

How to Survive a Congressional Investigation

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Introduction

The last Congress saw a substantial number of investigations conducted by legislative committees, and the pace is expected to pick up in the 112th Congress. The fact that one party controls the U.S. House of Representatives and the other the White House effectively guarantees there will be investigations focused on alleged misfeasance by the Obama administration. Private 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 chairing the House's top investigative panel in the 112th Congress has announced plans to inquire into the federal bailout of AIG, GM, Chrysler, and Fannie and Freddie Mac; food safety; Medicare fraud; wasteful stimulus spending; and cost overruns in federal IT projects, among other things.¹ At the same time, the Democrats in charge of the U.S. Senate are likely to continue to 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 arrive on a company's doorstep with little warning, and often at an awkward time, such as when the company is trying to close a deal or is embroiled in an investigation or class action lawsuit concerning the same subject. Unless properly handled, a congressional investigation can make it exceedingly difficult to do deals or to favorably resolve concurrent criminal and civil proceedings, or may even spawn new investigations. Because the collateral damage potentially can be devastating to a company's business and stock price, and to the reputation and credibility of its top executives, it is important to be familiar with the practical realities as well as the official rules of a congressional investigation.

The Practical Realities of Congressional Investigations

The mechanics and formal rules of congressional inquiries are discussed in detail below. More important is first to understand the practical realities of dealing with a legislative investigation.

Congress's Legal Authority to Investigate Is Almost Limitless

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Often, the first question that the target of a congressional investigation asks is, What can be done to stop it? The short answer is very little. While one may work informally with a committee to narrow the scope of an inquiry, taking legal action to quash or limit a congressional investigation is likely to be fruitless. Congress has plenary power to investigate any matter in furtherance of its legislative function, subject only to the constraints of the U.S. Constitution and any rules that the House and Senate impose on themselves. "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.'"²

Courts have deemed congressional subpoenas for documents and testimony proper 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 "pursuing a valid legislative purpose."³ As to the first factor, both the House and Senate have authorized each standing committee to conduct investigations into any matter within its jurisdiction that it deems appropriate.⁴ And as to the last factor, a "valid legislative purpose" includes inquiry into any subject which is, has been, or might be the subject of legislation.⁵

Even the existence of a concurrent criminal investigation or pending lawsuit does not divest Congress of its authority to require documents or testimony on the same subject.⁶ Indeed, a witness has been convicted of contempt for withholding information from Congress on the grounds that there was a lawsuit pending involving the same matter,⁷ and committees have held hearings on the conduct of criminal investigations while they were underway.⁸

In sum, legal challenges seeking to end or limit congressional investigations very rarely have met with success in court. Short of a situation where Congress has violated an individual's constitutional

rights, courts rarely intervene in congressional inquiries.

Direct Confrontation With a Committee Is Usually Not Productive

Almost all aspects of a congressional inquiry—from the scope of document and information requests, to the confidentiality of documents, to the tone and content of any report the committee may issue, to the conduct of a public hearing—are subject to the complete discretion of the committee. The committees are the ultimate arbiters of their own rules, and have numerous ways to make life difficult for individuals and companies if they choose to do so. These include the power to feature a company's top executive as the star witness at a congressional hearing; issue embarrassing reports and press releases; leak sensitive documents and information to the media; spin news stories in a manner injurious to a company or industry; and provide documents and information to criminal law enforcement authorities, state attorneys general, and plaintiffs' counsel. They also can draft legislation aimed at a specific industry or business practice. In addition, while Congress itself can levy few if any direct sanctions, committees can refer their findings to the Department of Justice, and conduct that occurs in the course of responding to a congressional inquiry can give rise to criminal prosecution for perjury, false statements, and obstruction of Congress.⁹

Because committees have such broad discretion, it is rarely productive to flout a congressional request for documents or information. Generally, the most productive response is to open a line of communication promptly with the committee staff to convey a cooperative attitude, and to communicate that you respect the legitimacy of the committee's inquiry. This is not to say that you do not push back when staff is being unreasonable, but you should pick your fights carefully, cooperate where you can, and have good reasons for pushing back when you do. While a cooperative posture cannot guarantee a positive outcome before a

committee, a confrontational response most assuredly will guarantee a negative experience.

Another practical reality is that, at the investigation stage, having a relationship with a member of the committee is less significant than most people believe. The most important dealings will be with committee staff, who have been delegated day-to-day authority to conduct the investigation, and who answer to the committee chairman. By the time an investigation is initiated, the chairman already has made the determination to commit time and resources to the inquiry,¹⁰ and may already have issued a press release publicizing his or her view that there is a problem into which it is worth inquiring. The chairman is therefore unlikely to halt an ongoing inquiry at the request of a corporation, constituent, or lobbyist. The staff, moreover, briefs the chairman and other committee members about their findings and the level of cooperation they are receiving from responding parties; therefore, most information flowing to members will be filtered through the staff. Relationships with members of a committee are most useful if and when there is a hearing, to ensure that questions are asked or witnesses are called to elicit a fairer or more complete record. Establishing a good relationship with committee staff, however, is the most important first step in any congressional inquiry.

