How to Survive a Congressional Investigation

Introduction

Legislative committees of the 111th U.S. Congress conducted a substantial number of investigations, and the pace is expected to pick up in the Congress just elected. The fact that one party controls the House and the other the White House effectively guarantees there will be investigations focused on alleged misfeasance by the Obama administration. Companies that participate in or are subject to government programs will get caught in the crossfire, including health insurers and providers affected by the new health care act; businesses impacted by the Dodd-Frank reforms; financial institutions involved in all aspects of the housing market, mortgages and foreclosures; companies that received or administered TARP funds or assets; businesses that benefited from federal stimulus funds; and defense contractors. The lawmaker who is in line to chair the House’s top investigative panel already has announced plans to inquire into the federal bailouts of AIG, GM, Chrysler, and Fannie Mae and Freddie Mac; food safety; Medicare fraud; wasteful stimulus spending; and cost overruns in federal IT projects, among others. At the same time, the Democrats in charge of the Senate likely will investigate alleged consumer fraud, the housing foreclosure process, Internet security and privacy, the operations of investment banks, environmental disasters and perhaps even the safety of NFL football.

A congressional investigation can erupt with little warning — and at the very moment your company is trying to close a deal or is embroiled in a criminal investigation or class action concerning the same subject. Since the collateral damage can be devastating to a company’s business, stock price, and the reputation and credibility of its top executives, it is important to be familiar with the practical realities and the official rules of a congressional investigation.

The Practical Realities

Resistance, for the Most Part, Is Futile

The first question that the target of a congressional investigation often asks is, what can be done to stop it? The reality is, very little. Congress has plenary power to investigate any matter in furtherance of its legislative function. Thus, “[t]he scope of its power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.” Courts uphold congressional subpoenas so long as the investigation concerns a subject within the authority given to a committee by the House or Senate, the specific inquiries are reasonably pertinent to that subject area, and the investigation is “pursuant to a valid legislative purpose.” A “valid legislative purpose” includes inquiry into any subject which is, has been or might be the subject of legislation.

1 See A Constitutional Obligation: Congressional Oversight of the Executive Branch, September 22, 2010, released by Rep. Darrell Issa (R-CA), who will likely chair the U.S. House Committee on Oversight and Government Reform.
2 Eastland v. United States Servicemen’s Fund, 421 U.S. 491, 504 n. 15 (1975) (citation and internal quotation marks omitted).
4 Shelton v. United States, 404 F.2d 1292, 1297 (D.C. Cir. 1969).
Nor will the existence of a concurrent criminal investigation or pending lawsuit suffice to block a congressional inquiry. In fact, committees have inquired into the conduct of criminal investigations while they were under way. Short of a situation where Congress has violated an individual’s constitutional rights, courts rarely intervene in congressional inquiries.

Cooperation vs. Confrontation

It is almost never effective to take a confrontational stance in response to a congressional investigation. Congressional committees are the ultimate arbiters of their own rules, and every aspect of a legislative inquiry is left to their complete discretion. They have the power to call a company’s top executive as the star witness at a congressional hearing, issue embarrassing reports and press releases, leak sensitive documents to the media, and provide information to law enforcement authorities, state attorneys general and plaintiffs’ counsel. Committees also can refer their findings to the Department of Justice, and a misstep in the course of responding to an inquiry can give rise to criminal prosecution for perjury, false statements or obstruction of Congress.

Therefore, the most productive response usually is to open a line of communication with committee staff, indicate that you generally want to cooperate, and demonstrate that you respect the legitimacy of the committee’s inquiry. Of course, you can push back when staff are being unreasonable, but you should pick your fights carefully. While a cooperative posture cannot guarantee a positive outcome before a committee, a confrontational response most assuredly will guarantee a negative experience.

Respondents have some leverage in attempting to narrow the scope of an inquiry and achieve fairer treatment at hearings or in reports issued by a committee. First, Congress’s formal mechanisms for enforcing subpoenas are inefficient and cumbersome, and it rarely resorts to them. Second, a committee may be under time constraints that make it receptive to focusing on priority documents that can be produced readily. Finally, committee members’ and staffers’ knowledge of an industry or an issue may not be well-developed. While this can be frustrating, it also creates an opportunity to educate them about a sector of the economy or improve their understanding of a topic of concern to your business.

Additionally, depending on the facts and circumstances of each case, a committee may initiate an investigation but subsequently turn its focus away from you or your company. Some inquiries are preliminary and may be abandoned. Even where a committee moves forward, it may spotlight another actor in the industry rather than you or your company. In order to have any chance to achieve these outcomes, however, it is imperative to establish credibility with the committee at the outset. By contrast, conduct that is perceived by committee staff as recalcitrant or evasive only will intensify a committee’s scrutiny of a company or individual.

