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Congressional Investigations: The Subpoenas Are Coming

How often does William Safire agree with Paul Krugman? In his annual year-end prognostications for the coming year, Safire wondered what "the word most often heard in [the] 110th Congress will be (a) sellout (b) compromise (c) subpoena (d) civility (e) payback." He picked "(c)."[1] Before the November elections, Krugman wrote that the election was all about party control—for one "really important reason [that] may be summed up in two words: subpoena power."[2]

Both were right. We are going to see a substantial increase in congressional oversight hearings. Because Democrats are now in control of both houses, they will have the power to initiate investigations, to demand documents and information—both formally through the issuance of subpoenas, and informally through letter requests—to question witnesses in private and then in public hearings. The party in control also has many more resources, so they can hire additional lawyers and investigators.

As we have seen already, the first object of scrutiny will be the executive branch. But large businesses are not far behind—with government contractors and the healthcare industry at the head of the line.

Get ready!

Congressional investigative hearings date back to 1792, when a select committee of the House investigated a failed military mission into Indian territory which left over 600 troops dead. During that investigation the House requested documents from President George Washington, who complied with the request. The House determined that the War Department's failure to provide sufficient provisions caused the mission to fail.[3]

Although not expressly set forth in the Constitution, Congress's power to conduct investigations is implied as incidental to its legislative function, i.e., its power to "make all Laws which shall be necessary and proper."[4] Either as an entire body or through appropriately authorized committees, both houses of Congress have the power to investigate all matters germane to the proper exercise of any of their constitutional powers.[5] It is not necessary that legislation result from an investigation for the investigation to be proper.[6]

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Congress's investigatory power is far reaching. Virtually all congressional investigations are proper so long as they further a legitimate legislative purpose.[7] There are, however, a few limits on Congress's power. For example, it does not have the power to investigate merely for the sake of exposure or punishment.[8]

Investigations are, in most instances, initiated by congressional committees or their subcommittees. Under the rules of both houses, a congressional committee may investigate any matter within its jurisdiction, as defined by the resolution establishing the committee and describing the scope of its activities; or a committee may be delegated authority to initiate an investigation by a Senate or House resolution.[9] Special or select committees must be explicitly delegated the authority to conduct an investigation by a Senate or House resolution.[10]

A congressional committee may seek information for its investigation through voluntary measures, including questionnaires or voluntary document requests, or through informal interviews by congressional staff. Some committees also may rely on depositions taken by staff to gather information. In most instances, a committee is able to obtain the information it seeks through voluntary measures.

Congress also has the authority to compel the information it seeks through the power of subpoenas. The U.S. Supreme Court has stated that the power to subpoena documents or testimony is an "indispensable ingredient" of the legislative power of Congress.[11] As witnessed during the investigation into the use of steroids in Major League Baseball, Congress will use the power when it deems necessary.

A subpoena issued by a committee or subcommittee has the same authority as if it were issued by the entire house of Congress from which the committee was drawn.[12] Although committee rules may change the procedures for issuing subpoenas, typically a majority of the committee or subcommittee must vote to authorize the issuance of a subpoena unless that power has otherwise been delegated.[13]

A congressional subpoena will identify the name of the issuing committee or subcommittee, the date, time and place of the hearing the witness is to attend, and the documents sought to be produced. The subpoena may further specify the date and place the documents are to be delivered. Congressional subpoenas are generally served by a U.S. Marshall or committee staff.[14]

When properly served, the witness has a duty to appear and testify and produce the requested documents or present a valid reason for not doing so. The subpoena itself may be defective if it seeks information beyond the committee's jurisdiction, or it seeks information beyond the scope of the resolution authorizing the particular investigation, or it may be too vague in its request for documents, or it may be unreasonably burdensome.[15] Any reasons for a witness's refusal to comply should be timely communicated to the issuing authority; if not, the witness may run the risk that his or her objections will be deemed waived at a later contempt proceeding.[16]

Congress can enforce its investigative processes through three different contempt proceedings. The House and the Senate may cite a witness for contempt under their inherent contempt power, or they may invoke a statutory criminal contempt procedure. The Senate also has a separate civil contempt procedure available to enforce Senate subpoenas.[17]

