

# *Henry Waxman and the Tobacco Industry: A Case Study in Congressional Oversight*

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Whatever one thinks of his politics, there can be little question that Representative Henry Waxman (D-CA), who served in Congress from 1975 to 2015, was an effective practitioner of the art of congressional oversight. Deemed “Mr. Oversight” by Walter Oleszek of the Congressional Research Service, Waxman presided over some of the most noteworthy congressional hearings of his era, which delved into matters such as the use of force by the private contracting firm Blackwater in Iraq, the 2008 Wall Street collapse, and the BP oil spill.<sup>2</sup> As Waxman writes in his memoir:

Though oversight doesn’t get nearly the popular attention of major acts of legislation, I consider many of my accomplishments in this area to be every bit as significant as the laws I’ve worked on. Though legislation and oversight are often thought of as distinct processes, they are in fact very much conjoined.<sup>3</sup>

Above all, Waxman is associated with oversight of the tobacco industry, a project he pursued both during periods when his party enjoyed majority status in the House of Representatives (1975-95, 2007-11) and when it was in the minority (1995-2007, 2011-15). His successes in this endeavor provide important lessons for chairmen, ranking members, and even backbenchers who seek to effectively use the congressional power of inquiry in service of their legislative goals.

At the outset it is helpful to focus on the term “oversight,” which is often used in contrast to “investigation.” It is common to think of congressional oversight as involving fairly routine scrutiny, possibly but not necessarily adversarial in nature, which committees give to federal agencies within their jurisdictions, while investigations are thought of as adversarial proceedings which focus on uncovering the facts regarding a particular event, scandal, or other matter and which often take on the attributes of a mini-trial.

As Waxman’s “tobacco wars” illustrate, however, it is more helpful to think of “oversight” as the overall legislative or public policy objective of a given congressional inquiry, while “investigation” is best used to refer to techniques such as subpoenas or hearings that serve to compel the production of information. Properly conceived, investigation is not a separate category of activity from oversight, but rather is a set of tools that can be used in service of legislative oversight (or in support of a different congressional power, such as discipline of members or impeachment of officers).

Conceiving a congressional inquiry in terms of its oversight objectives can help the inquiry stay on track. Waxman’s broad oversight objectives were to establish a record regarding the health effects of tobacco use and the addictiveness of nicotine and to secure the passage of laws that would reduce smoking and thereby improve public health.<sup>4</sup> In the course of his

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2. MINORITY STAFF OF H. COMM. ON ENERGY AND COMMERCE, 113<sup>TH</sup> CONG., REPRESENTATIVE HENRY A. WAXMAN’S RECORD OF ACCOMPLISHMENT 18-19 (2014) [hereinafter WAXMAN’S RECORD OF ACCOMPLISHMENT].

3. HENRY A. WAXMAN WITH JOSHUA GREEN, THE WAXMAN REPORT: HOW CONGRESS REALLY WORKS 146-147 (2009).

4. *See id.* at 179.

inquiry, many subsidiary factual issues would be litigated. Did the tobacco industry know that nicotine was addictive? Did it manipulate nicotine levels to enhance addictiveness? Did it knowingly suppress information regarding addictiveness or health risks? Did it market its product to children?<sup>5</sup>

One can easily imagine that any one of these factual questions could lead to a lengthy mini-trial before Congress. Did a particular tobacco executive really know the results of his company's research into tobacco use and its effects? Did he try to suppress the research or prevent the company's scientists from cooperating with Congress? Did he lie to Congress about his knowledge or actions? While Congress might legitimately pursue any of these questions, an excessive focus on establishing the "guilt" of a particular individual or company could distract from, rather than enhance, the accomplishment of the oversight objective. By and large, Waxman's tobacco project avoided such pitfalls.