7 See 18 U.S.C. §§ 1621, 1001 and 1505, respectively.
8 Both houses of Congress have the inherent power to have the sergeant-at-arms bring an individual to be tried at the bar of House or Senate for contempt and, if the contempt is sustained, imprison him in the Capitol jail. See *Jurney v. MacDracken*, 294 U.S. 125, 147-48 (1935). Both houses also may use a criminal contempt process, codified at 2 U.S.C. §§ 192 and 194. Those provisions make it a misdemeanor punishable by up to a year in prison and a fine of $1,000 to fail to respond to a congressional subpoena. The Senate alone can initiate a civil contempt proceeding in federal district court, pursuant to 2 U.S.C. § 288d and 28 U.S.C. § 1364.
Confidentiality: Don’t Count on It

Simply put, there are no meaningful constraints on the public release of information or documents by congressional committees. Therefore, you must assume that any document you provide may at some point be posted on the committee website, leaked to the press or released as part of a committee hearing or report.

Privileges and Work Product Protection: Subject to Negotiation

Congress takes the position that the attorney-client privilege and the work-product doctrine are principles of state or common law, not binding on the national legislature. Thus committees are not required to, but may exercise their discretion to, recognize a claim of privilege on a case-by-case basis. Whether to accept a claim of privilege or work-product protection is determined by each committee in the context of a specific request in a particular investigation. In many cases, the issue can be resolved by persuading staff that the privileged materials are not germane to the investigation, or by negotiating a work-around to provide the factual information they desire while avoiding the production of privileged documents in which the facts may be embedded. In order to work out these arrangements, however, it is imperative to establish credibility in your dealings with staff before the issue arises, such that they trust you are asserting a well-founded privilege in good faith, and not as a subterfuge to withhold critical information.

The fact that a document may be deemed confidential pursuant to a federal statute also will not serve as an automatic ground for refusing to produce it to Congress. For example, documents protected by the Trade Secrets Act, 18 U.S.C. § 1905, the Privacy Act, 5 U.S.C. § 552a, or under exceptions to the Freedom of Information Act, 5 U.S.C. § 552, are not exempt from production to Congress. Thus, committee requests for documents containing sensitive proprietary or personal information must be negotiated on a case-by-case basis.

The Nuts and Bolts of Congressional Investigations

Requests and Subpoenas for Documents

A committee typically will first seek documents or information through letter requests. In most cases, it is more effective to work with the staff to try to narrow the scope of an informal request and achieve a reasonable period for responding, rather than resist or delay and thereby trigger a subpoena. All standing committees and subcommittees have subpoena power, which they will use against recalcitrant parties, often accompanied by a press release excoriating the subpoena recipient for not cooperating with the committee’s inquiry.

Because there are criminal sanctions for obstruction of or making false statements to Congress, document productions to legislative committees, like those to grand juries, state attorneys general or the

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9 See M. Rosenberg, Congressional Research Service Report for Congress On Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry (April 7, 1995) (CRS Report) at 32. There have not been any significant court challenges questioning Congress’s prerogative to reject claims of privilege, and Congress has turned back attempts to formally recognize the attorney-client privilege as a permanent requirement for committee investigations. Id. at 33.

10 See, e.g., F.T.C. v. Owens-Corning Fiberglass Corp., 626 F.2d 966, 970 (D.C. Cir. 1980); Exxon Corp. v. F.T.C., 589, F.2d 582, 585-86 (D.C. Cir. 1978); Ashland Oil Co., Inc. v. F.T.C., 548 F.2d 977, 979 (D.C. Cir. 1976).


12 See Senate Rule XXVI(1); House Rule XI(2)(m)(1)(B).
SEC, must be thorough and carefully organized. Appropriate document preservation memos should be issued to relevant personnel at the earliest possible stage. The materials should be collected in a systematic, well-documented fashion, which places one in an optimal position to defend any claims that a document was withheld improperly. Further, the production to Congress should be coordinated with the production of documents in any parallel government investigations or civil proceedings.

**Witness Interviews and Depositions**

Congressional committees can seek information from individuals in informal meetings, untranscribed witness interviews or sworn depositions. Witnesses need to prepare just as thoroughly for informal meetings and interviews as they would for a deposition, as the information provided may be used or quoted in committee reports or shared with other parties, and because knowingly false statements made in the course of unsworn interviews by congressional staff also can expose a witness to prosecution under 18 U.S.C. § 1001. Counsel should accompany a witness to any such informal meeting or interview.

