coming from the “Congress.” This interpretation of the FOIA by the DOJ (which has been upheld by courts) requires congressional attention, and perhaps legislation clarifying that “Congress” includes any Member thereof.²¹ Giving information to Congress is not the same as making it public.

BOWING TO EXECUTIVE PRESSURE WEAKENS CONGRESS'S OVERSIGHT AUTHORITY

*The longer a period of congressional acquiescence in the face of executive administrative challenges and lack of effective responses to judicial challenges, the more difficult it will be to retrieve and restore the legislature's investigative prerogatives. Those constitutionally based powers are not legally lost but their re-establishment can be difficult.*²²

Morton Rosenberg, “Remarks of Morton Rosenberg to the Participants at the July 18, 2008, COTS Session Sponsored by POGO.”

DON'T CONCEDE TO EXECUTIVE PRIVILEGE

*In discussing executive privilege, there is a temptation to cede to the President broad scope in military, diplomatic, or national security affairs. This is too great a concession. Generalizations of this order should be avoided.... What [may appear] to be “foreign policy” to the President may seem with equal clarity “foreign commerce” to Congress. Although the judiciary may decide at times to yield to presidential initiatives in military, diplomatic, and national security affairs, no such acquiescence should be expected of Congress.*²³

Louis Fisher, *Constitutional Conflicts between Congress and the President*

- The Speech or Debate Clause allows your boss to submit any information for the Congressional Record while on the Floor. It should be emphasized that the Clause not only provides independence for both Chambers of Congress and congressional committees, but also for individual Members in their pursuit of legislative activities.²⁴

As mentioned before, giving information to Congress is not the same as making it public. However, the Speech or Debate Clause gives your Member protection if they do believe information, which in other settings would be protected from public disclosure, needs to be made public. This is an important distinction to make, as you will likely need to receive sensitive information—of one stripe or another, and legitimately labeled as such or not—that may be best kept in confidence, at least initially. Also, this may be an important point to make in your dealings with agencies, businesses, whistleblowers, and other sources. There may be legitimate reasons for keeping information under wraps, but it is good to put them in context with your options, as well as your responsibilities to the public.

Remember: The Speech or Debate Clause does not protect speech made in press releases, just statements made in hearings and on the Floor.

SIGNIFICANCE OF THE SPEECH OR DEBATE CLAUSE

The Speech or Debate Clause represents “the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature.”

United States v. Johnson, 383 U.S. 169, 178 (1966)

14. Using Congress’s Oversight Arsenal

Congress not only has the right to information, it also has tools it can employ to get information from uncooperative agencies and companies. Here are a few of your options:

- **The House has the “resolution of inquiry” power.** This procedure can lead to the release of factual information from the executive branch. Just the simple act of a Member introducing such a resolution can spur the release of a substantial amount of information from the executive branch.²⁵
- **Shaming them publicly in the media.** It’s newsworthy when the executive branch doesn’t comply with the legislative branch’s duty to conduct oversight. Attention garnered from news coverage can lead to pressure from the top that shakes down the information needed.

A MEDIA SPOTLIGHT CAN HAVE IMMEDIATE IMPACT

There was a loophole in the Meat Inspection Act. You were not supposed to process and sell the meat of dead, dying, or diseased livestock interstate, but it could happen at an intrastate level. To remedy this, the House passed a lousy law, and the Senate passed a good one. The state agencies didn’t want a strong law. They were getting paid off by companies who could make a fortune because they could buy the sick animals very cheap.

I was in the conference committee and it was fascinating. Senator Mondale said, "Mr. Chair, there's bad meat getting out to the public." The Chair was a much-feared Senator from Texas, who jumped to his feet and, with a red face, shouted, "F@#! the public. I only care about what is going to impact my state Secretary of Agriculture."

When you see that close-up—what actually happens behind closed doors—you understand why you have to publicize things. Someone, unknown to this day, leaked it to The Washington Post, and the story had an immediate impact. The loophole was closed.

Franklin R. Silbey, former Democratic House and Senate oversight staffer and Staff Director

- **Subpoenas are one of Congress's strongest tools.** The subpoena can be used whenever necessary, though it should generally speaking be a near-last resort. You would be surprised at how much you can get with just the threat of a subpoena.



Fred Fielding
Counsel to the President
The White House
Washington, DC 20500

Dear Mr. Fielding:

By next week, it will have been nearly a month since the Committee's initial request for information relating to the White House's relationship with MZM. Yet we have received not a single document in response to this request. You should know that if the responsive documents are not provided by April 24, 2007, which is the date proposed by Mr. Flood, the Committee will consider a motion to subpoena these documents at the Committee's business meeting on Wednesday, April 25, 2007.

DON'T FORGET ABOUT DEPOSITIONS

Staff depositions afford a number of significant advantages for committees engaged in complex investigations, including the ability to:

- *obtain sworn testimony quickly and confidentially without the necessity of Members devoting time to lengthy hearings that may be unproductive because witnesses do not have the facts needed by the committee or refuse to cooperate;*
- *obtain testimony in private, which may be more conducive to candid responses as compared with public hearings;*
- *verify witness statements that might defame or tend to incriminate third parties before they are repeated publicly;*
- *prepare for hearings by screening witness testimony in advance, which may obviate the need to call other witnesses;*
- *question witnesses outside of Washington, D.C. without the inconvenience of conducting field hearings with Members present.*

Moreover, Congress has enhanced the efficacy of the staff deposition process by re-establishing the applicability of criminal prohibition against false statements to statements made during congressional proceedings, including the taking of depositions.

Certain disadvantages may also inhere. Unrestrained staff may be tempted to engage in tangential inquiries. Also, depositions present a “cold record” of a witness’s testimony and may not be as useful for Members as in-person presentations.²⁶

Congressional Research Service’s Congressional Oversight Manual

- **Funding.** As Congress possesses the power of the purse, it has the option of withholding or cutting an uncooperative agency’s funding. Like the subpoena, the threat of doing this is often sufficient for getting what you want.

If you are in a personal office or on an authorizing committee, reach out to the appropriations committee for the relevant agency. As the appropriators can have the agency on a “short leash,” the committee may be able to get you the information quite quickly.

Appropriations staffers may also be interested in your investigation, and can help move it forward. For example, a letter from the Chair of the House Committee on Science and Technology’s Subcommittee on Investigations and Oversight caused the House Appropriations Committee to deny funds for a DOJ program that the Subcommittee had been unable to investigate. The bipartisan leadership of the Subcommittee had tasked the GAO with researching whether the program had proper safeguards in place for storing billions of personal records, but the DOJ refused to let the GAO conduct its investigation. The Appropriations Committee denied the DOJ funding until it answered some of the questions raised by the Subcommittee.²⁷

THAT POWERFUL PURSE

There is one power above all, and that is the power of the purse. If a President of the United States refuses to provide the legislative branch with the information required to do its job in determining the laws of the United States ... that is the time for the Congress to get the President’s attention. How do you get the President’s attention? You fail to appropriate money for the President to do the things he or she wishes to do....

Politics has a very real effect. Let’s say there’s something going on with supplying weapons or supplies to the troops who are in combat. Nobody wants to cut off the ability of our troops to be able to defend themselves, to be able to eat. So, you don’t aim it at that. You say to the President ... “We’re going to cut the money for the Secretary of Interior in half. Just so you know we’re here. And if that doesn’t work, how about the Secretary of Agriculture?” ... Aimed at the top levels. Aimed at the political levels. There is great power in this institution.

I was in the House for sixteen years—I was in the Republican leadership. There was not one time, ever, when the executive branch did not provide me with what I wanted. Because it was always a matter of how high a price are you going to have to pay before you decide to provide the information I need?

Mickey Edwards, Executive Director of the Aspen Institute-Rodel Fellowships in Public Leadership, and Representative (R-OK) from 1977 to 1992

- **Contempt of Congress.** Agency officials or businesses can be held in contempt of Congress by either Chamber if they don't cooperate with your investigation. For a better understanding of the process, consult your chief counsel and the legal counsel for your Chamber.

CONTEMPTUOUS COMPLIANCE

Since 1975, there have been fourteen citations of contempt voted against cabinet-level officers by subcommittees, full committees, and once by the House of Representatives. In all but one instance, substantial, if not complete, compliance was achieved; the most recent citation—against Attorney General Eric Holder in 2012—is still in litigation and has not been resolved.

Morton Rosenberg, Fellow at the Constitution Project, and former Specialist in American Public Law at the Congressional Research Service

- **Pulling in other investigative partners.** The introduction of IGs and the GAO into your investigation can apply additional pressure to a recalcitrant agency.

EDWARD J. MARKEY
The District, Massachusetts
ENERGY AND COMMERCE COMMITTEE
RANKING MEMBER
SUBCOMMITTEE ON
TELECOMMUNICATIONS AND
THE INTERNET
SELECT COMMITTEE ON
HOMELAND SECURITY
RESOURCES COMMITTEE

Congress of the United States
House of Representatives
Washington, DC 20515-2107
March 21, 2005

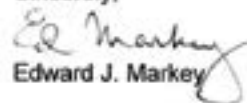
Hubert T. Bell
Inspector General
U.S. Nuclear Regulatory Commission
Mail Stop T5-D28
11545 Rockville Pike
Rockville, MD 20852-2738

Dear Mr. Bell:

I am concerned that the totality of the Commission's actions reflect a systemic effort to withhold important information from Members of Congress and their staffs, non-industry stakeholders, the press and members of the public, rather than a genuine effort to be protective of national security. I am concerned that the result of these actions may be to inhibit effective oversight of the Commission, and impede public participation in the Commission's proceedings. I therefore request that you conduct an investigation into the manner in which the Commission has responded to requests for information from Members of Congress, non-industry stakeholders and members of the public, the process by which it has allowed non-industry stakeholders and members of the public to participate in Commission proceedings since September 11, 2001, and any changes or proposed changes to its policies related to access to information. I further request that you prepare a report on any findings or recommendations made as the result of your investigation.