Respondents do have some leverage to negotiate with the committee to narrow the scope of an inquiry, ease the burdens of responding, and possibly achieve fairer treatment at any hearing or in any report issued by a committee. First, Congress's formal mechanisms for enforcing subpoenas are inefficient and cumbersome, and hence, Congress rarely resorts to them. Second, a committee may be under time constraints that will make it receptive to focusing a request on priority documents or information that can readily be produced. Finally, Committee and staff members' 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 informal, and may be abandoned if the committee's legislative priorities change or other events divert its attention. In the alternative, a company may be able to persuade the committee that it is not a worthwhile use of resources to pursue a line of inquiry if, for example, the company has already ended the practice of concern to the committee. Even where a committee moves forward with an inquiry, it may choose to spotlight another actor in the industry rather than you or your firm. In order to have any chance to achieve these outcomes, however, it is imperative to establish credibility with the committee at the outset. Companies or individuals whom the committee perceives as being recalcitrant or evasive will only pique the interest of the committee, and are likely to find themselves cast in the role of malefactor at any public hearing.

Confidentiality: Don't Count on It

Regardless of any House, Senate, or committee rule,¹¹ or any assurances staff may provide regarding the confidential treatment of produced materials, there are no meaningful constraints on the public release of information or documents by congressional committees. Therefore, if the documents you provide would be of public interest, you must assume they will 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

When a company is involved in parallel criminal or civil proceedings, it necessarily seeks to avoid producing privileged material to a congressional committee. Congressional committees are not

required to recognize the attorney-client privilege or to respect the confidentiality of attorney work product, however, they may exercise their discretion to do so on a case-by-case basis.¹² The rationale is as follows: such protections are the product of state or common law; they are not of constitutional dimension and therefore not binding on Congress in the exercise of its oversight and legislative functions.¹³ 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.¹⁴

Therefore, 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.¹⁵ In practice, most committees resolve such claims by pragmatically assessing the needs of the investigation and weighing them against the potential harm to the company or individual if the claim of privilege is denied.¹⁶ 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 get them the information they desire while avoiding the production of privileged documents. For example, there may be other means to supply the committee with the underlying factual information it seeks, rather than producing the attorney-client communication or work product in which it may be embedded. In order to make such arrangements, however, it is imperative to establish credibility in your dealings with staff before the issue arises, so that they trust you are asserting a well-founded privilege in good faith, and not as a subterfuge to withhold pertinent information.

The fact that documents may otherwise be deemed confidential pursuant to a federal statute also will not serve as an automatic ground for refusing to produce them to Congress.¹⁷ For example, documents protected by the Trade Secrets Act (18 U.S.C. § 1905), the Privacy Act of 1974 (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.¹⁸

Thus, committee requests for documents containing sensitive proprietary or personal information must be negotiated on a case-by-case basis. For example, staff may agree to accept redacted documents if they can view the unredacted documents to confirm the proprietary or sensitive nature of the redacted information. Once such materials are in the hands of a committee, however, a court will not block congressional disclosure of the information when doing so serves a legislative purpose, broadly defined.¹⁹

The Nuts and Bolts of Congressional Investigations

Requests and Subpoenas for Documents

As an initial step, a committee typically will seek documents or information through letter requests. Letter requests provide greater flexibility to negotiate the timing and scope of a response than do subpoenas. Therefore, in most cases, it is preferable 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 altogether and trigger a subpoena.

All standing committees and subcommittees have subpoena power,²⁰ which they will use against recalcitrant parties, often accompanied by a press release criticizing the subpoena recipient for not cooperating with the committee's inquiry. Depending on the committee, a vote of the majority of members may be required to issue a subpoena, or the authority to issue one may be delegated to the chairman, with notice to or the concurrence of the ranking minority member.²¹ Service of congressional subpoenas may be effected anywhere in the U.S.²² As noted above, mounting a court challenge to a congressional subpoena is rarely successful. In essence, so long as the requests are pertinent to a subject within the broad jurisdiction

granted to the committee by the House or Senate, the subpoena will be upheld.²³

Document productions to Congress, like those to grand juries, state attorneys general, the Securities and Exchange Commission, or other governmental investigatory authorities, must be thorough and carefully organized, as there are criminal sanctions for obstruction of, or making false statements to, Congress. To avoid loss or spoliation of responsive material, appropriate document preservation memos should be issued to relevant personnel at the earliest possible stage, even while negotiations are underway to narrow the scope of the document requests. The respondent should collect the documents in a systematic, well-documented fashion to be in an optimal position to refute any claims of improperly withholding documents. Further, to ensure consistency, the production to Congress should be coordinated with the production of documents in any parallel government investigations or civil proceedings. The parameters of electronic document productions, including the format to be used and the inclusion of metadata, also may be the subject of negotiations with the committee staff. Accordingly, especially if the requests are broad or the production voluminous, it is important to have counsel experienced with investigatory document productions overseeing the process.