This is not to say that investigative tools were unimportant to Waxman's efforts. Perhaps the best-known episode of the tobacco inquiry involved the 1994 hearing at which the CEOs of the largest tobacco companies testified before Waxman's health and environment subcommittee. Each of these executives was sworn and testified under oath that he did not believe that cigarettes were addictive. This iconic moment was pivotal to Waxman's strategy of "shattering tobacco's public image and exposing the industry for what it really was" by demonstrating the gulf between the industry's public position and the scientific evidence regarding the dangers of tobacco.<sup>6</sup> The executives were then cross-examined by committee members regarding tobacco's health risks and addictive effects, allegations of nicotine manipulation, and issues of marketing to children.

This type of adversarial hearing is the hallmark of a congressional "investigation." But the key to Waxman's success was skillful design and preparation, not merely the brute exercise of Congress's compulsory powers. Indeed, Waxman did not even subpoena the tobacco executives to testify. Instead, he announced the hearing and publicly "invited" the executives to appear, making it clear that the hearing would be held whether they appeared or not. As Waxman explains in his memoir, "[i]f they chose not to avail themselves of the opportunity, the television cameras would capture seven empty chairs, leaving the public to draw its own conclusions about whether the tobacco industry had something to hide."<sup>7</sup>

Waxman and his staff spent weeks preparing for the hearing, acting in coordination with members of the committee who shared his objectives and defining the issues that they wished to concentrate on.<sup>8</sup> This type of preparation is critical to a successful congressional hearing, particularly in the House, where the five-minute rule sharply limits the ability of any one member to develop continuity in questioning.

One creative use of the hearing was to get the tobacco executives to agree to release materials that might otherwise have been protected by privilege, such as the work of a former Philip Morris researcher into the addictiveness of nicotine.<sup>9</sup> The committee no doubt could have subpoenaed these documents, but the companies might have raised objections and run out the clock for the remainder of the congressional session. By putting the executives on the spot in a televised hearing, the committee was able to get them to agree to provide it with significant materials that had been secret up to that point.<sup>10</sup>

Congressional inquiries have tools beyond their formal investigatory powers. Professor Josh Chafetz has described these tools as Congress's "soft powers," which is a term he gives to each branch's "deliberate engagement with the citizenry—[in which] each branch must make its case in the public sphere."<sup>11</sup> One of the most important capabilities of a congressional oversight committee is its ability to exercise such "soft power" by engaging the media and the general public with the narrative and information produced by its inquiry.

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5. *See id.* at 185.

6. *See id.* at 183, 185-87; *id.* at xi ("By inviting the CEOs to testify, I hoped to change that image and expose the men who controlled this deadly business to the full glare of the public spotlight.").

7. *Id.* at 184.

8. *Id.* at 185.

9. *Id.* at 187.

10. *Id.*

11. Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 722 (2012).

Waxman understood that communicating to a wider audience was critical to the success of congressional oversight. His memoirs note that “[f]rom the very beginning, the purpose of the oversight hearings had been to build a public record and eventually create enough momentum in Congress and among the American public for legislation to mitigate the terrible health effects of tobacco.” By 1996, he explains, “the actions of Congress had dramatically changed public perception of the industry and made real the possibility that comprehensive tobacco legislation could soon be forthcoming.”<sup>12</sup>

To build a “public record,” Waxman did not rely primarily on Congress’s “hard power” of testimonial compulsion, but on information voluntarily provided by cooperative witnesses. These included outside experts and public health officials such as Food and Drug Administration (FDA) Commissioner David Kessler. Significantly, they also included whistleblowers from within the tobacco industry, many of whom came forward because of the publicity generated by the congressional inquiry.<sup>13</sup> It was to enable such witnesses to provide public testimony (which otherwise might have violated nondisclosure agreements they had signed with the tobacco companies) that Waxman’s committee asked the CEOs to waive any objections to such disclosure.

The Constitution protects Congress’s exercise of soft power in part through the Speech or Debate Clause, which immunizes members of Congress from criminal or civil liability for speech within the legislative sphere.<sup>14</sup> Waxman used this protection when his committee received an important leak of internal Philip Morris documents. Waxman was concerned (properly) that if he simply released the documents in a press conference, the protections of the Speech or Debate Clause might not apply:

It wasn’t clear that a court would agree that press conferences constituted official House business, and the proven litigiousness of the tobacco industry suggested a high likelihood that it would test the proposition. So in order to make the documents public, I went to the House floor and read their entire contents into the Congressional Record. Afterward, with the media clamoring to discuss this important new information, I had to decline all press requests since nothing I said to reporters was assured of being protected speech.

