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Focus
Congressional Investigations

Congressional Oversight Investigations: What to Expect And How to Respond

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In recent weeks, new House and Senate committee chairs have confirmed pre-election speculation that a Democratic-led Congress would engage in sweeping oversight of the Bush Administration, federal contractors, and the broader business community. For companies and individuals caught up in a congressional investigation of an executive branch department or agency, or targeted for their own practices, congressional investigations pose significant legal risks.

The power of Congress to conduct oversight investigations is far-reaching. It is implicit in its constitutional power to legislate, it has been confirmed by numerous Supreme Court decisions, and it extends to any subject matter over which Congress may legislate. Congressional committees have the power to subpoena the testimony of witnesses and virtually all documents that may be pertinent to the subject matter of their inquiries, and this power may be enforced through contempt proceedings. Evidentiary privileges, such as the attorney-client privilege, rest within the discretion of the committees. In a congressional oversight hearing, there is no right of cross-examination, and none of the familiar rules of evidence apply. Even claims of constitutional rights, such as a witness' right under the Fifth Amendment to decline to give self-incriminating testimony, may be probed and tested by a committee. Courts almost never intervene, except to provide after-the-fact review, which generally affirms the broad authority of Congress.

A company or individual under the public spotlight of a congressional investigation often has a myriad of concerns, which may include threatened or actual litigation, civil enforcement action by federal or state agencies, criminal prosecution, and adverse publicity that can damage reputations and business. Actions in response to a congressional investigation carry their own risk of criminal exposure: potential prosecution for perjury, false statements or obstruction of justice, and criminal contempt proceedings for refusal to testify or to provide documents pursuant to a committee subpoena.

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Lawyers representing a target or witness in a congressional investigation must be able to work cooperatively with members and committee staff to meet their legitimate requests, yet also establish ground rules to assure fairness, protect a client's rights, and minimize risk to a client's litigation posture or reputation. Throughout the process, it is critical to take steps to assure that an individual's or organization's conduct in the investigation, and a witness' testimony before a congressional hearing, does not itself lead to criminal exposure.

Congressional Committee Powers

A congressional committee's authority to conduct oversight investigations is based upon Congress's inherent power to legislate. The Supreme Court has said that oversight investigations must serve a ''legislative purpose''—that there is ''no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress,'' nor is Congress a law enforcement agency. However, it is not necessary that actual legislation be the end result of oversight hearings. Congress has broad powers to inquire into areas that could be the subject of future legislation and to examine the operations of existing governmental programs.

As a practical matter there are few opportunities to challenge the basis of a committee's oversight inquiry. Each committee has authority to conduct oversight relating to the full range of jurisdiction delegated to it by the House or Senate. Since the jurisdictions of committees frequently overlap, a company or individual may be subject to multiple hearings on the same topic.

Responding to Subpoenas

A company's or individual's first notice of an investigation may be a written request from the chair of the committee to produce documents or to appear at a hearing or staff interview, which could be scheduled within a very short time frame. In some circumstances, a subpoena may be sent in the first instance.

Counsel should contact the committee staff promptly after a client receives a request or subpoena for documents or testimony and should direct immediate steps to preserve all potentially relevant documents.

Documents that are privileged or protected from disclosure in other contexts are not necessarily shielded from congressional inquiries, and the pendency of litigation, enforcement actions, or criminal prosecutions generally will not provide an excuse to avoid or even delay response to a congressional investigation.

Although most committees maintain that they are not obligated to recognize the attorney-client privilege or protections for confidential and sensitive information, they nonetheless will often agree to take steps to do so, except in extraordinary circumstances. The committee chair's letter or subpoena will request a privilege log and, in our experience, the staff may probe to ascertain the true nature of the documents or testimony for which privilege is claimed.

Committee staff may be willing to negotiate a narrowing of document requests or agree to limit access to documents in the case of commercially sensitive information, if disclosure of the information is not necessary for the committee's oversight purposes. But while assurances of confidentiality may be given, a company must always be aware of the possibility that confidential documents may be leaked, or included in the record at the hearing.

Contempt Proceedings

Failure to comply with a committee subpoena, or refusal of a witness at a hearing to answer a pertinent question, may result in contempt proceedings. The most commonly used procedure is a statutory criminal contempt procedure, which begins with a vote by the committee involved, followed by a report by that committee to the House or Senate and a vote of the particular house involved. The contempt is then certified by the President of the Senate or Speaker of the House to the U.S. Attorney for the District of Columbia, who brings the matter before a grand jury. Courts will not step in to enjoin a congressional subpoena. Therefore, if negotiations with committee staff and members over documents or testimony break down and the committee insists on documents or testimony which the witness declines to provide, the witness' only (but distinctly unappealing) remedy is to refuse to comply and ultimately raise his or her objections in a contempt prosecution.

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If the investigation is within the committee's jurisdiction and furthers a valid legislative purpose, and if the subject of the particular subpoena or question is pertinent (meaning reasonably related) to the subject of the investigation, a congressional vote of contempt will be upheld, unless a court finds that constitutional rights have been abridged. Most disputes are solved through negotiation before reaching this stage, but the existence and scope of the contempt power give Congress tremendous leverage in this negotiation.