Congress has several mechanisms for holding respondents in contempt for failing to comply with a subpoena. Both bodies have inherent contempt power, i.e., the power to have the Sergeant-at-Arms bring an individual to be tried at the bar of the House or Senate, and if the contempt is sustained, imprison him in the Capitol jail, in which case, judicial review can be obtained only through a habeas corpus proceeding.²⁴ Congress has not exercised its inherent contempt process since 1934.²⁵

Both bodies 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 contempt citation must first be approved by the subcommittee, the full committee, and then the full House or Senate.²⁶ The Speaker of the House or the President of the Senate must then certify the contempt to the U.S. Attorney who, according to the statute, has a "duty" to bring the matter before a grand jury for action.²⁷ The criminal contempt mechanism has not been used by Congress in decades.²⁸

The inherent and criminal contempt mechanisms are the only two methods by which the House may seek to enforce subpoenas. The Senate has a third option: initiate a proceeding in federal district court to hold a nonresponsive party in civil contempt pursuant to 2 U.S.C. § 288d and 28 U.S.C. § 1365. Under this procedure, the Senate applies to the court for an order directing the party to comply with the subpoena.²⁹ If compliance is not forthcoming, the party may be tried in a summary proceeding for contempt of court.³⁰ Given the inefficiency of these enforcement mechanisms, Congress rarely relies on them. More likely, parties that fail to cooperate will find themselves called to answer hostile questions at a public hearing, and maligned in any written reports that are released to the news media.

Congressional Depositions and Witness Interviews

Often, in anticipation of a public hearing or a report, committees will seek information from individuals in informal meetings, untranscribed witness interviews, or formal, sworn depositions.

Witnesses need to prepare just as thoroughly for informal meetings with or interviews by staff as they would for a deposition, as the information provided may be used or quoted in committee reports or shared with other parties. Counsel should accompany an individual to any such meeting or interview, to advise the witness, clarify any matters for the witness or the staff, and memorialize the event. This is particularly important because 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.

The rules about who may accompany a witness to a meeting or interview—whether personal or company counsel or both—are flexible. Except in the most high-profile congressional investigations—typically those involving public officials, such as the Iran-Contra and Whitewater matters—these sessions are conducted by staff, in private, usually without committee members present. When this authority is delegated to staff, a staff member from each of the majority and minority parties may conduct the questioning.³¹

Depositions may be conducted by a member from each party, but more typically are conducted by staff. Notices for deposition usually may be authorized by the chairman with notice to, or consultation with, the ranking minority member.³² Witnesses at congressional depositions may be represented by personal counsel "to advise them of their legal rights."³³ Whether counsel for the witness's employer also may attend varies from committee to committee and case to case.³⁴ Depositions are closed to all but the witness, counsel, committee members, and staff (and an official reporter),³⁵ although the transcript ultimately may be released by the committee, posted on its website, included in a report, or shared with law enforcement authorities and civil litigants. A congressional deposition transcript thus may find its way into the hands of opposing counsel in concurrent civil or governmental proceedings.

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 will be recognized, other than constitutional objections such as refusing to respond on the basis of the Fifth Amendment (see below). As a practical matter, however, in most committees objections must be ruled on by the chairman,³⁶ who usually is not in attendance. Hence if an attorney objects to a

question and advises his or her client not to answer, any appeal to the chairman for a ruling typically would be made subsequent to the deposition.

For all the above reasons, a witness should prepare for a congressional deposition as he would for any other deposition, by meeting with counsel and reviewing documents that he or she is likely to be shown during his testimony. False or misleading testimony at a congressional deposition may expose a witness to charges of false statements or perjury.

Appearing as a Witness at a Congressional Hearing

Testifying at a congressional hearing is a high-risk performance on a very public stage. The cameras are rolling, the photographers are swarming, and the questions may be hostile and argumentative. There are no rules of evidence or civil procedure to provide regularity to the proceedings. Lawyers for the witnesses are not permitted to make objections or even to speak. Some hearings are truly aimed at elucidating the facts and educating members of Congress and the public about an issue; others 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.