Thank you very much for your attention to this important matter. If you have any questions or concerns, please have your staff contact Dr. Michal Freedhoff of my staff at 202-225-2836.

Sincerely,


Edward J. Markey

SURPRISE: REPORTERS FIND INACCESSIBLE WITNESSES COMPELLING

My interest in a witness goes up in direct proportion to how difficult it is for me to get that witness on the phone. You guys have subpoena power, we don't. That's cool to be you—I'm jealous.

If it's an academic person—they are brilliant people—but, I can probably get that person on the phone and they'll say the same thing to me. My editor is not going to understand why it's worth me going to the Hill to spend several hours listening to this person say something I could have gotten them to say, or they have said before publicly.

The people who are compelling are the people I can't get to, for whatever reason, such as whistleblowers that will only speak under the protection of a hearing situation.

Anna Mathews, reporter with *The Wall Street Journal*

OPPORTUNITY ARISES FROM THE CONFIRMATION HEARING

The confirmation hearing serves as an opportunity for senatorial oversight and influence, providing a forum for the discussion of the policies and programs the nominee intends to pursue. The confirmation process as an oversight tool can be used to

- I. provide policy direction to nominees;*
- II. inform nominees of congressional interests; and*
- III. extract future commitments.²⁸*

Congressional Research Service's *Congressional Oversight Manual*

- **Holds on nominations.** Senators in the majority may be able to hold or delay certain legislation or an executive branch nomination in order to compel disclosure. This is a forceful tactic and should be used only after careful consideration leads to the conclusion that more temperate means, such as transmitting a request letter or arranging a conversation with the agency's head, have yielded no results.

FOLLOWING IN THE FOOTSTEPS OF OTHER INVESTIGATORS

It is usually worthwhile to ask for copies of all documents produced in response to an administrative, civil, or criminal legal action, including any subpoena, search warrant, or other legal writ, notice, or order requesting documents related to the matter at issue. People usually keep a copy of the documents they produce to the government or in a legal case, which means they ought to be able to make a quick second copy of those same documents for you. Asking for the documents that have already been produced once enables you to benefit from the investigators who went before you.

Elise Bean, former Democratic Staff Director and Chief Counsel for the Permanent Subcommittee on Investigations



5. THE HEARING & BEYOND

INVESTIGATION / OVERSIGHT / QUESTIONS / ACCOUNTABILITY / BIPARTISAN

In this chapter you'll discover the importance of:

1. Engaging the media
2. Scripting the hearing
3. Not letting the hearing be the end

Most investigations should be complete by the time the hearing starts. The hearing is only the most high-profile way to make sure your colleagues understand the scope of your work and to attract the media and thereby public attention. Because there are such high expectations about the quality of investigations that result in hearings, the pressure on both Members and staff is tremendous and at times seemingly overwhelming. Don't let the stress get to you: there are still a few things you need to keep in mind, and a few tools that will help you make your hearing as successful as possible.

1. Engaging the Media

Press coverage of your hearing is essential in helping you achieve the goals of your investigation. An agency or company will have no reason to change policies if no one cares.

- **Connect to a natural news hook.** Think about media “pegs” for your hearing, such as the beginning of a government counter-terrorism exercise, the anniversary of a major event, or a missed milestone. Can you schedule the hearing for the day, or near the day, of a major event related to your issue?

Consider having the hearing in the field, whether in the Member’s home state or at the site of a problem you are investigating, such as a Veterans hospital. This fresh approach will not only capture the attention of national media—who may get interesting on-site video footage—but also the state and local media.

- **Consider the scheduling of your hearing.** In order to get optimal news coverage, you should avoid holding hearings on days when there is already something significant planned. They should also be held early enough in the day so reporters can make their deadlines. By 2:00 p.m. or 3:00 p.m., most reporters’ deadlines are looming.

REPORTERS WANT THE SCOOP BEFORE HEARINGS

From my perspective, hearings are the least interesting part of your investigation because the hearing is where everybody is at. I want to try to get the information before the hearing happens. I want to get the stuff that nobody else has. I don’t want to get it when it’s already on C-SPAN, that’s when everybody’s watching it.

Journalist

- **Don’t drag your feet.** You cannot expect media coverage of your event if you wait until the last minute to send out a press release. Give reporters enough time and information to do reporting *before* the hearing.

DEVELOP A CURTAIN-RAISER

Before a hearing you always get together with a reporter and develop a curtain-raiser. We were looking into a major defense contractor for the production of engine blades for the B-1 bomber that was overcharging the living #%&! out of the Air Force. We called a reporter at CBS and said, “We’ve got this great story. We’ve got docs, the whistleblower. You can interview him the day before the hearing.” So the reporter came, and we helped him get the information from the whistleblower. However, when the story ran, there was no mention of the hearing or our committee. Often, the press doesn’t give any credit to the people who come to them. They want to act like they discovered it themselves, like it fell off a truck in the middle of 15th Street! But, the press is absolutely crucial to getting the investigation out. Without them, there would be no public outrage or change.

Peter Stockton, Democratic House staff investigator from 1969 to 1994

- **Create a buzz.** Use social media to create a buzz around the hearing that can spark interest among the larger media outlets.

- **Simplify.** Many of the issues you investigate will be extremely complicated. You want to try to give the media information in general terms and have at least some simplified dialogue in the hearing itself for sound-bites. Letting the public know what you're doing is pointless if they don't understand it.

SUMMARIZE

You have to be able to say what the hearing is really about in one or two sentences. If you can't do it or if you can't do it in a really good title, then you're too sprawling and too disorganized to have a hearing that's going to be as effective as it ought to be.

Ruth Fleischer, Adjunct Professor of Law, and former Democratic House and Senate committee Counsel and personal staff Counsel

- **Remember that the media will talk to both sides.** You want to make sure that your position is strong: your argument is clean, your facts are straight, and your conduct has been appropriate. You want the agency or company to be under the microscope, not you and your boss.

2. Scripting the Hearing

You need to make sure that your boss is completely prepared for the hearing so they are running the show, and so they won't be blindsided by a better-prepared colleague or witness.

- **Tell a story.** From the title of the hearing, to the opening statement, to the questions, you want to make sure the point of the hearing comes across. You also need to remember that people will be listening to your hearing, not reading it. They also may be texting, or staring off into space, so you want to make sure that you are clear and have ways to capture their attention. Repetition and clarity are keys.
- **Remember the goal of the hearing.** The purpose of the hearing is typically not to get new information. While some may unexpectedly surface, the goal is to persuade the other Members and the press about the importance of resolving the problem your investigation uncovered.

OPENING STATEMENTS—LESS IS MORE

One other thing, which you probably can't effect, but I'll make the point anyway... is the possibility of a lower ratio of opening statements to interesting witness questioning. I understand your bosses want to make opening statements, but to be honest they're not usually the most compelling or news-making part of the affair.

Anna Mathews, reporter with *The Wall Street Journal*

- **Have your most knowledgeable staffer on hand.** At least one person on staff should know the issue backwards and forwards and be available to advise your boss during the hearing to make sure things are staying on track. They should be sitting right beside or behind the Chair during the question and answer period to let the Chair know when a witness is being contradictory, and to make sure the Chair doesn't forget anything important. The staffer should move along to other committee members as they ask their questions.
- **Know how your witnesses will act ahead of time.** From staff interviews you can often get a sense of how your witnesses will be at a hearing. If they are nervous but helpful you can be gentle, whereas if they are evasive and confrontational you know to be more aggressive.
- **Use the anticipatory rebuttal in an opening statement.** Since you've done your homework, your boss can disarm the witnesses as soon as the hearing begins by stating the excuses the witness is likely to give, and why they are flimsy.
- **Organize panels for maximum impact.** Consider the advantages and disadvantages of beginning the hearing with the government and corporate officials versus kicking it off with a whistleblower or someone else who will put a human face on the problem.

In most cases you want to put the most newsworthy witnesses at the beginning, and force the second panel of government and corporate officials to respond to the first panel's allegations.

If you lead with the government and corporate officials, be sure to have them stay to respond to the second panel.

- **Share hearing questions with other Members.** You will know your investigation and findings better than anyone, and your boss may not have the time to ask every question you write for him or her. Share those lines of



Photo courtesy of the Office of Carolyn Maloney. Representative Carolyn Maloney (D-NY), left, chairing a hearing of the Financial Institutions and Consumer Credit Subcommittee with Subcommittee Staff Director, right.



Photo Credit: James A. Parcell
House hearing on Halliburton's role in Iraq as a government contractor. First witness panel, three whistleblowers who worked for Halliburton. Marie deYoung, Logistics Specialist with KBR speaks. [Also visible] is truck driver for KBR, James Warren.
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questioning. Staffers for other Members will appreciate a favor that will make their own bosses sound smart, and it will help keep the hearing focused on your findings.

- **The only surprises should be the ones you orchestrated.**

Mr. DINGELL.

When the GAO interviewed you, General Yates, you said you did not agree with the Secretary of the Air Force's letter and you said that the pulley puller should have cost only a few dollars and that as soon as Air Force officials found out about the price, the Air Force asked and received a voluntary refund; is that correct?

General YATES. That is not correct. I have never discussed, to the best of my recollection, the pulley puller with the GAO. For sure, I never said I disagreed with the Secretary of the Air Force.

Mr. DINGELL. The GAO also informed the subcommittee you said you did not agree with the refund and only requested it when you were ordered to do so; is that correct?

General YATES. Sir, I do not ever recall discussing this subject with the GAO.

Mr. DINGELL. All right. The GAO also informed the subcommittee you said that the data submitted to the Headquarters U.S. Air Force was the same as presented to the GAO and did not support a refund request; is that correct?

General YATES. No, sir. It is not.

Mr. DINGELL. In fact, you were supposed to have said to the GAO that General Dynamics is entitled to the refund that it made; is that correct or not correct?

General YATES. Sir, I have not discussed this with the GAO.

Mr. DINGELL. Mr. Quicksall, will you come forward, please?

Mr. Quicksall, you have just been sworn, so you may consider yourself to continue being under oath.