Another important use of the Speech or Debate protections occurred when the committee received internal Brown & Williamson documents, which had been disseminated by the former paralegal of a law firm representing the tobacco company. The law firm and the tobacco company brought an action in Kentucky state court against the paralegal and those who had allegedly received copies of the documents, including Waxman and one of his colleagues on the committee. Brown & Williamson then procured an order from the Kentucky judge and a subpoena from the D.C. Superior Court requiring the congressmen to appear for a deposition at the offices of Brown & Williamson’s D.C. attorneys and to bring with them any of the relevant B&W documents in their possession.

The matter was removed to the federal district court in D.C., which issued a scathing opinion and ordered the subpoenas quashed. Judge Harold Greene acknowledged that the paralegal may have acted unlawfully in releasing the documents, but he noted that there was no evidence that Waxman or his committee caused the illegal activity or conspired with the paralegal to break the law. He then concluded:

The crux of the matter is still this. B&W, through its management, may be asked to testify at a hearing conducted by a committee of the House of Representatives into grave allegations, apparently with substantial factual supporting evidence, that B&W’s products present a threat to the health and indeed the lives of thousands, if not millions, of Americans, as well as into other serious allegations that B&W has for decades been engaged in a cover-up designed to mislead its customers and the public with respect to these health hazards.

Through the current proceedings B&W is attempting to interfere with that probe by a variety of means: by summoning the Congressmen to the offices of B&W’s lawyers; by seeking to require them to identify their sources; and by seeking to

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12. See WAXMAN WITH GREEN, *supra* note 3.

13. See *id.* at 188.

14. See Chafetz, *supra* note 11. at 744-45.

require them to permit B&W to peruse such documentary evidence that the committee may or may not ultimately use in its investigation. As the Court has previously concluded, the committee and the Members of Congress which sit on that body are clearly protected by the Speech or Debate Clause of the Constitution from such interference.<sup>15</sup>

Perhaps as important as Waxman's legal victory was the fact that he had successfully framed the narrative regarding the health effects of tobacco and the industry's conduct. Rather than focusing on the paralegal's alleged misconduct (which represented a blatant breach of the attorney-client privilege), the court looked at the matter in terms of Brown & Williamson's "cover-up" of evidence showing its products presented a health hazard to its customers and the public.<sup>16</sup>

Successful congressional oversight almost always depends not just on the actions of Congress itself, but also on non-congressional parties that independently uncover information and help to shape the legal landscape and the terms of the debate. These "force multipliers" include investigative reporters and other media outlets, regulatory and enforcement authorities at the federal and state levels, and private lawsuits. One of the overlooked aspects of the art of congressional oversight is the ability to encourage and work cooperatively with such outside parties where appropriate.

As Waxman indicates in his memoir his oversight of the tobacco industry benefitted from many such force multipliers. He gives credit to investigative journalism, such as the Wall Street Journal series called "Smoke and Mirrors," which exposed the tobacco industry's efforts to cast doubt on whether smoking causes cancer and other diseases "by creating and funding entire organizations devoted to manufacturing bogus scientific research."<sup>17</sup> Such journalism helped spark public interest in Waxman's inquiry, and the committee's efforts in turn produced more information for the media. For example, Waxman reports that a key industry whistleblower, Jeffrey Wigand, came forward after watching the 1994 CEO hearing. Wigand would appear on "Sixty Minutes" and allege that his former employer, Brown & Williamson, had manipulated nicotine levels and, contrary to the testimony before Congress, was well aware of the addictiveness of smoking. Wigand's story would later become the basis for the Hollywood movie *The Insider*.<sup>18</sup>

Further impetus for the anti-tobacco efforts came from the efforts of government regulators such as the Environmental Protection Agency, which investigated secondhand smoke as an environmental risk factor, and Kessler's FDA, which announced plans to consider regulating cigarettes as a drug. Perhaps even more important were the efforts of state attorneys general, such as Mike Moore of Mississippi, and plaintiffs' lawyers like Richard ("Dickie") Scruggs, who began filing numerous lawsuits and class actions against the tobacco industry on behalf of states and smokers.<sup>19</sup> These lawsuits in turn uncovered more damaging information from the files of tobacco companies, generated additional publicity, and put more legal and financial pressure on the industry.