An executive's conduct at a congressional hearing can, if he is not properly prepared, have disastrous consequences for his company or his career. When counseling clients called to testify at a hearing, seasoned counsel will consider a whole host of issues from the mundane to the substantive, before witness preparation even begins. These include whether to meet with committee members in advance of a hearing; how to arm supportive 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, or an injured consumer); whether the witness will be sworn;³⁷ how the witness should travel to the hearing (e.g., private or commercial jet, limousine, or public transportation); what route the witness should take

to enter and exit the building (i.e., to avoid or engage camera crews); whether a waiting room near the hearing room will be made available to the witness where he can hear any testimony that precedes his appearance, and if not, making other arrangements to follow the proceedings; who should sit behind the witness in camera view and who should not; and even what kind of snacks to bring to nourish a witness during a marathon session. 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 (i.e., the CEO, CFO, etc.) may sometimes be negotiated with the committee.

A witness may be requested to appear voluntarily at a hearing, or he may be subpoenaed.³⁸ Generally, the rules require committees to give one week's notice of any hearing to their own members or the public, although this time may be shortened in exigent circumstances.³⁹ A request for testimony is usually made a few weeks in advance of the public announcement, especially if the committee is seeking the appearance of a high-ranking corporate officer or public official. Witnesses who attempt to put off the committee's voluntary request, however, risk being subpoenaed on short notice.

Typically, each witness is given the opportunity to submit a written opening statement 24–48 hours in advance of a hearing.⁴⁰ The witness reads this statement, or an abridged version thereof, into the record before the questioning begins. While a written statement is not always required, preparing a short piece provides an opportunity to thoughtfully summarize the key facts in a cogent and concise manner, and to ensure that complete and helpful information gets into the official record. The witness can then refer back to the points he made in his written testimony when responding to questions on the same subject.

At the outset of the hearing, each member of the committee is permitted to make an opening statement of specified duration. Then, after the

witnesses' opening statements, the questioning begins. The majority and minority members alternate questioning, in order of seniority. In both the House and Senate, the "five-minute rule" generally holds sway, limiting each member to approximately five minutes of questioning at a time.⁴¹ Once the entire committee has been given the opportunity to ask questions, the process begins again if any members have additional questions to ask.⁴²

This format requires special preparation of the witness. First, given the propensity of lawmakers to hold forth, a portion of their limited time is usually taken up by statement or argument. In addition, most members are not trained litigators and do not ask concise questions. In reality, therefore, there only may be a minute or two available for the witness to respond to any question, and witnesses need to be prepared to make the points they wish to make succinctly and quickly. Second, witnesses need to listen for and be prepared to counter any unfounded characterizations or assumptions embedded in a member's comments or questions. Third, witnesses need to be prepared to testify before cameras. This requires attention to physical demeanor as well as the substance of one's answers. 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, and most importantly, a witness should be prepared to be questioned in the most inflammatory, argumentative fashion imaginable. Desensitizing a witness in advance to these kinds of questions will assist him to remain calm, respectful, and on point even in the event of intensely hostile questioning. If appropriate to the circumstances, a witness also should be ready to show some contrition.

A witness may be accompanied to a hearing by his personal counsel or counsel for his employer, or both.⁴³ The rules effectively provide, however, that counsel is to be seen but not heard: available to advise a witness of his rights, but not permitted to

address the committee or make objections.⁴⁴ This rule is breached on rare occasion when counsel perceives that questioning has become unduly abusive or to protect a client answering questions related to potential criminal charges, as when Oliver North's lawyer, Brendan Sullivan, famously declared to the Iran-Contra Committee that he was "not a potted plant."⁴⁵ Counsel whose conduct is deemed to be impeding or disrupting the hearing, however, may be ejected.⁴⁶ In no circumstances will counsel be permitted to cross-examine an adverse witness. Courts have ruled there is no constitutional right to confront witnesses at a congressional hearing.⁴⁷ Questions for such witnesses can in some cases be proposed to supportive committee members in advance of the hearing.

The Fifth Amendment in Congressional Inquiries

As noted above, Congress does respect certain constitutional privileges, including the Fifth Amendment privilege against self-incrimination.⁴⁸ Given the opprobrium that accompanies "taking the Fifth," however, public officials and officers of publicly traded companies are loathe to exercise this right, especially in such a visible setting. Occasionally, counsel can negotiate with the committee to assert the privilege in writing rather than being forced to do so before the television cameras, but committees more often insist that the privilege be invoked at a public hearing.