Will you sit down over there on the end and tell us what are the facts with regard to the interview of General Yates.

Mr. QUICKSALL. The interview with General Yates was in Dayton, OH, I think in February, and I was not at that meeting.

However, I know there are GAO people in the audience who were at that interview—

Mr. DINGELL. I gather that Ms. Nancy Kingsbury is the GAO agent?

Mr. QUICKSALL. Yes, sir. I believe she is in the audience.

Mr. DINGELL. Ms. Kingsbury, are you here, please?

Ms. KINGSBURY. Yes, sir.

Mr. DINGELL. Would you come forward, please.

General YATES. Mr. Chairman, may I say something?

Sir, I certainly do recall having an interview with Ms. Kingsbury. I am sorry I have not met Mr. Quicksall before and in my comments directed to you, I was addressing the GAO presentation here today.

Mr. DINGELL. We will ask Ms. Kingsbury about her recollection of the discussion and then we can perhaps get a better appreciation of what the facts are here.

PANELS CAN HELP ILLUSTRATE YOUR POINT

This was one of my favorite panels.... We were looking at an offshore tax scam. What we decided to do was bring in the attorneys who designed these tax shelters. We had a panel of four people. On the left hand, a little weedy guy, very slimy, your typical tax shelter shyster. On the far right, we had a guy you would hire after you got in trouble—he was 6 feet tall, bald head, looked like a prize fighter, big heavy tough guy. But both of them you could tell were not exactly your most reputable lawyers.

The two guys in the middle considered themselves, and are considered, the leading tax voices in the country. They had their thousand dollar suits on and they spoke in soft voices in multi-syllabic sentences and they tried to pretend they were different from the shysters on each end of them.

Our point of putting them on the same panel is that they were all doing the same thing—they were selling tax shelters and making money off it.

Elise Bean, former Democratic Staff Director and Chief Counsel for the Permanent Subcommittee on Investigations

KNOW YOUR BOSS'S STRENGTHS AND WEAKNESSES

My boss was not fast on his feet. I had to learn how to do several things simultaneously to compensate for that because if he would ask a question at a hearing.... [he] could not figure out how to counterpoint the answer—because he was not fast on his feet.

So what I had to learn to do was think for him and speak for him, without me actually doing the speaking. So, I would hear the answer coming from the witness and I would anticipate what he's saying, write down the comeback response from [my boss], and do it in a pithy way—so people could understand it, like a sound bite—write it legibly so he could read it, and give it to him so he could read it, all at the same time.

Longtime Republican Investigative Staffer

IF YOU'RE GONNA DO IT, DO IT RIGHT

You shouldn't hold an investigative hearing unless you have a compelling horror story, a smoking gun to reveal, or an important point to make. Executive witnesses should know explicitly what you want them to talk about and what materials to bring with them. Failure to be precise invites the response, "Gee, I didn't anticipate that. We'll get back to you with the answer in writing soon."²⁹

Morton Rosenberg, "Remarks of Morton Rosenberg to the Participants at the July 18, 2008, COTS Session Sponsored by POGO."

- **Practice makes perfect.** Government and corporate officials often prepare to give testimony before their own "murder board," with a lobbyist or congressional liaison playing the role of the Chair. You and your boss should be similarly rehearsed and prepared.
- **Members, and former Members, may be working against you.** Defense lawyers for your witnesses are likely trying to find sympathetic Members of the committee who will ask questions to get your hearing off track. You may even see a former Member representing the defense, and know that they are tapping into their relationships and know-how.

MEMBERS MAY MOVE TO THE OTHER SIDE OF THE DAIS

During this period [1912], the Committee's power to elicit testimony was first challenged.... George G. Henry of Salomon and Company refused to divulge the names of national bank officers involved in the stock promotion syndicate. He refused on the advice of ex-Senator John C. Spooner, who appeared as counsel to several of the most important witnesses.³⁰

Richard Sheldon, *Congress Investigates: A Documented History, 1972-1974*

- **Predict adversarial witnesses.** You're going to have them. Know your stuff and plan responses to the witness's testimony. Enable the Member to give a confident response and move on—do not allow the adversarial witness to sidetrack the hearing.

Lawyers for the defense may also try to answer questions on behalf of their client during the hearing. Make sure your Member knows not to tolerate this, as you will lose control of the hearing.

PREEMPT EXCUSES

One of the most effective things is showing agencies, and Members, that other agencies or state agencies are doing something. It really takes away the "That's just crazy" or "That's just asking a million miles for us to walk" response. Show them that others are doing it, and this is how they're doing it. When the IRS was saying forever, "We couldn't do x," we brought in the [Securities and Exchange



Photo Credit: Jonathan Newton

Roger Clemens' attorney Lanny Breuer points to Chairman Henry Waxman during House Oversight and Government Reform Committee hearings on steroids in major league baseball, February 13, 2008. © 2008, *The Washington Post*. Reprinted with Permission.

Commission] and sat them right next to the IRS. We asked the SEC, "Don't you do x?" They answered, "Why yes, we do." The IRS looked mighty stupid, and sure enough, they changed their behavior.

Dean Zerbe, former Counsel and Investigator for the Office of Senator Charles Grassley (R-IA)

YOUR BOSS CAN SHOW THERE ARE CONSEQUENCES FOR INTERFERING WITH A HEARING

A knowledgeable Chair running a tightly controlled hearing has the power to deal severely with an obstreperous attorney, which can include expulsion from the hearing or a demand that counsel take an oath and testify, thereby risking waiver of the attorney-client privilege.³¹

Morton Rosenberg, "Remarks of Morton Rosenberg to the Participants at the July 18, 2008, COTS Session Sponsored by POGO."

- **Make sure your boss knows to stick to the script.** You may have painstakingly crafted a sharply focused question that the witness cannot sidestep or obfuscate in their answer. It still is *crucial* to learn a polite, but effective way to emphasize to your Member before the hearing the importance of asking the question just as written and not reframing or trying to explain it with folksy elaboration that leaves a truck-sized escape route for the witness.
- **Don't ask questions in the hearing that you don't already know the answers to.** You don't want your boss to get surprised or thrown off track by a witness's answers. If you don't get the answer you are expecting, ask the witness why they had told you differently earlier or why their own documents contradict what they just said.
- **Avoid imprecise questions and lumping questions together.** If you are overly broad or ask multiple questions at a time before giving witnesses time to respond, you are giving them wiggle room to avoid the specific issue. Ask specific questions sequentially to get real answers. If you can't avoid using broad questions, have specific ones for follow up.
- **Question hostile and friendly witnesses differently.** Ask friendly witnesses open-ended questions. In most cases, hostile or defensive witnesses should be asked factual questions. If there was serious wrongdoing that your investigation uncovered, your questioning should confront them with the facts and give them a choice between admission of truth or perjury. This can be done by asking the witness leading yes or no questions that suggest the answer.



Photo Credit: Gordon L. Freedman

Congressional investigators for the House Committee on International Relations Investigation of Korean-American Relations react as Members disregard the staff's prepared questions during the hearing. April 20, 1978.

CAUGHT ON TAPE

We also did an Enron investigation in the Senate. One of the angles we chose to look at was how financial institutions helped Enron commit fraud. So we looked at Chase, Citibank, and Merrill Lynch.... We received a bunch of audio tapes from Chase about two or three days before the hearing. Of course, it's very difficult to deal with that, but we had an intern. We said, "Go through the tapes and pick out the ten segments you think are the most interesting," and we picked out a couple for the hearing.

In one segment this Chase banker was talking about certain trading deals where Chase was pretending they were entering into energy deals with Enron, but they really were loans using an offshore entity that Chase itself had set up in the Isle of Man called Mahonia. [Chase] had a deal with Mahonia, Mahonia had a deal with Enron, and Enron had a deal with the bank [Chase]. They were really just sliding money around. Senator Levin said to this banker, "Would you describe these as circular deals, where the money just goes in a big circle?" And he responded, "Oh no Sir, I would never describe it that way."

Senator Levin said, "Would you like to hear yourself?" and he hit the tape. And it was this guy talking to his buddies on the phone explaining the deals and saying, "It's just a circular deal, the money just goes in a circle." So that was very dramatic.

Elise Bean, former Democratic Staff Director and Chief Counsel for the Permanent Subcommittee on Investigations

- **Use questioning to make the witness confirm the problem.** Like a jury, you want the other Members, the press, and the public to come to their own conclusion about the scope of the problem and witnesses' culpability. Your boss should not need to assign blame or point fingers because this will be accomplished through the process of questioning the witness.

Sometimes, it will not be until the hearing that your boss grasps the depth of wrongdoing or cover-up, especially if the wrongdoers are particularly arrogant or evasive. This may motivate your boss to stay on top of the problem until it is resolved.

WITHOUT SAYING A WORD, A WITNESS CAN SAY A LOT

This was a hearing on workplace safety. The beef processing business is not one of the safest occupations in our economy. Upton Sinclair first started telling us that at the turn of the century.... And we had everybody prepared beautifully. As Counsel, I was sitting on the left, the head of public affairs was next, the president of the company was in the center. And next to him was the vice president for production, a guy who had come up through the ranks. The television cameras were all on these people, and they stood to be sworn in. I sat there and looked down the row. As everybody raised his right hand, the vice president in charge of production stood up and raised his right hand. His three fingers had been cut off at the knuckles. At that point, I think Tom Lantos said, "Game, set, match, and it's all over."³²

Jim Fitzpatrick, retired partner at Arnold & Porter, who represented numerous clients before congressional hearings

- **Ask tough questions, but don't come off as a bully.** Sometimes getting the best information requires making government or corporate witnesses uncomfortable. Still, you should probably use "gotcha" questions sparingly. While using a few keeps things interesting, using too many could lead to overly defensive witnesses and could come off as bullying and generate sympathy for the subject of your investigation.