Depositions may be conducted by a member from each party, but typically also are conducted by staff. Witnesses at congressional depositions may be represented by personal counsel “to advise them of their legal rights.”\(^\text{13}\) Whether counsel for the witness’s employer also may attend varies from committee to committee.\(^\text{14}\) Usually, depositions are closed, although the transcript may be released by the committee, posted on its website, included in a report, or shared with law enforcement authorities and civil litigants. Witnesses who provide knowingly false or misleading testimony at a congressional deposition may face charges of false statements or perjury.

**The Unique Experience of Testifying at a Congressional Hearing**

Testifying before a congressional committee is like no other experience. An executive’s conduct at such a congressional hearing can, if he is not properly prepared, have disastrous consequences for his company or career. For corporate executives, it is a high-stakes performance in the glare of a very public spotlight, with potentially hostile and argumentative questioning. The rules of evidence or civil procedure do not apply. Lawyers for witnesses are not permitted to make objections or even speak. Some hearings are truly aimed at elucidating the facts. More often, they are an opportunity for lawmakers to express communal outrage, and the witnesses are made to feel like props in a play with a pre-ordained denouement.

Before witness preparation begins, lawyers counseling clients should consider a host of issues. These include whether to meet with committee members in advance of a hearing; how to arm supportive committee members with background information and helpful questions; whether the client will testify alone or be part of a panel of witnesses; who else will be on any panel with the witness (e.g., other executives from the same industry, a whistleblower, an injured consumer); whether the witness will

\(^{13}\) See, e.g., U.S. Senate Committee on Homeland Security and Governmental Affairs’ Permanent Subcommittee on Investigations (PSI) Rule 9.2; U.S. House Committee on Oversight and Government Reform (Government Oversight Committee) Rule 22. Since the rules of evidence and privileges are not recognized by Congress, and since a committee’s jurisdiction is very broad, there are few objections an attorney can assert on behalf of a client that would be recognized in any event, other than constitutional objections such as refusing to respond on the basis of the Fifth Amendment.

\(^{14}\) Compare, e.g., PSI Rule 9.2 (witness may be accompanied only by personal counsel if the Chair determines that the presence of counsel from the witness’s employer “creates a conflict of interest”); Government Oversight Committee Rule 22 (witness may be accompanied by counsel, but observers or counsel “for other persons” may not attend).
be sworn;\(^{15}\) how the witness should travel to the hearing (\textit{e.g.}, private or commercial jet; limousine or public transportation); and even who should sit behind the witness in the camera’s view. Some of these matters, such as the timing of a witness’s appearance, the composition of the panel on which he will appear, and, if the client is a company, which employee will testify on its behalf (\textit{i.e.}, the CEO, CFO, etc.) may sometimes be negotiated with the committee.

Typically, each witness is given the opportunity to submit a written opening statement 24 to 48 hours in advance of a hearing. While a written statement is not required, it usually is advisable to prepare a short piece, as it provides an opportunity to thoughtfully summarize the key facts in a cogent and concise manner, and to ensure that helpful information gets into the official record. The witness can then refer back to the points he made in his prepared testimony, when responding to questions on the same subject.

In both the House and Senate, the “five-minute rule” generally holds sway, limiting each lawmaker to approximately five minutes of questioning at a time, a portion of which is usually taken up by statement or argument. A witness needs to be prepared to make key points succinctly and quickly, and to listen for and be prepared to counter any unfounded characterizations or assumptions embedded in a member’s comments or questions. Because the witness is testifying before cameras, preparation should focus on physical demeanor as well as substance. The most effective witnesses phrase their responses in a manner that is clear and will not be taken out of context in a sound-bite world. Finally, a witness should be prepared to be questioned in the most inflammatory, antagonistic fashion imaginable. Desensitizing a witness in advance will help him remain calm, respectful and on point, even in the event of intensely hostile questioning.

### Written Reports

Many investigative committees issue reports on their findings. Increasingly, these reports are released on the eve of a hearing, along with press releases and sensitive documents. The report and documents become the basis for news stories in the newspapers and programs on the morning of the hearing, thereby generating greater media interest in the hearing itself. On rare occasion, staff will permit counsel to review drafts and advocate for corrections or modifications before a report is released, or to present facts to be included in a dissenting report issued by a minority of the committee. The question of whether and how to respond to a draft or final committee report depends on a number of factors, including, for example, whether criminal or state attorney general investigations are ongoing or anticipated. The answer varies from case to case.

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\(^{15}\) Whether to swear a witness is usually left to the discretion of the chair, although some committees mandate that all witnesses will be sworn. \textit{See, e.g., PSI Rule 6.}