Developing the Response Strategy

Soon after an initial contact from the committee, the organization or individuals must assess their vulnerability in the matter under investigation, including business, reputational, and legal considerations. Under certain circumstances, an acknowledgement of the problem and a pledge to take remedial steps may be warranted. However, an admission of fault may not be feasible for any number of reasons, such as pending or potential civil lawsuits or potential criminal exposure. A decision to ''fight'' the investigation, however, must be taken with full awareness that members of Congress will dominate the hearing and likely dictate the press coverage; there are few instances of companies or individuals emerging from congressional hearings with the press focusing on abuse by Congress rather than the subject's own conduct.

Whatever the strategy, telling the truth and establishing credibility with congressional fact-finders must be paramount goals of the target or witness in the investigation. It is always better to be candid about what one cannot say or do than to be subject to possible public criticism as uncooperative or mendacious. At the same time, the scope and timing of document production, witness interviews, and testimony should be negotiated

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with an eye toward the collateral consequences of releasing into the public realm information that may be proprietary, sensitive, embarrassing, or potentially incriminating.

Staff Interviews

Committees increasingly are requesting that potential witnesses appear before the staff prior to a formal hearing for informal interviews or, in certain cases, for on-the-record depositions under oath. Counsel should schedule full-scale preparation sessions prior to any appearance before the staff, in much the same way a witness would be prepared for a deposition in civil litigation or an interview by a prosecutor. The witness should understand that, despite the informal nature of the surroundings in such an interview—which may be conducted by relatively young congressional staffers in a small conference room filled with boxes and old furniture—the consequences of failing to answer carefully and truthfully could be criminal prosecution for false statements.

Written and Oral Statements

Committees almost always ask a witness to submit a written statement two days prior to a hearing. But, while a committee can compel the production of documents, it cannot compel the submission of a written statement. In deciding whether to submit a written statement, counsel and the witness must weigh the potential risk a written document may pose in the congressional investigation itself and in other proceedings.

Virtually all committees invite witnesses to make a short opening statement and to submit the text in advance. Again, whether or not to make an opening statement is a decision to be made, based upon a balancing of the risks versus benefits. If an oral statement is to be made, it usually should be a summary of the written testimony, but with emphasis on the key points and the key themes.

Testifying at the Hearing

A congressional hearing is an unfamiliar and unsettling atmosphere for most witnesses. The inquiry is, in part, theatre—but theatre in which a failure to speak truthfully and carefully can lead to criminal prosecution.

Members' opening statements and the questions posed to the witness may be accusatory and inflammatory. Questions may mischaracterize the facts, be completely off-base, be leading (or misleading), or simply be speeches rather than questions. With members coming in and out of the hearing room, questions may be repetitive. Unlike a trial or deposition, there are constant distractions in a hearing room, including photographers and others moving around. A lawyer must prepare the witness as he or she would for any trial—to listen carefully to the questions; to reject any incorrect foundation; and not to agree with or try to be helpful to the questioner simply to avoid conflict in this very public setting.

No individual can be compelled to give self-incriminating testimony before a congressional committee, but, if subpoenaed, he or she must appear at the hearing. Committee chairs rarely excuse a witness from appearing based on counsel's representation that he or she will assert Fifth Amendment rights. The practice instead is to force the witness to appear at the hearing, to be sworn in, and to assert his or her rights under the glare of television lights.

While it may be tempting for a witness to state brief exculpatory remarks while asserting the Fifth, he may be opening himself to claims by committee members of ''selective'' assertion of the Fifth and waiver of that right, as well as threats of contempt for refusing to answer questions based on his remarks, however brief. A witness should not try to have it both ways: a witness who asserts his or her Fifth Amendment rights should do so simply, then be quiet.

The House and Senate have varying rules that provide for committee executive sessions to protect a witness from a public spectacle that would ''defame, degrade or incriminate'' a person, ''expose an individual to public contempt'' or invasion of privacy, or disclose trade secrets. While these rules are rarely invoked, counsel should be aware of them and in appropriate cases should, at least for the record, make a request that a session be closed.

A witness has a right to consult with an attorney, but counsel's overall role is limited. The committee chair will ask that any counsel accompanying the witness be identified by the witness.

Other Tasks and Issues to Address

Prior to a hearing, intelligence gathering—not only with respect to the committee chair's specific concerns, but also those of other members of a committee—is an important part of preparation.

Any company or high-profile individual should have a press and public relations strategy, but it always should be driven by the legal strategy. How the press views the facts, legitimacy, and fairness of the congressional inquiry can have an enormous impact on the potential fallout from a hearing that targets a particular business or industry.

Consider briefing key press people before the hearing, providing the press materials in addition to the written statement on or before the day of the hearing, and making the witness or other spokespersons available to the press for an on-camera interview after the hearing. All of this, however, must be decided with an eye toward avoiding prejudice to the company or witness in subsequent legal proceedings and avoiding antagonizing Congress.

After the hearing, counsel should carefully review the hearing transcript in order to ensure that all the statements are accurate and ask to supplement the record if there is any confusion or inaccuracy. If any materials were promised to the committee during the hearing, they should be assembled and delivered.

Conclusion

Oversight investigations are an important part of the work of the U.S. Congress and its committees. However, the target of any investigation must endure an uncertain forum, where the rules are unlike any other—tempered only by the Constitution, Congress' own rules, and basic concepts of fair treatment to which most members of Congress adhere.

In light of the broad powers of the Congress, the unequal bargaining power of witnesses and committees, and the public and political nature of the proceedings, thorough and careful preparation, and advice and assistance from persons experienced in dealing with Congress and the particular committee, are essential to help minimize the legal, business, and reputational risks to any organization or individual that must respond to a congressional investigation.