- **Don't let witnesses stall the hearing.** It is perfectly okay to cut off a witness if they are taking too long to answer a question or taking a circuitous path toward what you are looking for. If they continue to avoid answering questions directly, switch to yes or no questions (which you can have prepared ahead of time) to make up for lost time.
- **Insist on a clear record when questioning witnesses.** All too often, witnesses (particularly purposefully evasive ones) will want to answer the question that they would like for your boss to have asked and not what they actually asked. The key to effectively questioning witnesses (at hearings, depositions, or interviews) is listening—and listening carefully. Beware of answers that, while true, are actually non-responsive. Only by listening carefully will you be able to ferret out these sorts of answers, which tend to clutter the record and can get a purposefully evasive witness out of a perjury or misleading-Congress charge.
- **Let there be silence sometimes.** Once the question is asked, and the witness fails to respond immediately, resist the human urge to fill the silence by offering your own suggested answer and asking the witness if that is correct. Instead, let them stew in the silence until they answer or, if it's a hearing rather than an interview or deposition, press them to answer so your allotted time won't expire.

DON'T BE SCARED TO BRING YOUR WITNESSES OUT OF PRISON

One case that was actually sort of humorous if it weren't so stupid was when the Justice Department and the Marshals Service, which has oversight of the asset forfeiture program, had seized a casino. The casino was making so much money, [the Marshals Service] kept it. So you had the U.S. Marshals Service owning and operating a casino....

We had sources inside that casino, including the director of security. When we did the hearing, we exposed things like the court-appointed trustee, who was the Marshals' guy representing the government's interest in the casino, making \$350,000 a year and working two days a week....

This gets to how you put on these hearings—there had been a guy in the casino who ran the Asian games—very complex games of poker, played with cards or tiles—and he had been arrested for loan sharking and conspiracy, so he was in prison. We brought him out of prison on a writ that the Chairman signed. He testified that he had told the Marshals what he was doing and that he had been arrested and they let him go back to work before his trial. So here we had a real live prisoner at the hearing, ironically guarded by U.S. Marshals.

60 Minutes covered that one. That was a great one. We had them cold. They had nowhere to go on that one.

Former Republican House and Senate investigator

- **When possible and appropriate, use props.** Using props in a hearing not only adds a visual aspect to your hearing, it can also serve to trap witnesses who you expect will be less than forthcoming. Props can include anything from a poster-sized document, a chart or graph outlining information, or a person who was involved in the investigation.

EYES BEFORE EARS

People get much less information from their ears than their eyes, so you need to reinforce the spoken word with some sort of visual. I had one hearing that had video, a filmstrip, maps, big photos.... One of the video parts was actually kind of a cartoon. Every step along the way we would have something bolstering the verbal with something visual to make it easier to understand.

Ruth Fleischer, Adjunct Professor of Law, and former Democratic House and Senate committee Counsel and personal staff Counsel

3. Not Letting the Hearing Be the End

Like your tennis serve, an effective oversight hearing requires you to have a good follow-through. Hearings can lead to reports, secondary hearings, agency rule changes, or give rise and motivation to legislative initiatives.

- **Inform the authorization and appropriations committees.** Send a copy of your investigative report or findings to the Chair and other members of the relevant authorization and appropriations committees and subcommittees and go talk with the relevant staff. Include recommendations. There is great potential to influence the appropriations process, as these committees have small staffs and may really appreciate your oversight efforts.

MAKE PROCEEDINGS AVAILABLE TO RELEVANT COMMITTEES

There was really a tally sheet, a box score, for every oversight hearing and every oversight recommendation. Moreover, we made our oversight findings available to the relevant authorizing committees and the appropriations subcommittees.³³

Peter Barash, former Democratic Staff Director of the House Government Operations Subcommittee on Commerce, Consumer, and Monetary Affairs

- **Stay in touch with your witnesses.** By staying in touch with your witnesses, you can discover whether the problems have really been addressed internally, or whether solutions were effective or not.
- **Keep track of agency promises.** We're all familiar with the ability to talk the talk without walking the walk. Make sure the agency is taking the proper steps, and not just standing their ground in the troubled status quo. If the agency is standing still, it may be time for another legislative solution or another hearing.

TWO STEPS FORWARD, ONE STEP BACK

Congressional hearings and oversight projects rarely have a black and white nature to them ... they're generally more in the gray areas. You try to accomplish a little bit, but sometimes it's two steps forward, and one step back. You may expose something you just can't fix, at least not the first time around. You can get frustrated because you know that something will require multiple hearings or a long-haul review, and it's very difficult to get the media to focus upon the fact that you are trying to do something over a period of months in three or four hearings.

Jack Mitchell, former Democratic committee investigative chief, former journalist, and former FDA senior investigator

- **Don't give up if there's no media coverage of the hearing.** After the hearing, it is not too late to work with reporters to get out a story on the issue. If your investigation turned up a lot of documents that were not released at the hearing, the topic of your hearing can be a great story, especially if it can be an exclusive for one outlet. Also, the impact of your investigation and hearing may not be immediately apparent, but may have influenced decision-making in sectors such as commercial and academic, or in international, state, and local government.

THE RIPPLE EFFECT OF CONGRESSIONAL INVESTIGATIONS

In the case of [former Chilean President Augusto] Pinochet, he had \$8 million at Riggs Bank.... We thought, "Does \$8 million really matter?" We decided to go ahead with it. It turned out that in Chile, Pinochet's whole reputation was that he had made the tough decisions and he had never made a dime on his government service. So this \$8 million, while by our standards was very small, was a thunderstorm in Chile and in fact led the country to indict him for tax evasion. And that made people so mad they also revoked his immunity—he had lifetime immunity—to investigate human rights violations. So they began criminal investigations of that as well, and it completely changed the public's entire perception of him and his reputation in Chile, that \$8 million. The Chilean government continued to investigate, and they found a total of \$25 million.

Elise Bean, former Democratic Staff Director and Chief Counsel for the Permanent Subcommittee on Investigations

Endnotes

Chapter 1: Recognizing Responsibility and Power

- ¹ U.S. Supreme Court, *McGrain v. Daugherty*, 273 U.S. 135 (1927).
- ² Morton Rosenberg, "Remarks of Morton Rosenberg to the Participants at the July 18, 2008, COTS Session Sponsored by POGO." <http://pogoarchives.org/m/cots/rosenberg-remarks-20080718.pdf>. Audio recording of remarks: <http://www.pogoarchives.org/audio/cots/mortrosenberg-20080718.mp3>. (Hereinafter Remarks of Morton Rosenberg)
- ³ Hasia Diner, "Teapot Dome, 1924," *Congress Investigates: A Documented History, 1972–1974*, Eds. Arthur M. Schlesinger, Jr. and Roger Bruns, New York: Chelsea House Publishers, 1975, pp. 5-6.
- ⁴ There is statutory basis for limiting disclosures to the "Gang of Eight" (the eight Members of Congress in key leadership positions) in the 1947 National Security Act (NSA), but that provision (the Hughes-Ryan Act) applies only to statutorily-defined "covert action" and not to intelligence collection or counter-intelligence matters, let alone to other national security issues. A separate provision of the 1947 NSA Act requiring what is now the Director of National Intelligence (DNI) to protect "sources and methods" can be cited to limit briefings on matters of intelligence generally, but it has been badly abused beyond its originally limited scope, and its overly broad use needs to be challenged.
- ⁵ Congress should pursue vigorously whether any OLC or other DOJ opinions on constitutionality or legality were sought and whether any were obtained regarding the action. This will let you know if the White House, or elsewhere in the executive branch, may have had doubts about the legality of the action.
- ⁶ Stanley M. Brand and Mickey Edwards, edited comments from the January 23, 2009, seminar of the Congressional Oversight Training Series (now called the Congressional Training Program). For an audio recording of Mr. Brand's comments, go to <http://pogoarchives.org/audio/COTS/stanbrand-20090123.mp3>. For an audio recording of Mr. Edwards' comments, go to <http://pogoarchives.org/audio/COTS/mickeyedwards-20090123.mp3>
- ⁷ *House Judiciary Committee v. Miers*, No. 08-0409, U.S. District Court for the District of Columbia, July 31, 2008. https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cv0409-49
- ⁸ George Stephanopoulos, *All Too Human: A Political Education*, Little Brown and Company, 1999.

Chapter 2: Beginning Your Investigation

- ⁹ House of Representatives, Committee on Rules, *Committee Print—Congressional Oversight: A "How-To" Series of Workshops June 28, July 12 and 26, 1999*, Washington, D.C.: U.S. Government Printing Office, 2000, p. 13. (Hereinafter Congressional Oversight: A "How-To" Series of Workshops)
- ¹⁰ Minority Staff of the Senate Permanent Subcommittee on Investigations, *Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act—Case Study Involving Riggs Bank*, July 14, 2004.
- ¹¹ James Risen and Eric Lichtblau, "Bush Secretly Lifted Some Limits on Spying in U.S. After 9/11, Officials Say," *The New York Times*, December 15, 2005.
- ¹² Senate Judiciary Committee, *Hearing on: Wartime Executive Power and the NSA's Surveillance Authority*, February 6, 2006.

Chapter 3: Utilizing Resources

- ¹³ See OSC's website for information about its process: Office of Special Counsel, "Prohibited Personnel Practices: Our Process." <https://osc.gov/Pages/ppp-ourprocess.aspx> (Downloaded March 26, 2015)
- ¹⁴ See for instance, Division E, Sec. 743 of the FY 2015 Omnibus.