In part because of the momentum generated by all of these efforts, Waxman was able to continue his oversight of the tobacco industry even after he lost the chairmanship of the subcommittee following the Republican victory in the 1994 election. Despite the fact that he no longer had the power to subpoena witnesses or hold formal hearings, Waxman found that he continued to receive leaks and other important information regarding tobacco. The subcommittee he once chaired had been a clearinghouse of sorts for negative information regarding cigarettes and the tobacco industry, but there was no reason why he could not fill the same function as a ranking member.

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15. *Maddox v. Williams*, 855 F. Supp. 406, 417 (D.D.C. 1994).

16. On appeal, the D.C. Circuit affirmed the lower court's decision to quash the subpoenas on the basis of the Speech or Debate Clause, but the panel declined to wade into Judge Greene's more inflammatory remarks regarding the health effects of tobacco and Brown & Williamson's alleged desire to interfere with the congressional investigation. *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995).

17. *See WAXMAN WITH GREEN*, *supra* note 3, at 181-2.

18. *See id.* at 188.

19. *See id.* at 189, 192.

Indeed, during his time in the minority, Waxman realized that he could still conduct oversight, albeit with a somewhat reduced level of resources (in the House the minority on a committee gets one third of the budget). While he no longer had control of the committee's hard powers, he could still make requests for information, receive information from cooperative sources, and release information to the public through the media. He even formed a Special Investigations Division within the committee's minority staff to perform tasks such as interviewing whistleblowers, accessing government databases, and even on occasion going undercover.<sup>20</sup>

On one occasion, Waxman used his power in the minority to block a tentative settlement that the state attorneys general and private plaintiffs had reached with the tobacco industry. Waxman deemed the settlement too soft on the industry, but he could not call a hearing of the committee to review its terms. Instead, he and other allies on the Hill created a "shadow committee" led by Kessler and former Surgeon General C. Everett Koop. Called the "Advisory Committee on Tobacco Policy and Public Health," this group conducted a series of hearings on Capitol Hill and was successful in creating political opposition that ultimately derailed the settlement.<sup>21</sup>

Waxman's years of oversight over the tobacco industry coincided with a great reduction in the number of smokers and a decline in the financial condition and public standing of the tobacco industry. While there were legislative measures passed during this time that incrementally restricted tobacco use, Waxman argues that "ultimately it was oversight, rather than legislation, that made the greatest impact on our nation's relationship to tobacco."<sup>22</sup> It is difficult to dispute that assessment.

What lessons can be drawn from Waxman's efforts? First, successful oversight requires time. Waxman had spent more than a decade on the tobacco inquiry before he began to make real progress in the early 1990s. Developing both expertise and information on a particular subject can pay dividends. Similarly, learning the techniques of oversight is not something that happens overnight. Term-limited committee chairs may therefore be at a disadvantage when it comes to conducting effective oversight.

Second, investigative tools are not an end in themselves. They can be very useful to achieving an oversight objective, but they should not be confused with the objective. Members of Congress can conduct successful oversight without issuing subpoenas or even holding formal hearings. As Waxman demonstrated, a good deal of oversight can be accomplished by a creative and determined member in the minority.

Finally, oversight is greatly enhanced by use of "force multipliers" outside of Congress, including the media, executive agencies, and public interest organizations. Ultimately, successful oversight is about communicating information and a narrative to Congress and to the general public, and creative use of these outside resources is essential to achieving that objective.

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20. See WAXMAN'S RECORD OF ACCOMPLISHMENT, *supra* note 2, at 19-20 (describing how Waxman "invented a new model for oversight from the minority"),

21. See WAXMAN WITH GREEN, *supra* note 3, at 194-196.

22. See *id.* at 199.