Committees are authorized by statute to confer "use" immunity on witnesses who assert their Fifth Amendment rights.⁴⁹ They accomplish this by applying to a federal district court for an order compelling the witness to testify and granting immunity against the use of his testimony and information derived therefrom in any subsequent prosecution.⁵⁰ While the Attorney General cannot veto a congressional grant of immunity, the statute requires the committee to notify him at least ten days before applying for court-ordered immunity.⁵¹ The Attorney General can then ask the court to delay issuance of the order for 20 days,⁵² which gives the Department of Justice time to sequester

files and attorneys involved in any ongoing criminal investigation that may be impacted, to be better able to demonstrate in any subsequent prosecution that it had already developed evidence apart from any immunized congressional testimony. The Court cannot deny the order; once Congress makes the request, issuance of the order is ministerial.⁵³

Grants of congressional immunity are infrequent. They became controversial as a result of the case of Lieutenant Colonel Oliver North, who asserted his Fifth Amendment right not to testify before the Iran-Contra congressional committees regarding the government's secret sale of weapons to Iran, and whose testimony was compelled by a congressional grant of use immunity. North subsequently was convicted of "aiding and abetting an endeavor to obstruct Congress"; "destroying, altering, or removing official [National Security Council] documents"; and "accepting an illegal gratuity." His conviction was overturned by a federal appeals court because, among other reasons, the district court failed to hold a hearing in order to ensure that the Independent Counsel made no use of North's immunized congressional testimony.⁵⁴ That court set a very high bar for prosecutors to demonstrate that their case was not tainted by evidence derived from congressionally immunized testimony.

Closed Hearings

The rules of both the House and Senate provide for all hearings to be open to the public, and available for broadcast by radio and television.⁵⁵ Hearings also are streamed live on committee websites. In certain circumstances, however, House and Senate Rules permit a committee to proceed in executive session or to turn the cameras off, but requests from witnesses to do so are not usually granted.

Specifically, in the House, a witness may ask that a hearing be closed or not broadcast on the ground that the evidence or testimony to be presented "may tend to defame, degrade, or incriminate the witness."⁵⁶ A committee member also may request that the panel proceed in executive session if he or

she believes the evidence or testimony would tend to defame, degrade or incriminate any person.⁵⁷ House committees also may close hearings when receiving testimony or evidence in public would jeopardize national security or compromise a law enforcement investigation.⁵⁸ A majority of the committee present may subsequently decide to release testimony taken in executive session.⁵⁹

Senate committees similarly may close hearings by majority vote, when, among other things, the hearing will disclose information that "tend[s] to charge an individual with crime or misconduct, to disgrace or injure the professional standing of any individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion" of individual privacy.⁶⁰ A witness at a hearing of the Senate Committee on Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations (PSI) also may request that television, motion picture, and other cameras not be directed at him or her, on grounds of "distraction, harassment, personal safety, or physical discomfort," and the members present will determine whether to grant such a request.⁶¹ Senate committees also are permitted to go into closed session in certain circumstances when the hearing "will disclose information relating to the trade secrets of financial or commercial information pertaining specifically to a given person," or would reveal national security or law enforcement secrets.⁶² A majority of the committee may subsequently vote to release the information.⁶³

Defending Your Reputation Before a Committee

The House Rules also provide that anyone who believes he or she has been defamed, degraded, or incriminated by testimony before a committee must be afforded the opportunity to voluntarily appear as a witness before the panel, and may request the committee subpoena additional witnesses.⁶⁴ Likewise, some Senate committees allow any individual who is referenced by name in evidence or statements that are made public, and who believes

such evidence or statements tend to defame or impugn him or adversely affect his reputation, to file a sworn statement of facts that will be considered for placement in the record; request an opportunity to appear before the committee; or submit questions for the committee's consideration to be used to cross-examine other witnesses.⁶⁵ Individuals seeking to submit written statements may have to agree to testify before the committee before the statement will be included in the record, however.⁶⁶ Perhaps for this reason, these procedures are seldom invoked.

Written Reports

Many investigative committees issue reports of their investigations.⁶⁷ The practices regarding these reports vary substantially from committee to committee. Historically, such reports were issued when the investigation and hearings were complete. Increasingly, some committees, including the PSI and the U.S. Senate Committee on Energy and Natural Resources, have developed a practice of releasing written reports on the eve of a hearing, even though testimony has not yet been heard.⁶⁸ The report typically includes sensitive documents, or such documents are leaked to the media or posted on committee websites in the days before the hearing. The report and documents thus become the basis for news stories in the morning papers and news programs on the day the hearing is scheduled, thereby generating greater media interest in the hearing itself.

On occasion, staff will provide an opportunity for the subject of such a report to review drafts and advocate for corrections or modifications. In a few cases, a committee may even include a separate written response from the subject and issue it with the report. In addition, House and Senate Rules permit committee members who disagree with the findings of the majority to file a minority, or dissenting, report.⁶⁹ Counsel for companies or individuals that are the subject of the investigation may be able to present facts to be included in such a minority report. Finally, even in cases where there

is no opportunity to review or comment on a report, committee staff may agree to at least give the subject a "heads up" that a report is going to be released, which provides the target of the report the opportunity to prepare press releases or other materials to respond to the charges that it anticipates will be in the report.⁷⁰