- ¹⁵ Government Accountability Office, *Department of Health and Human Services—Chief Actuary's Communications with Congress* (B-302911), September 7, 2004. <http://www.gao.gov/decisions/appro/302911.pdf> (Downloaded March 26, 2015)
- ¹⁶ For instance, see: Government Accountability Office, *Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints* (GAO-15-343T), March 4, 2015. <http://www.gao.gov/assets/670/668812.pdf>; Rodney M. Perry, *Intelligence Whistleblower Protections: In Brief*, Congressional Research Service. Order code R43765. <http://fas.org/sgp/crs/intel/R43765.pdf>; Government Accountability Project, "House Approves Military Whistleblower Protection Act Makeover," December 16, 2013. <http://www.whistleblower.org/press/house-approves-military-whistleblower-protection-act-makeover> (All downloaded March 26, 2015)
- ¹⁷ An overview of federal whistleblower and anti-retaliation laws can be found at: Jon O. Shimabukuro and L. Paige Whitaker, *Whistleblower Protections Under Federal Law: An Overview*, Congressional Research Service, Order code R42727. <https://fas.org/sgp/crs/misc/R42727.pdf>; Katz, Marshall & Banks, LLP, "False Claims Act Retaliation." <http://www.kmblegal.com/practice-areas/whistleblower-law/false-claims-act-retaliation/> (All downloaded March 26, 2015)
- ¹⁸ Ben James, "NDAA Whistleblower Rules Expose More Cos. To Complaints," January 8, 2013. <http://www.law360.com/articles/404417/ndaa-whistleblower-rules-expose-more-cos-to-complaints> (Downloaded March 26, 2015)

Chapter 4: Conducting the Investigation and Prepping for a Hearing

- ¹⁹ Department of Defense, *Authorization for Appropriations for Fiscal Year 1979: Hearings on H.R. 10929 Before the House Committee on Armed Services*, 95th Cong. 2d Sess., pt. 3, bk. 2, at 2220 (1978).
- ²⁰ Department of Justice, "Freedom of Information Act Guide," September 1998.
- ²¹ *Leach v. RTC*, 860 F. Supp. 868, 878-79 & n. 13 (D.D.C. 1994) (treating contrary statements in *Murphy v. Department of the Army*, 613 F.2d 1151, 1155-59 (D.C. Cir. 1979), as no better than "mere dicta"), appeal dismissed per stipulation, No. 94-5279 (D.C. Cir. Dec. 22, 1994)
- ²² Remarks of Morton Rosenberg.
- ²³ Louis Fisher, *Constitutional Conflicts between Congress and the President*, Fifth Edition, Kansas: University Press of Kansas, 2007, pp. 190- 91.
- ²⁴ "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." U.S. Supreme Court, *United States v. Brewster*, 408 U.S. 501 (1972).
- ²⁵ Christopher M. Davis, *House Resolutions of Inquiry* (RL31909), Congressional Research Service, June 17, 2009.
- ²⁶ Congressional Research Service, *Congressional Oversight Manual* (RL30240), Updated December 19, 2014, pp. 29-30. (Hereinafter *Congressional Oversight Manual*)
- ²⁷ Office of Representative Brad Miller, Press Release: "House Denies Increased Funding for Controversial FBI Data-Mining Program," June 26, 2008.
- ²⁸ *Congressional Oversight Manual*, p. 21.

Chapter 5: The Hearing and Beyond

- ²⁹ Remarks of Morton Rosenberg.
- ³⁰ Richard Sheldon, "The Pujo Committee," *Congress Investigates: A Documented History, 1972 - 1974*, Eds. Arthur M. Schlesinger, Jr. and Roger Bruns, New York: Chelsea House Publishers, 1975, p. 297.
- ³¹ Remarks of Morton Rosenberg.
- ³² *Congressional Oversight: A "How-To" Series of Workshops*, p. 220.
- ³³ *Congressional Oversight: A "How-To" Series of Workshops*, p. 231.

Resource A

Useful Databases and Other Resources for Conducting Oversight¹

The American Association for Budget and Program Analysis's [Departmental and Agency Budgets](#) web page gathers a number of agencies' "congressional justifications" in one place:

<http://www.aabpa.org/budget-justifications>

Arizona State University's [Donald W. Reynolds National Center for Business Journalism](#) provides an index of databases you can use to search for state business incorporation records:

<http://businessjournalism.org/registration/llc/>

[Better Business Bureau's](#) database of businesses and charities:

<http://www.bbb.org/search>

The [Bureau of Labor Statistics \(BLS\)](#) provides a variety of information to help you evaluate public policies on healthcare, retirement benefits, the minimum wage, workforce education and training, economic development, workplace safety, monetary policy, consumer spending, and other topics that affect the well-being of American workers, retirees, and their families:

<http://www.bls.gov/data/>

The [Bureau of Transportation Statistics](#) includes national and state transportation statistics, freight data, border crossing data, multimodal transportation indicators, and more:

<http://www.rita.dot.gov/bts/node/11792>

[BRB Publications](#) allows you to search free public records organized primarily by state and county:

<http://www.brbpub.com/>

[Census Bureau Data](#) includes quick facts, easy stats, mapping tools, and more:

<http://www.census.gov/data/data-tools.html>

Center for Responsive Politics' [OpenSecrets.org](#) offers data on campaign contributions, lobbying, and the revolving door:

<http://www.opensecrets.org/>

Citizen for Tax Justice's [Corporate Tax Explorer](#) database of what companies pay in state, federal, and foreign income taxes:

<http://ctj.org/corporatetaxdodgers/tax-dodgers-index.php>

Civic Impulse's [GovTrack](#) helps you find the status of federal legislation, voting records for the Senate and House of Representatives, information on Members of Congress, congressional district maps, and the status of state legislation:

<http://www.govtrack.us/>

[Congressional Budget Office](#) (CBO) produces independent analyses of budgetary and economic issues to support the Congressional budget process. The agency is strictly nonpartisan and conducts objective, impartial analysis:

<http://www.cbo.gov/>

[Congressional Research Service](#) reports address a wide variety of topics and are excellent sources of unbiased information. Congress can request reports directly from the CRS. The public doesn't have direct access, but can find some reports on a number of websites:

<https://archive-it.org/collections/1078> and <http://www.fas.org/sgp/crs/index.html>

¹ For updates to this list and current links, please visit the Project On Government Oversight's website at <http://www.pogo.org/coi/resources/>.

The Consumer Financial Protection Bureau's (CFPB) **Consumer Complaint Database** contains data on complaints received by the CFPB regarding credit cards, mortgages, student loans, and other financial products and services: <http://www.consumerfinance.gov/complaintdatabase/>

The Consumer Product Safety Commission's **SaferProducts.gov** has a database of product safety information: <http://www.saferproducts.gov/Search/default.aspx>

The **Council of the Inspectors General on Integrity and Efficiency (CIGIE)** is an independent entity established within the executive branch that addresses integrity, economy, and effectiveness issues that transcend individual government agencies and aid in the establishment of a professional, well-trained, and highly skilled workforce in the Offices of Inspectors General: <https://www.ignet.gov/>

Data.gov contains thousands of federal agency information databases. Topics include Business, Cities, Consumer, Counties, Developers, Education, Energy, Ethics, Health, Law, Manufacturing, Ocean, Research, Restore the Gulf, Safety, States, and Supply Chain: <http://www.data.gov/>

Department of Defense historical **budget materials**, including the Green Book: <http://comptroller.defense.gov/BudgetMaterials.aspx>

The **Defense Contract Audit Agency (DCAA)** provides audit and financial advisory services to Department of Defense and other federal entities responsible for acquisition and contract administration, including audit manuals and contracting checklists: http://www.dcaa.mil/about_dcaa.html

Defense Federal Acquisition Regulation Supplement (DFARS) and Procedures, Guidance, and Information (PGI): <http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html>

The Department of Defense **Office of Inspector General reports** page lists all DoD IG publications and testimony: <http://www.dodig.mil/pubs/index.cfm>

Department of Defense's **Personnel, Workforce Reports & Publications** site contains DoD Personnel and U.S. Military casualty statistics, as well as historical DoD procurement reports and data files: https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp

Department of Defense's **Public Affairs** website presents transcripts of news briefings, speeches, and press releases of the DoD: <http://www.defense.gov/pubs/almanac/asdpa.aspx>

Department of Defense's **Publications page** lists all recent reports and plans released by the Department: <http://www.defense.gov/pubs/>

Department of Defense's **Selected Acquisition Reports** records cost data on weapon systems: <http://www.acq.osd.mil/ara/am/sar/>

Department of Defense's **sites page** is a quick reference listing the top DoD sites that serve as a starting point for finding U.S. military information online. It provides direct access to the databases of all registered DoD sites: <http://www.defense.gov/Sites>

DuckDuckGo is an Internet search engine that emphasizes protecting searchers' privacy and avoiding the filter bubble of personalized search results: <https://duckduckgo.com/>

Environmental Protection Agency's **enforcement data**: <http://www2.epa.gov/enforcement>

Ethics.data.gov brings records and data from across the federal government to one central location:

<https://explore.data.gov/ethics/>

The **Federal Acquisition Regulation** is 1,900 pages of contracting administration fun. Enjoy:

<http://www.acquisition.gov/far/>

Federal Advisory Committee Act Database contains every federal advisory committee, the members on that committee, the committee charters, meeting dates, committee reports, committee costs, and a host of other information:

<http://facadatabase.gov/>

Federal Awardee Performance and Integrity Information System (FAPIS) lists instances of non-responsibility by contractors and grantees:

<https://www.fapiis.gov/fapiis/index.action>

Federal Business Opportunities lists federal government procurement opportunities, award notices, and justifications and approvals for certain awards:

<https://www.fbo.gov/?s=opportunity&mode=list&tab=list>

Federal Election Commission database of campaign finance disclosures by recipient and donor:

<http://www.fec.gov>

Federal Procurement Data System - Next Generation (FPDS-NG) reports contracts whose estimated value is \$3,000 or more. Every modification to that contract, regardless of dollar value, must be reported to FPDS-NG:

https://www.fpds.gov/fpdsng_cms/index.php/en/

FedStats provides easy, one-stop public access to statistical information from more than 100 agencies broken down by state and/or agency including links to government databases:

<http://fedstats.sites.usa.gov/>

The Financial Management Service's (FMS) **Payment Information Repository (PIR)** is a multi-year initiative that will create a centralized information repository for federal payment related data. The PIR is aimed at improving and increasing the transparency of government payments, as well as streamlining the reporting of accounting classification information from Non-Treasury Disbursing Offices (NTDOs). With PIR, payments information will be available to view from one source. PIR will provide a single, web-based system from which people can view disbursement information; supply both summary and detail information on payment transactions in a single source; and provide business analytics and government-wide accounting reporting on the payment transactions originating from Federal Program Agencies:

<http://fms.treas.gov/pir/index.html>

The Food and Drug Administration's **Adverse Event Reporting System (FAERS)** is a database that contains information on adverse events—including death, disability, and hospitalization—and medication error reports submitted to the FDA. Reports can be submitted by patients, healthcare professionals, and drug manufacturers. The FDA uses the reports to monitor the safety of products approved by the agency. There are limitations to the FAERS data since many reports are submitted voluntarily, and the FDA does not require proof of a causal relationship between a product and an adverse event:

<http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Surveillance/AdverseDrugEffects/>

The Food and Drug Administration's **Manufacturer and User Facility Device Experience (MAUDE)** contains data that represents reports of adverse events involving medical devices. The data consists of voluntary reports since June 1993, user facility reports since 1991, distributor reports since 1993, and manufacturer reports since August 1996. MAUDE may not include reports made according to exemptions, variances, or alternative reporting requirements granted under 21 CFR 803.19:

<http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfMAUDE/search.CFM>

Free Public Records allows you search free public records organized by category and state:

<http://publicrecords.searchsystems.net/>

General Services Administration's **Schedule Library** of goods and service contractors provides a centralized online source for the latest contract award information from GSA Federal Supply Schedules, VA Federal Supply Schedules, Government-wide Acquisition Contracts, Technology Contracts, Assisted Acquisition Services, and Strategically Sourced Blanket Purchase Agreements:

<http://www.gsaelibrary.gsa.gov/ElibMain/ElibHome>

Geo-location on Twitter allows you to gather Tweets from a discrete geographic area. To use this tool, 1) Drop a pin on the location in Google maps; 2) Copy the coordinates into Twitter, preceded by "geocode:" and followed by a comma and the desired radius in either miles (mi) or kilometers (km). Do not use spaces. For example, "geocode:38.898135,-77.027321,1mi" will return all of the Tweets within a 1-mile radius of POGO's offices.

Good Jobs First's Subsidy Tracker is a database of local, state, and federal economic development subsidies and other financial assistance to corporations:

<http://www.goodjobsfirst.org/subsidy-tracker>

Government Accountability Office (GAO) reports:

<http://www.gao.gov/>

Government Accountability Office's **Legal Decisions (bid protests)** web page, where GAO's Office of General Counsel posts legal decisions, opinions, and reports on bid protests, appropriations law, and other issues of federal law:

<http://www.gao.gov/legal/bid-protests/search>

GuideStar collects information on non-profit organizations registered with the Internal Revenue Service (IRS). You can find information on each non-profit's mission, finances, programs, and more:

<http://www.guidestar.org/rxg/analyze-nonprofit-data/index.aspx>

Health and Human Services' **Hospital Compare** database, which displays rates for process-of-care measures, information on hospital outcome-of-care measures, surveys of patients' hospital experiences, and more:

<http://www.medicare.gov/hospitalcompare/search.html>

The **IT Dashboard** enables federal agencies, industry, the general public, and other stakeholders to view details of federal information technology investments:

<http://www.itdashboard.gov/>

The Department of Justice's **FOIA** resources site:

<http://www.justice.gov/oip>

The **Department of Labor** provides data on the agency's administration and enforcement of federal labor laws that guarantee workers' rights to safe and healthful working conditions, a minimum hourly wage and overtime pay, and freedom from employment discrimination, as well as the integrity of their pensions and health plans. You can find enforcement data for the Employee Benefits Security Administration (EBSA), Mine Safety and Health Administration (MSHA), Office of Federal Contract Compliance Programs (OFCCP), Occupational Safety and Health Administration (OSHA), and the Department's Wage and Hour Division (WHD):

http://ogesdw.dol.gov/views/data_catalogs.php

The Library of Congress's **Congress.gov** provides access to federal legislative information. It offers bills and resolutions, activity in Congress, congressional records, schedules and calendars, committee information, presidential nominations, and treaties:

<https://www.congress.gov/>

Million Short allows you to remove the top million (or top 100k, 10k, 1k, 100) sites from the results so you can discover more obscure sources and sites:

<https://millionshort.com/>

National Institute on Money in State Politics' database of state campaign contributions:

<http://www.followthemoney.org/>

Netro Online allows you to search public records related to property and land:

<http://www.netronline.com/>

Occupational Safety and Health Administration's **Fatality and Catastrophe Investigation Summaries** provides access to accident investigation information:

<http://www.osha.gov/pls/imis/accidentsearch.html>

Occupational Safety and Health Administration's **Injury and Illness** data on work-related injuries and illnesses collected from employers within specific industry and employment size specifications:

http://www.osha.gov/pls/odi/establishment_search.html

The **Office of Government Ethics** provides overall leadership and oversight of the executive branch ethics program designed to prevent and resolve conflicts of interest. OGE's mission is part of the very foundation of public service:

<http://oge.gov/home.aspx>

The **Office of Government Information Services (OGIS)** is the federal Freedom of Information Act (FOIA) ombudsman responsible for fielding complaints and questions about FOIA. In addition to serving as a bridge between agencies and the public, OGIS also offers mediation services for FOIA disputes and offers suggestions to Congress for improving FOIA:

<https://ogis.archives.gov/>

The Office of Management and Budget's **Analytical Perspectives volume** provides key data on the national defense budget function and all its components, from 2012 to 2022. It includes both discretionary and mandatory spending:

www.whitehouse.gov/omb/budget/Analytical_Perspectives

Office of Management and Budget's **Appendix** web page provides access to current agency budget appendices:

<http://www.whitehouse.gov/omb/budget/Appendix>

Office of Management and Budget's **Earmarks** database:

<http://earmarks.omb.gov/>

Office of Management and Budget's **Office of Information and Regulatory Affairs (OIRA)** reviews all collections of information by the federal government. OIRA also develops and oversees the implementation of government-wide policies in several areas and maintains information about government meetings and communications with outside entities:

<https://www.whitehouse.gov/omb/oira/about> and

https://www.whitehouse.gov/omb/inforeg_regmatters

Office of Management and Budget's **USAspending.gov**, which includes for each federal award the name of the entity receiving the award; the amount of the award; information on the award including transaction type and funding agency; the location of the entity receiving the award; and a unique identifier of the entity receiving the award:

<http://usaspending.gov/>

PaymentAccuracy.gov contains dedicated information on improper payments, as required by Executive Order 13520. The site provides government-wide improper payment estimates, as well as agency-level and program-specific improper payment information. The charts section reports data on improper payments in both graphic and tabular form:

<http://www.paymentaccuracy.gov/>

Pipl searches for people, including in the deep web. It is very effective, though it will return a lot of results that are subscription based:

<https://pipl.com/>

The **Straus Military Reform Project** at POGO's Center for Defense Information (CDI) seeks to secure far more effective military forces and much more ethical and professional military and civilian leadership at significantly lower budget levels:

<http://www.pogo.org/our-work/straus-military-reform-project/about.html>

POGO's **Federal Contractor Misconduct Database (FCMD)** is a compilation of misconduct and alleged misconduct by the largest federal contractors since 1995. Data can be sorted and viewed many different ways: alphabetical and date order, number of misconduct instances, and dollar amount of penalties. Or search for specific instances of misconduct by contractor name, disposition, court type, misconduct type, contracting party, date, dollar amount, or key words:

<http://www.contractormisconduct.org/>

POGO's **Foreign Influence Database** is based on informational materials filed by lobbying and public relations firms working on behalf of foreign entities in the United States. The Foreign Agents Registration Act (FARA) requires advocates representing foreign interests to register with the Department of Justice and to file within 48 hours any informational materials disseminated to two or more individuals. This database is comprised of informational materials filed between 2009 and 2012:

<http://www.pogo.org/tools-and-data/foreign-influence-database/>

POGO's **Securities and Exchange Commission (SEC) Revolving Door Database** contains post-employment disclosure statements filed by former SEC employees. SEC regulations require former employees to file these statements if they intend to represent an employer or client before the agency within two years of their SEC employment. The database covers statements filed between 2001 and 2010, and will be updated as additional statements become available:

<http://www.pogo.org/tools-and-data/sec-revolving-door-database/>

POGO's **"Where Are All the Watchdogs?"** tracks how long Inspector General positions across the federal government have been vacant:

<http://www.pogo.org/tools-and-data/ig-watchdogs/go-igi-20120208-where-are-all-the-watchdogs-inspector-general-vacancies1.html>

Rapportive adds a sidebar to a Gmail account that shows LinkedIn information associated with whoever you are emailing:

<http://rapportive.com>

The Recovery Accountability and Transparency Board's **Recovery.gov** shows how Recovery funds are being spent by recipients of contracts, grants, and loans, and the distribution of Recovery entitlements and tax benefits:

<http://www.recovery.gov/Pages/default.aspx>

Regulations.gov provides access to agency proposed and final rules as well as comments from the public:

<http://www.regulations.gov/#!home>

Securities and Exchange Commission's **Electronic Data Gathering, Analysis, and Retrieval (EDGAR)** system contains the financial filings of publicly traded companies:

<http://www.sec.gov/edgar/searchedgar/companysearch.html>

The U.S. Senate's [Lobbying Disclosure Act Search Site](#) provides access to all documents filed under the Lobbying Disclosure Act. It allows researchers to use a query system, download the Secretary's lobbying documents database, and access both registrations (LD-1) and reports (LD-2):
<http://soprweb.senate.gov/index.cfm?event=selectfields>

[Seen.co](#) gathers Tweets, photos, and data around specific hashtags:
<http://seen.co/>

[Snap Bird](#) allows you to search individual Twitter feeds for words or phrases:
<http://snapbird.org>

State Department list of consent agreements in [import/export violation](#) cases:
http://www.pmdtdc.state.gov/compliance/consent_agreements.html

State Department list of parties [debarred for import/export violations](#):
http://www.pmdtdc.state.gov/compliance/debar_intro.html

Sunlight Foundation's [Docket Wrench](#) allows users to monitor public comments on federal rulemaking:
<http://docketwrench.sunlightfoundation.com/>

