



## NAVIGATING THE PERILOUS SHOALS OF CONGRESSIONAL OVERSIGHT INVESTIGATIONS

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With the beginning of the 116th Congress came a new majority and new committee leadership in the U.S. House of Representatives—and a whole new dynamic on Capitol Hill for congressional investigations. Despite relative stability in the U.S. Senate, albeit with some committee leadership changes, this new Congress is already pursuing a very robust oversight agenda aimed at not only the executive branch, but a range of industries as well.

Even for savvy in-house counsel and experienced civil and criminal litigators, congressional investigations can be confusing, frustrating, and treacherous. Effective representation of the target of a congressional investigation requires a combination of experience and expertise in a diverse range of legal and non-legal disciplines, including civil litigation, white collar defense, lobbying, and public affairs. The most adept practitioners in this area must be able to combine all of the above in order to effectively represent a client that has drawn the interest of congressional committee.

This LEGAL BACKGROUNDER provides a useful overview of some of the unique aspects and nuances of congressional oversight, and allows the reader to understand the basics of how to successfully navigate a congressional investigation.

### Congressional Power to Investigate

First and foremost, potential targets of investigations must understand that a congressional committee's power to investigate, while not unlimited, is as broad as Congress' authority to enact laws. Indeed, the U.S. Supreme Court long ago observed that "[t]he scope of [Congress'] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."<sup>1</sup>

As long as a congressional committee can articulate a "legislative purpose" behind its investigative effort, a court will likely support that effort should it be called upon to do so.<sup>2</sup> Investigative targets must also understand that information obtained in the course of a congressional investigation is generally subject to public disclosure at the discretion of Congress. Indeed, if publicly disclosing such information serves some political purpose, chances are it will be disclosed.

<sup>1</sup> *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 n. 15 (1975) (quoting *Barenblatt v. United States*, 360 U.S. 109, 111 (1950)). See also, *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.").

<sup>2</sup> *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

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Also, unlike the initiation of a civil lawsuit or a criminal investigation, which must be based upon some rule or policy-based threshold of evidence, a congressional investigation need not meet such an objective standard. In fact, the decision whether to investigate is entirely within the discretion of the committee chair. This reality should serve as a reminder that everything Congress does is political, including its decision on what, who, and when to investigate. Understanding this fundamental fact of congressional life is critical to understanding how to effectively handle an oversight investigation.

### **How a Congressional Investigation is Initiated**

Inspiration for congressional investigations comes from many sources, including press reports, whistleblowers, trial lawyers, and economic rivals. Some investigations begin with a formal letter from a committee chair requesting the production of certain documents or answers to written interrogatories. Others start more informally with a phone call from committee staff inquiring about a particular topic. Still others may be announced by way of a news conference, press release, comment to a reporter, or even a Tweet.

No matter what form the initial notice may take, once a target of investigative interest becomes aware of such interest, the target must immediately consider retaining experienced counsel to interact with staff for the investigating committee. This advice applies not only to actual investigative targets, but to potential witnesses as well. Frequently, a person with knowledge of the subject matter of the investigation, perhaps a former executive of the target company, will find herself on the receiving end of a committee request for documents and an interview. Such witnesses should consult with counsel before rushing to cooperate with the requesting committee.

### **How to Handle Requests from a Congressional Committee**

As stated above, congressional oversight investigations, like everything else in Washington, are political. They may look and feel a lot like litigation, but they share little in common with a lawsuit's procedural rigors. As such, the way they are conducted, like most everything else in Washington, is subject to negotiation. For example, an initial request for information from a committee will typically be accompanied by an unreasonably short deadline. This is almost always subject to change. Initially, counsel should take time to understand why the committee is making the request, what the committee really wants, and what political objective the committee is trying to achieve.

This information can typically be ascertained by researching media reports, news releases, and simply asking staff what they are looking for and why. Rarely is the true motivation behind an oversight request difficult to discern. Only upon developing an understanding of the committee's political or policy goal and how a target or a witness fits into that bigger picture can counsel effectively navigate the rest of the oversight process.

### **The Rules that Apply (or Don't Apply) to Congressional Oversight Investigations**

Investigative targets should know what rules, however few there are, do apply. Targets should also know that the attorney-client privilege and other rules that generally govern most other types of legal or quasi-legal proceedings may not apply to a congressional investigation.

The rules that do apply include both the rules governing the relevant body—Senate or House—and those that govern the requesting committee. For example, some committees allow the chair to authorize and issue a subpoena for documents or testimony, while others reserve that authority for the committee as a whole. Although a rule-based objection can be effective, the true nature of the process is such that if the chair wants to do something, the rules can be interpreted or even changed to allow it. Congressional committees generally operate by majority rule, and that means that the majority, led by the chair, rules.

An oversight target's ability to assert privilege is uncertain and thus very much subject to negotiation. Congress has historically recognized only constitutional privileges such as the Fifth Amendment privilege against

self-incrimination, and it has not necessarily recognized common-law privileges, such as the attorney-client privilege. Nevertheless, committees will typically negotiate around privilege issues.

Furthermore, few safeguards exist in the congressional-investigation process for sensitive information, such as trade secrets and sales data. Even if counsel successfully negotiates a confidentiality agreement for client records, members of Congress and staff with access could still disclose information to the public. Another option, which may reduce the likelihood of member or staff leaks, is to negotiate the committee’s reception of information in “executive session.” In that case, a full committee vote must be taken for the information’s release.