Increasingly, Congress also is using the mechanism of creating bipartisan commissions with special expertise, such as the National Commission on Terrorist Attacks Upon the United States (also known as the 9-11 Commission)⁷¹ and the Financial Crisis Inquiry Commission (FCIC), to conduct investigations and issue final reports.⁷² The authority of these commissions is derived from Congress and they operate in a manner very similar to legislative committees. The FCIC, for example, has held a series of investigative hearings; issued interim draft reports on select topics and solicited comments thereon; and issued a final report with two separate dissents.⁷³

The decision of whether and how to respond to an anticipated or issued committee report depends on a number of factors unique to each case. The decision may turn, for example, on the level of expected press attention or whether criminal or state attorney general investigations are ongoing or anticipated. There is no one-size-fits-all answer, and the judgment of experienced counsel should be brought to bear on the issue.

Conclusion

In any congressional investigation, the playing field belongs to Congress, which also writes the rules and serves as referee. The representation of companies or individuals subject to a congressional inquiry is, therefore, largely an exercise in damage control. Working with experienced outside counsel can minimize the damage and position the company or individual well to deal with the collateral impact of such investigations.

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¹ See STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 111 CONG., A CONSTITUTIONAL OBLIGATION: CONGRESSIONAL OVERSIGHT OF THE EXECUTIVE BRANCH (Staff Rep. 2010) (released by Representative Darrell Issa (R-CA-49), then the ranking member of the committee and for the 112th Congress, committee chairman).

² *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n. 15 (1975) (citation omitted; some alteration in original). See also *Watkins v. United States*, 354 U.S. 178, 187 (1957) (noting that the broad power of Congress to conduct investigations "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes").

³ *Wilkinson v. United States*, 365 U.S. 399, 408-09 (1961)

⁴ H.R. Rules X(2)(a), XI(1)(b)(1); S. Rule XXVI(1). Hereinafter, all citations to House Rules refer to those Rules adopted by the 111th Congress, available at <http://clerk.house.gov/legislative/rules111/111th.pdf> (last visited Oct. 26, 2010). Likewise, all citations to the Senate Rules refer to those Rules adopted by the 111th Congress, available at <http://rules.senate.gov/public/index.cfm?p=RulesOfSenateHome> (last visited Oct. 26, 2010).

⁵ See *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968). To understand how far that authority extends, one need only look to the jurisdiction of a single committee, the Senate Committee on Homeland Security and Governmental Affairs. The committee's jurisdiction includes, among other things, the authority to investigate "the compliance or noncompliance of such corporations, companies, or individuals or other entities with the rules, regulations, and laws governing the various governmental agencies and its relationships with the public." S.Res. 73, 111th Cong. (2009), § 12(e)(1). The Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Governmental Affairs carries out that investigative function for the full committee.

⁶ *Hutcheson v. United States*, 369 U.S. 599, 613 (1962); *Sinclair v. United States*, 279 U.S. 263, 295 (1929), overruled on other grounds, *United States v. Gaudin*, 515 U.S. 506 (1995).

⁷ *Sinclair*, 279 U.S. at 284-285.

⁸ See, e.g., *McGrain v. Daugherty*, 273 U.S. 135, 151 (1927).

⁹ See 18 U.S.C. §§ 1621, 1001, and 1505 respectively. As discussed *infra* under "The Nuts and Bolts of Congressional Investigations: Requests and Subpoenas for Documents" and notes 27-29, a party

who refuses to produce documents or information to Congress also may be held in criminal contempt.

¹⁰ See, e.g., S. Permanent Subcomm. on Investigations of the Comm. on Homeland Security and Governmental Affairs Rule of Procedure ("PSI Rule") 1 (providing that preliminary inquiries may be initiated by the subcommittee majority staff "upon the approval of the Chairman" and with notice of such approval to the ranking minority member or counsel, and investigations may be initiated with the approval of the chairman and ranking member without notice to other members) (S. PRT. 111-32 (2009)).

¹¹ For example, Paragraph 5 of Rule XXIX of the Standing Rules of the Senate provides:

Any Senator, officer, or employee of the Senate who shall disclose the secret or confidential business or proceedings of the Senate, including the business and proceedings of the committees, subcommittees, and offices of the Senate, shall be liable, if a Senator, to suffer expulsion from the body; and if an officer or employee, to dismissal from the service of the Senate, and to punishment for contempt.

However, enforcement of this rule is rare and requires self-policing by the Senate. The rule, moreover, permits the committees to determine what is "secret or confidential business."

¹² See MORTON ROSENBERG, CONG. RESEARCH SERV., 95-464, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY (1995) ("CRS Report") 32, available at <http://www.fas.org/sgp/crs/misc/95-464.pdf> (last visited Feb. 16, 2011).

¹³ *Id.* at 35-36.

¹⁴ *Id.* at 33.