Sunlight Labs' (the technology arm of the Sunlight Foundation) [Influence Explorer](#) provides an overview of campaign finance, lobbying, earmark, contractor misconduct, and federal spending data. The data is provided by the Center for Responsive Politics, the National Institute for Money in State Politics, Taxpayers for Common Sense, the Project On Government Oversight, the EPA, and USAspending.gov:
<http://influenceexplorer.com/>

Sunlight Foundation's [Scout](#) allows users to track the progress of specific bills or issues through Congress. It makes it easy to search federal regulations and track bills in all 50 states, and enables legislative news searches about numerous issues. It's essentially Google Alerts for government:
<https://scout.sunlightfoundation.com/>

[System for Award Management \(SAM\)](#) combines federal procurement systems and the Catalog of Federal Domestic Assistance into one system. This consolidation is being done in phases, the first of which includes the functionality from the Central Contractor Registry (CCR), Federal Agency Registration (FedReg), Online Representations and Certifications Application, and Excluded Parties List System (EPLS). The overarching benefits of SAM include streamlined and integrated processes, elimination of data redundancies, and reduced costs while providing improved capability:
<https://www.sam.gov/portal/public/SAM/>

[Taxpayers for Common Sense](#), a nonpartisan budget watchdog, lists budget information and other federal spending data, including earmarks:
<http://www.taxpayer.net/data-center>

[Transactional Records Access Clearinghouse \(TRAC\)](#) provides comprehensive information about staffing, spending, and enforcement activities of the federal government:
<http://trac.syr.edu/>

[Topsy](#) "allows you to search by time & place, set alerts, and analyze sentiment for every tweet ever made":
<http://topsy.com/>

[Who is John Doe](#) is a collection of tools to access public records, including those on lobbyists, current and past military personnel, and politicians:
<http://www.reporter.org/desk doe.htm>

[World Bank's](#) listing of ineligible firms and individuals:
<http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984>

Resource B

Tip Sheet on Congressional Access to Classified, Sensitive, or Privileged Information

In the course of its oversight and investigative work, Congress sometimes requires executive branch agencies or companies to produce classified, sensitive, privileged, or otherwise restricted information. The executive branch does not have a monopoly on the right to information.¹ Members of Congress and the staff need to stop perceiving themselves as subservient to or an advisory group for the executive branch. The Constitution clearly delineates congressional authority to receive information, including classified information, as part of your legislative and oversight duty.² Indeed, Congress is the only branch of government with constitutionally explicit original classification authority, per Article I, Sec. 5 of the Constitution. This right has been upheld by the judicial branch.

You should consult with legal counsel before requesting, compelling the production of, and working with any of the categories of information. Rules and practices for handling such information might depend on your employing office, your security clearance, and arrangements made for protecting the information, including entering into a nondisclosure agreement or placing the information under lock and key.³

The following is a list of laws, Executive Orders, rules, and regulations that might apply to certain types of information:

- Classified Information (restricted, confidential, secret, and top secret) pursuant to Executive Order 13526⁴
- Controlled Unclassified Information (CUI) subject to Executive Order 13556, forthcoming National Archive and Records Administration regulations, and agency-specific regulations
- Executive Privileges⁵
- Privacy Act under 5 U.S.C. § 552a
- Tax information subject to 21 U.S.C. § 6103
- Health Insurance Portability and Accountability Act of 1996 (HIPAA)
- Trade Secrets Act under 18 U.S.C. §§ 1831-1839
- Exemptions to the Freedom of Information Act at 5 U.S.C. § 552
- Speech or Debate Clause

1 Updates and changes to the materials we've listed are common. Please check to see if any new reports have been issued or changes to the laws or rules have been made.

2 Congressional Research Service, *Congressional Access to Executive Branch Information: Legislative Tools*, May 17, 2001.

3 Congressional Research Service, *Congressional Oversight Manual*, December 19, 2014.

4 Congressional Research Service, *Classified Information Policy and Executive Order 13526*, December 10, 2010; Congressional Research Service, *The Protection of Classified Information: The Legal Framework*, January 10, 2013; Congressional Research Service, *Protection of Classified Information by Congress: Practices and Proposals*, August 31, 2011; Kate Martin, *Congressional Access to Classified National Security Information*, a joint product of OpenTheGovernment.org, the Center for National Security Studies, and the Center for American Progress, March 2007.

5 Congressional Research Service, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, August 21, 2012. (Hereinafter *Presidential Claims of Executive Privilege*)

You are not completely barred from receiving information from a whistleblower or an agency when the executive branch claims that information is classified, sensitive, or privileged. Requests for certain information might require a lot of work and, in certain instances, agreements. Once received, you must also pay close attention to the risks to you, your office, and the sources that provided the information if you intentionally or unintentionally publicly release restricted or sensitive information.

CLASSIFIED INFORMATION

Everyone knows that clearances are everything when working on certain defense and intelligence investigations. If you have a proper clearance, the executive branch may still attempt to argue that you lack the “need to know”—but Congress is in a better position to evaluate its own need to know than is the executive branch, and you should resist such arguments. You might have clearance to receive the information, initiate a procedural challenge to whether the information was classified properly, or request that the information be redacted or declassified: consult with counsel to ensure that you are properly cleared. If your office received information that should not have been shared, counsel should report it to the appropriate security office (we talk more about working with whistleblowers below).

If you don’t have the proper clearance, you should remember that Members of Congress have access to classified information by virtue of their position. If the agency still isn’t forthcoming with classified information, even if you don’t have a clearance you can consider filing a classification challenge or working with an appropriate committee to request a classification review by the Public Interest Declassification Board (PIDB).⁶ This is an uphill battle because the PIDB has limited authority to recommend declassification after examining classified documents, and the final decision to declassify records or information requires White House approval, but it might be worth it in some cases. Declassification provides access to information, but it also allows the information to be publicly released if Congress chooses. Sometimes, negotiations between the two branches might have a quicker and better result, so also consider the power of persuasion to gain access to classified information.

In some cases, Congress and the executive branch can negotiate an arrangement so that Congress can obtain, see, or be briefed on the classified information. In addition, the House and Senate can hold secret sessions and receive confidential information, which must be protected.⁷ Congress needs to be prepared and equipped to protect that information.

Although you may be allowed to receive this information, national security and intelligence community (IC) whistleblowers are not adequately protected for making disclosures to Congress. There is only limited administrative recourse if an IC whistleblower faces retaliation for going to Congress, and those protections are only available if the disclosure is a matter of “urgent concern” and is first made to an IG and then to the congressional intelligence committees following certain procedures. These procedures are described in the Intelligence Community Whistleblower Protection Act of 1998 (Section 8H of the Inspector General Act of 1978) and protected under Presidential Policy Directive 19 (PPD-19).

If you need to protect a source who is exposing classified information, consider using a Sensitive Compartmented Information Facility (SCIF). A SCIF can be used as long as you are receiving the information and not sharing classified information.

6 50 U.S.C § 3161 notes (permitting a classification review upon the request of one of the committees with jurisdiction).

7 Constitution, Article I, Section 5 (“Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy....”). See House Rules X, clause 11, and XVII, clause 9; and Senate Rules XXI, XXIX, XXXI. See also Congressional Research Service, *Secret Sessions of the House and Senate: Authority, Confidentiality, and Frequency*, December 30, 2014.

If the matter involves wrongdoing in the Departments of Defense or State, or the intelligence community, and your Member does not have confidence that the House or Senate Intelligence or Armed Services Committees will be receptive to the IC whistleblower's concerns, try to use a SCIF not under the active control of the committee in order to protect the source. If the whistleblower's complaint involves non-Special Compartmented Information (SCI), consultation with the House Committee on Oversight and Government Reform may be in order, as they may be able to receive the information and take on the whistleblower's case.

The Government Accountability Office (GAO) has SCIF space and is also a potential avenue for the IC whistleblower to report his or her concerns. Consult with the Comptroller General's counsel and Congressional Affairs office about their procedures in these kinds of cases.

A Member of Congress can often protect a whistleblower if a dedicated staffer is allowed to make the whistleblower a priority. During investigative and regular authorization or appropriations hearings, agency officials can be questioned about retaliation. If your Member does not sit on the committee of jurisdiction, it may still be possible for your Member to sit in on the hearing and have the opportunity to ask questions pursuant to a unanimous consent agreement prior to the hearing. You can send request letters asking for records or a response, or even request that an IG open a reprisal investigation into a protected disclosure. Let the agency know you're watching, but ensure that the source is comfortable being a topic of discussion. Retaliation can come in many forms and can happen long after your work is completed, so be mindful of exposing a source.

Once Congress has access to classified information, it might find that the classification markings are being used to conceal information from the public. You can always turn to the PIDB and request declassification or file a classification challenge. Additionally, Congress can make classified information publicly available pursuant to their Rules in instances when the public interest would be served by a disclosure. The House rule allowing disclosure by the House Permanent Select Committee on Intelligence can be found in Rules of the 114th Congress, U.S. House of Representatives, Rule X, Section 11(g)(1). Senate Resolution 400, section 8, agreed to May 19, 1976 (94th Congress, 2nd Session) allows the Senate to make a public disclosure. This step might be controversial, so involve your boss and ensure that counsel is onboard.

CONTROLLED UNCLASSIFIED INFORMATION

Congress has a right to information marked with any one of the many controlled unclassified information (CUI) markings, just as it has a right to classified information. CUI markings come in all shapes and acronyms, including For Official Use Only (FOUO), Sensitive Security Information (SSI), and Law Enforcement Sensitive (LES) to name just a few. As with classified information, safeguarding CUI is advised when warranted. However, CUI labels do not carry the same legal authority as classified markings. Agency CUI markings are administratively created and apply to government officials and authorized holders, but they lack statutory authority to bind anyone outside the agency. Such markings have grown in number and use, and some policymakers are questioning the need for all of them and their use to conceal embarrassing government information. The proliferation of CUI markings doesn't limit your access to information so marked. For example, the Supreme Court held in early 2015 in *Homeland Security v. MacLean* that CUI markings did not remove whistleblower protections when former Air Marshall Robert MacLean disclosed information that the agency considered CUI. You should push for such information from the agency and be comfortable receiving it from a source.