### **Responding to a Committee Request is not Optional**

While perhaps tempting, ignoring a committee request is generally not advisable, and will typically result in a subpoena. Ordinarily, counsel should work with committee staff to reach an agreement on the scope and timing for a response to a request in order to accommodate the committee’s legitimate oversight interests and avoid a subpoena. Whether for documents or witness testimony, again, everything is negotiable, and counsel should be confident in cooperatively negotiating the details.

Senate and House committees possess subpoena authority for the timely production of documents or witnesses, and the U.S. Supreme Court has recognized Congress’ power to hold a witness in contempt as an inherent part of its legislative authority. There are three types of contempt proceedings. The first is “inherent” contempt. Pursuant to this type of proceeding the committee can conduct a trial of the target refusing subpoena compliance. Neither the Senate nor the House has utilized inherent contempt since 1930. A second type of contempt is “criminal” or “statutory” contempt. Criminal or statutory contempt is based on an 1857 law that defines failure to obey a properly authorized subpoena as a misdemeanor, punishable by a fine and imprisonment.<sup>3</sup> The third type of contempt power, which the Senate alone wields, enforces a subpoena through civil litigation in the U.S. District Court for the District of Columbia. The court can impose sanctions for noncompliance.

Because of the complicated, costly, and potentially onerous ramifications associated with contempt proceedings, they are rare. As with ordinary civil litigation, the parties to a congressional request, even when initially at odds, are usually able to negotiate a compromise that satisfies the requesting committee’s legitimate oversight needs, while also accommodating the valid interests of the target or witness.

### **How to Handle Different Types of Requests**

**Document Requests.** Because congressional committee requests for documents can be (and often are, by design) incredibly overbroad, compliance can be extremely challenging and costly. Overbroad requests put pressure on the target to negotiate for reasonable production scope and timing. Committee staff, while often beginning with a “shotgun” approach, are nevertheless typically appreciative of counsel’s ability to help narrow the request to more accurately target the documents and witnesses the committee actually needs. Committee staff no more want to review thousands of pages of irrelevant documents than the client wants to search for and produce them.

Again, the committee may not recognize common-law privileges like the attorney-client privilege. The Federal Rules of Evidence also do not apply. Realistically, though, most committees will recognize privileges, contingent on the target’s creation of the same type of a detailed privilege log that a federal court would require.

**Staff Interviews/Depositions.** Committee staff commonly request interviews of key witnesses parallel to the document request/production process. Such interviews, typically informal, private, and not transcribed, can be both very useful for the committee to quickly get relevant information, and be an efficient way for the client to provide information from the right people without the spectacle of a more formal, public hearing. These

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<sup>3</sup> 2 U.S.C. §§ 192 and 194.

“private” interviews, however, are *not* “off the record” and whatever is said can and likely will be made public if doing so suits the committee’s interests. Like everything else, the contours and ground rules for such interviews are negotiable.

Staff may also conduct transcribed interviews, which are essentially depositions without the compulsion of a subpoena. A transcribed interview, particularly in a very political or newsworthy investigation, may be to the client’s benefit because it avoids any discrepancy about the content of the interviews. Furthermore, a deposition, under oath, is another possible outcome. Members of Congress and staff may conduct such depositions. Any statement made to a congressional committee is subject to an array of federal statutes providing for criminal penalties, including perjury, obstruction of justice, and false statements. Counsel cannot be too careful in preparing witnesses with this reality in mind.

**The Hearing.** With the advent of C-SPAN and the proliferation of cable news networks, the congressional hearing has become the predominant form of political theater in modern-day Washington. A hearing on a newsworthy oversight matter, especially if it features a high-profile witness such as a CEO, has the potential to become a made-for-TV spectacle with a standing-room-only audience and a press area full to capacity.

While the Federal Rules of Evidence don’t apply to congressional investigations, counsel for the witness can be present in the hearing room, though he or she generally cannot sit at the witness table with his or her client. This makes objecting to questions challenging. Nevertheless, a witness can invoke his or her Fifth Amendment right against self-incrimination, and thus should be prepped by counsel on how to effectively do so should that be the desired strategy.

The hearing will typically begin with the chair’s opening statements, followed by a statement by the ranking member. At the discretion of the chair, other committee members will then make their own brief opening statements, followed by the witness(es) being sworn and afforded the opportunity to make an opening statement of their own. This statement is generally limited to five minutes. A longer “statement for the record” may also be submitted for inclusion in the hearing record.

Upon the conclusion of the witnesses’ opening statement, the committee members, usually led by the chair and ranking member, will begin five-minute rounds of questions, with the majority and minority taking turns. At this point in the hearing, the witness would be well advised to remember that in a congressional hearing there is no such thing as a stupid question. The best witnesses are ones that treat each member and each question with respect. Any serious oversight hearing will include tough, even unfair, questions by members, but it is absolutely essential for the witness to maintain a demeanor that reflects an attitude of respect for the questioner and the process. While there may be occasions when a witness should, even must, firmly push back on an unfair or inaccurately premised question, this should be done in a calm, professional way.

## Conclusion

With its record number of new members and new House leadership, the 116th Congress poses new and unique challenges for potential oversight investigation targets. Political and personal maneuvering ahead of the 2020 election will, of course, also play a major role in how congressional committees proceed in 2019.

Such posturing will place many businesses and their executives on the wrong end of committee oversight requests. Those recipients must take the oversight process, and all its rules and quirks—some of which have been laid out here—seriously. Prompt, full, and professional cooperation with the committee’s reasonable requests, even with the assistance of able counsel, is time-consuming, costly, and distracting, but is the only way to effectively survive the process.