¹⁵ *Id.*

¹⁶ *Id.* at 32.

¹⁷ 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).

¹⁸ See CRS Report, *supra* note 13, at 17.

¹⁹ See *Doe v. McMillan*, 412 U.S. 306, 317 (1973); *F.T.C. v. Owens-Corning Fiberglass Corp.*, *supra*, 626 F.2d at 970.

²⁰ See S. Rule XXVI(1); H.R. Rule XI(2)(m)(1)(B).

²¹ Compare, e.g., S. Comm. on Homeland Security and Governmental Affairs Rule of Procedure ("S. Homeland Security Rule") 5(C) (providing that the chairman may authorize a subpoena with the approval of the ranking minority member) (S. PRT. 111-31 (2009)); PSI Rule 2 (providing that subpoenas may be authorized and

issued by the chairman or another member at his designation, with notice to the ranking minority member) (S. PRT. 111-32); H.R. Rule XI(2)(m) (3)(A)(i) (providing that a Committee may delegate subpoena authority to its chairman); H. Comm. on Energy and Commerce Rule of Procedure ("H. Energy and Commerce Rule") 16 (providing that the chairman may authorize subpoena after consultation with ranking minority member, and that if latter objects the matter shall be referred to the full committee for resolution) (H.R. REP. NO. 111-706 (2011)).

²² CRS Report, *supra* note 13, at 4.

²³ See *Barenblatt v. United States*, 360 U.S. 109, 117 (1959); *Watkins*, 354 U.S. at 209–15.

²⁴ See *Groppi v. Leslie*, 404 U.S. 496 (1972); *Jurney v. MacCracken*, 294 U.S. 125, 147–148 (1935).

²⁵ "See *Jurney*, 294 U.S. at 143; see also CRS Report, *supra* note 13, at 11.

²⁶ If Congress is not in session, the President of the Senate or Speaker of the House, as applicable, may approve the contempt. 2 U.S.C. § 194.

²⁷ 2 U.S.C. § 194. It is an unresolved question of law whether a U.S. Attorney may exercise the executive branch's prosecutorial discretion in this regard, or whether he or she is bound to present the matter to the grand jury.

²⁸ In this regard, the Senate Legal Counsel observed in 1996 that since the creation of the Ethics in Government Act of 1978, the Senate always has opted to pursue civil enforcement over criminal penalties for failure to comply with a subpoena. See JOHN C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE 91 (1988).

²⁹ 28 U.S.C. § 1365.

³⁰ *Id.*

³¹ See, e.g., PSI Rule 9.3 (S. PRT. 111-32); H. Comm. on Oversight and Government Reform Rule of Procedure ("H. Oversight Rule") 22 (H.R. REP. NO. 111-705 (2011)).

³² See, e.g., PSI Rule 9.1 (S. PRT. 111-32); H. Oversight Rule 22.

³³ See, e.g., PSI Rule 9.2 (S. PRT. 111-32); see also e.g., H. Oversight Rule 22.

³⁴ Compare, e.g., PSI Rule 8 (providing that witness may be accompanied only by personal counsel if the chairman determines that the presence of counsel from the witness's employer "creates a conflict of interest") (S. PRT. 111-32); H. Oversight Rule 22 (providing that a witness may be accompanied by counsel, but "[o]bservers or counsel for other persons ... may not attend").

³⁵ See, e.g., H. Oversight Rule 22; PSI Rule 9.1 (stating "[t]he deposition shall be in private").

³⁶ See, e.g., H. Oversight Rule 22.

³⁷ Whether to swear a witness is usually left to the discretion of the committee chairman, although some committees mandate that all witnesses will be sworn. See, e.g., PSI Rule 6 (S. PRT. 111-32).

³⁸ S. Rule XXVI(1); see also H.R. Rule XI(2)(m)(1)(B) (specifically authorizing a subpoena duces tecum to contain "terms of return other than at a meeting or hearing").

³⁹ See, e.g., S. Rule XXVI(4); H.R. Rule XI(2)(g)(3); H. Energy and Commerce Rule 3(a) (H.R. REP. NO. 111-706).

⁴⁰ See, e.g., S. Rule XXVI(4)(b) (must submit at least one day before appearance, except for the Committee on Appropriations); PSI Rule 10 (if submitted, must submit at least 48 hours in advance) (S. PRT. 111-32); H. Energy and Commerce Rule 3(c)(1) (must submit at least two working days before appearance) (H.R. REP. NO. 111-706).

⁴¹ See, e.g., H. Energy and Commerce Rule 3(d)(1) (H.R. REP. NO. 111-706); H.R. Rule XI(2)(j)(2)(A).