UNCLASSIFIED INFORMATION

For information that isn't classified, you can push back on the agency or company, request a briefing, or seek the help of a committee. Additionally, Congress has a number of other options available to it when the executive branch or a company refuses to produce requested documents. These options include a subpoena,⁸ withholding funds, Senate holds on appointments, and conducting investigative and oversight hearings. Another legislative tool for forcing information from agencies is exclusive to the House: the *resolution of inquiry*, which requires a vote in the committee of jurisdiction on the request.⁹ The resolution of inquiry is "a simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the executive branch."¹⁰

A briefing or *in camera* review of records, while not compliant with a records request, can assist you in learning more about the policies and actions of others. Such briefings can also lead to arrangements to settle disputes, including narrowing a request and agreeing to certain redactions in order to receive copies of the records that you need.

When public affairs offices are obstructing your oversight, whistleblowers and concerned insiders can provide information to you. The Lloyd LaFollette Act of 1912 (5 U.S.C. § 7211) protects the right of Congress to receive information from civil servants. However, take care to protect the identities of sources, who can face retaliation if an agency discovers they have leaked information.

EXECUTIVE PRIVILEGES

A major obstacle to obtaining information is the executive branch invocation of executive privilege at the demand of the President. The executive privilege has been cited in numerous responses when executive branch officials have refused to comply with a congressional subpoena. The privilege has long been upheld to immunize certain White House officials in certain cases: "foreign relations and military affairs, two separate topics that are sometimes lumped together as 'state secrets,' law enforcement investigations, and confidential information that reveals the executive's 'deliberative process' with respect to policymaking."¹¹

A civil contempt of Congress order from a court and a trial is one option to challenge a privilege claim. That said, in most executive privilege cases, the better trick is to reach an agreement that preserves the privilege—an agreement to protect the executive branch's right to operate as an independent branch of government but to also provide congressional access to the requested records. A conciliatory approach should be considered before taking more political or aggressive approaches that might actually hinder a quick resolution.

The executive branch also cites numerous testimonial privileges that conceal information from Congress, including constitutional protections and attorney-client, work-product, deliberative process, and state secrets privileges.¹²

8 To combat non-compliance with a subpoena, Congress can exercise contempt powers or seek judicial enforcement. Congressional Research Service, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, May 8, 2014; See also Hon. David M. McIntosh, Hon. Mark Gitenstein, and Sean P. McDonnell, *Understanding Your Rights in Response to a Congressional Subpoena*, no date.

9 Louis Fisher, *The Politics of Executive Privilege*, Durham, North Carolina: Carolina Academic Press, 2004, chapter 7. http://www.loc.gov/law/help/usconlaw/pdf/fisher_politics_ch_07.pdf (Downloaded July 15, 2015) (Hereinafter *The Politics of Executive Privilege*)

10 U.S. Congress, House, *Deschler's Precedents of the United States House of Representatives*, H. Doc. 94-661, 94th Congress, Second Session, Vol. 7, Ch. 24, § 8. For more information on the resolution of inquiry, see *The Politics of Executive Privilege*.

11 *Presidential Claims of Executive Privilege*, p. 8.

12 Morton Rosenberg, *When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry*, the Constitution Project, 2009, pp. 25-43.

PRIVACY ACT

The Privacy Act, 5 U.S.C. § 552a, is one of the frequently cited statutes for withholding information from Congress. It is frequently raised in relation to personnel records, traveler records, and any database information related to individuals. Agency custodians have good reason to protect such information, but the statute explicitly authorizes disclosure of such information to committees and subcommittees of Congress¹³ :

(b) **Conditions of Disclosure.**- No agency shall disclose any record...unless disclosure of the record would be—

* * *

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee....

The executive branch argues that this exemption is only available to majority staff when there is request letter from a chairman of a committee. However, there is nothing in the statute or in any case law that limits the right to receive such information to the majority or that requires a request letter from a chairman. The plain language of the statute authorizes disclosure to “any committee or subcommittee” regardless of whether the chairman or anyone at all requests the information.

TAX INFORMATION

Certain committees have a statutory right to tax information. According to 26 U.S.C. § 6103(f), the House Committee on Ways and Means, the chairman of the Senate Committee on Finance, and the chairman of the Joint Committee on Taxation have access to “any return or return information” specified in a request to the Internal Revenue Service. If the taxpayer can be identified, such information “shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.” The information can generally be obtained after agreeing to restrict access to it, or to keep the material under controlled conditions, such as safeguarding information in a locked filing cabinet for which only the clerk or the lead investigator has the key.

HEALTH INFORMATION

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) protects the privacy of individually identifiable health information. HIPAA is a common statute cited for withholding information from Congress, especially Department of Veterans Affairs medical records. Similar to obtaining tax information, a proposal to restrict access or place the materials in a controlled location will often result in reducing agency custodian concerns.

TRADE SECRETS AND PRIVILEGES

Obtaining information from companies might also require some finagling. Companies are often protective of trade secrets, also known as commercial proprietary information, which are generally protected pursuant to 18 U.S.C. §§ 1831-1839 and 1905. Obtaining information from privately held companies can be more problematic. As witnessed during the October 2007 House Oversight and Government Reform Committee hearing on private security

¹³ 5 U.S.C. § 552a(b)(9)

contracting in Iraq and Afghanistan, representatives of Blackwater were less than forthcoming with company information. Blackwater's justification was that "we are a private company, and there is a key word there, private."¹⁴ Companies and individuals also might withhold information from Congress by claiming attorney-client privilege or work product.

Despite those hindrances, Congress possesses very broad authority to conduct an investigation or hearing. Therefore, you still have the ability to request information, ask for a briefing, conduct an interview, or issue a subpoena. As advised above, arrangements that include certain restrictions or handling safeguards might be enough to obtain the information that you need without issuing a subpoena and potentially enforcing it in court.

However, public disclosure of trade secrets not protected by the Speech or Debate Clause (discussed later) puts your Member in jeopardy of potentially causing unintended loss or injury to a business or individual by releasing their sensitive or privileged data. Be careful what you release.

EXEMPTIONS TO THE FREEDOM OF INFORMATION ACT

In many instances the executive branch considers a congressional request letter to be no different from a request pursuant to FOIA from a member of the public. Courts have drawn a distinction between Congress as a body and a Member acting as a sole part of Congress, holding that FOIA exemptions cannot be used to withhold records from Congress—i.e., committee chairs—but can be used to withhold records from Members.¹⁵ Certainly you should fight an agency demand to submit a FOIA request and push back on that agency if information is withheld pursuant to a FOIA exemption. If the agency doesn't relent, find a committee or subcommittee chairman who has jurisdiction and is willing to submit a request letter to the agency. Congress has a right to receive information that the public does not. Also, it is important to remember and to remind agencies that FOIA is a disclosure statute and its exemptions are discretionary. A FOIA exemption, therefore, does not legally prevent an agency from releasing the information if it chooses to do so. It merely means that they are not legally required to release such information by FOIA.

OTHER PROVISIONS

Additional provisions affecting the Departments of Defense and Energy and the intelligence community are found in multiple laws and regulations. If you are working with whistleblowers in any of those areas, you might want to review the following provisions for any specific restrictions placed on national security information, restricted data, or foreign intelligence and surveillance information: National Security Act (50 U.S.C. Ch. 44); Atomic Energy Act (10 CFR pt. 1045); and the Foreign Intelligence Surveillance Act, as amended (50 U.S.C. Ch. 36).

AND THEN THERE ARE THE SPEECH OR DEBATE PROTECTIONS...

In the 1970s, Senator Mike Gravel entered the classified Pentagon Papers into the Congressional Record, citing immunity based on the Constitution's Speech or Debate Clause.¹⁶ That clause provides immunity for a Member's legislative acts to allow free speech, debate, and deliberations without reprisal from other branches of government. Floor speeches and hearings offer Speech and Debate protections. The Supreme Court has recognized that the clause protects staff as well as Members, as long as they are acting in the course of their legislative or oversight

14 Testimony of Erik Prince, Chairman, The Prince Group, LLC and Blackwater USA, before the House Oversight and Government Reform Committee, Hearing on Private Security Contracting in Iraq and Afghanistan, October 2, 2007, p. 173.

15 *Murphy v. Dep't of the Army*, 613 F.2d 1151 (D.C. Cir. 1979).

16 Congressional Research Service, *The Speech or Debate Clause: Constitutional Background and Recent Developments*, August 8, 2012.

duties. In the current environment, however, realize that statements in press releases or on social media most likely are not protected since they do not involve legislative activities.

Speech or Debate protections can apply in the context of classified information, as well as in the public release of unclassified information, but don't forget that House and Senate confidentiality rules may apply.¹⁷

CONCLUSION

Obtaining information isn't easy. In fact, considering all of the hindrances, it seems as though Congress will be in a perpetual fight to gain access to executive branch, company, or personal information. That might be the case, but understanding the rights and duties of all of the parties, and a few tricks to gain access to information, might make the difference between breaking a big investigation and not.

Recognize that resistance from the executive branch, corporate entities, and individuals is part of the process. The executive branch has always taken exaggerated positions regarding its right to withhold information from Congress. Do not take it personally or hesitate to employ stringent tactics. Remember that this is about your obligation to serve your boss's constituents and to help fulfill the promises to the nation he or she made upon taking the oath of office.

At the same time, keep in mind that your investigation or oversight hearing might harm a government mission or innocent people if you carelessly release classified or otherwise sensitive information. Moreover, remember that it is important to protect your sources or the whistleblowers, and that certain requests for information might place your sources in the hot seat. There might be liability for you and your office, but the stakes might be greater for the people assisting you.

¹⁷ See footnote 7.



PROJECT ON GOVERNMENT OVERSIGHT

Project On Government Oversight
1100 G Street, NW, Suite 500
Washington, DC 20005
Phone: (202) 347-1122
www.pogo.org

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