⁴² On exceptional occasions, committee rules allow for lengthier periods for questioning or permit questioning by the staff, or both. See, e.g., H. Energy and Commerce Rule 3(d)(2) (allowing for 30 minutes of questioning by each side at a time, or by staff) (H.R. REP. NO. 111-706); H.R. Rule XI(2)(j)(2)(B), (C).

⁴³ H.R. Rule XI(2)(k)(3). But see PSI Rule 8 (providing that witness may be accompanied only by personal counsel if the chairman determines that the presence of counsel from the witness's employer "creates a conflict of interest") (S. PRT. 111-32); S. Homeland Security Rule 5(D) (same) (S. PRT. 111-31). Typically counsel sits behind the witness and not at the table with him.

⁴⁴ See, e.g., PSI Rule 7 (S. PRT. 111-32).

⁴⁵ Joint Hearings Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran, 100th Cong. 263 (1987) (testimony of Oliver L. North).

⁴⁶ See, e.g., S. Homeland Security Rule 5(D) (S. PRT. 111-31).

⁴⁷ *United States v. Fort*, 443 F.2d 670, 678–79 (D.C. Cir. 1970).

⁴⁸ *Emspak v. United States*, 349 U.S. 190, 196 (1955) ("Although the privilege against self-incrimination must be claimed, when claimed it is guaranteed by the Constitution.") (internal quotation marks omitted).

⁴⁹ 18 U.S.C. §§ 6002, 6005.

⁵⁰ 18 U.S.C. § 6005(a). If the testimony is to be before a committee, two-thirds of the members of the

committee must approve the request. 18 U.S.C. § 6005(b)(2). If the testimony is before the full House or Senate, the request must be approved by a majority of Members present. 18 U.S.C. § 6005(b)(1).

⁵¹ 18 U.S.C. § 6005(b)(3).

⁵² 18 U.S.C. § 6005(c).

⁵³ See *Application of U.S. Senate Select Comm. on Presidential Campaign Activities*, 361 F. Supp. 1270, 1275–1276 (D.D.C. 1973) (citing S. REP. NO. 91-617 (1969); H. REP. NO. 91-1549 (1970)).

⁵⁴ See *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), *modified*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991).

⁵⁵ S. Rule XXVI(5)(b), (c); H.R. Rule XI(2)(g)(1).

⁵⁶ H.R. Rule XI(2)(k)(5).

⁵⁷ *Id.*

⁵⁸ H.R. Rule XI(2)(g)(2)(B)(i).

⁵⁹ H.R. Rule XI(2)(k)(7).

⁶⁰ S. Rule XXVI(5)(b)(3).

⁶¹ See, e.g., PSI Rule 11 (S. PRT. 111-32).

⁶² S. Rule XXVI(5)(b)(1)–(6).

⁶³ See, e.g., PSI Rule 16 (S. PRT. 111-32).

⁶⁴ H.R. Rule XI(2)(k)(5).

⁶⁵ See, e.g., S. Homeland Security Rule 5(F) (S. PRT. 111-31); PSI Rules 14–15 (S. PRT. 111-32).

⁶⁶ See, e.g., PSI Rule 15.

⁶⁷ See, e.g., S. REP. NO. 111-199 (2010); H.R. REP. NO. 111-423 (2010).

⁶⁸ See, e.g., Press Release, S. Comm. on Commerce, Science, and Transportation, Rockefeller Releases Report on the Rail Industry and the Need for Level Playing Field to Create Competition and Boost Economy (Sept. 15, 2010), *available at* http://commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=6aeeac1b-0f6a-4a6c-89b7-21f24df5dedf&ContentType_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group_id=4b968841-f3e8-49da-a529-7b18e32fd69d&MonthDisplay=9&YearDisplay=2010 (last visited Feb. 9, 2011) (noting advance release of committee staff report "[i]n anticipation of [the upcoming] hearing on federal rail policy"); Justin Blum & Colum Lynch, *Oil-for-Food Benefited Russians, Report Says*, WASH. POST, May 16, 2005, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/15/AR2005051501024.html> (last visited Feb. 9, 2011) (noting that "reports and documents [were] made public last night by the Senate Permanent Subcommittee on Investigations in advance of a hearing tomorrow").

⁶⁹ H.R. Rule XI(1)(b)(4), XI(1)(d)(4)(B), XI(2)(l); S. Rule XXVI(10)(c).

⁷⁰ Some committees, such as the Senate Special Committee on Aging or the Senate Committee on Health, Education, Labor, and Pensions, have a practice of involving the Government Accountability Office (GAO) in its investigations, either by calling on the GAO to initiate an investigation into a topic, or to complete an investigation started by the committee, and to issue a report.

⁷¹ Pub. L. 107-306 (2002), Tit. VI; Pub. L. 108-207 (2004).

⁷² See Pub. L. 111-21 (2009), § 5.

⁷³ These reports are available at <http://www.fcic.gov/> (last visited Feb. 9, 2011).