Although Congress has not exercised its inherent contempt power in more than 60 years, there is little doubt that it has the authority to impose contempt sanctions upon those who refuse to cooperate with an investigation.[18] A person who refuses to provide information or cooperate with an investigation is brought before the Sergeant at Arms of the respective house of Congress and is held in custody until a contempt hearing can be held.[19] If found in contempt, the witness is subject to imprisonment for a designated period or until he or she purges the contempt, although an individual cannot be imprisoned beyond the duration of the congressional session.[20]

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In response to the cumbersome and time-consuming nature of this procedure, in 1857 Congress enacted a criminal contempt statute.[21] Codified today at §§192 and 194 of Title 2 of the United States Code, the contempt statute has effectively replaced the inherent contempt procedure. Under this statute:

> [e]very person who having been summoned as a witness by the authority of either house of Congress to give testimony or to produce papers upon any matter under inquiry before either house, or any joint committee established by a joint or concurrent resolution of the two houses of Congress, or any committee of either house of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.[22]

A contempt citation must be approved by the subcommittee, if there is one, and by the full committee, and by the full House or Senate or by the presiding officer if the Congress is not in session.[23] Once a citation has been certified by "the President of the Senate or the Speaker of the House," it is referred to the appropriate U.S. attorney, "whose duty it shall be to bring the matter before the grand jury for its action."[24]

In a criminal contempt action the prosecution must prove the pertinency of the question asked or documents sought and the willfulness of the witness's refusal to answer or refusal to produce. Whether a question or document is pertinent is a matter of law for determination by the court.[25] Pertinency is considered to be broader than the concept of relevancy, and it is relatively rare for a question to be declared non-pertinent.[26]

The Senate has an additional contempt procedure at its disposal. Pursuant to §288d of Title 2 of the United States Code and §1365 of Title 28, upon application from the Senate, or any authorized committee or subcommittee, the U.S. District Court for the District of Columbia may issue an order directing that an individual comply with a Senate subpoena. If after receiving the order the individual still refuses to comply, a contempt proceeding may be commenced by order to show cause before the court to determine why the individual should not be held in contempt. The proceeding is tried by the court in a summary manner, and the court may impose sanctions for the purpose of compelling compliance.[27]

The Role of Counsel

A congressional investigation is not a trial; and you should not assume that the protections afforded to participants in trial and pretrial processes (either criminal or civil) will be the same as those afforded in a congressional investigation and hearing. The rights afforded in the congressional forum, though perhaps more limited, are nonetheless significant.

The role of counsel in the process is crucial.[28] For most clients, a congressional investigation is not a happy event. Whatever may or may not be accomplished for the public good, rarely will anything good come to the client. This is a forum controlled almost entirely by the members and their staffs. The hearings are often played out in public—part inquiry, part press release, part morality play, and sometimes public flogging. Sometimes the witnesses are used simply as props to illustrate conflicting political or policy perspectives.

Assuming that the inquiry is properly authorized, it will be difficult to avoid altogether. So the task of counsel will be to guide his or her client through unfamiliar waters and to ameliorate possible negative fallout. In this endeavor, the staff of the committee is central. In the pre-hearing process, they are the ones who, in the first instance, will be deciding whether to limit requests for documents and for witnesses. They will be the ones deciding whether to seek interviews with witnesses and, if so, with whom. And they are the ones questioning those witnesses. In short, they will be the ones who will be shaping the body of information upon which the members will rely once the hearing begins.

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So, it is important to establish and maintain a good working relationship with the staff. That, in turn, requires candid, straightforward and frequent communications. To the extent possible given other constraints (e.g., an ongoing criminal investigation, questions of privilege), it is important that your client be perceived by the staff as being an aid, not an impediment, to their doing their jobs. With a good working relationship, it is possible to have a reasonable input into narrowing requests for information and also about who the staff might want to interview.

If there are to be interviews (or depositions) before the hearing, it is very important that the witness be fully prepared. Don't be fooled by the sometimes relaxed setting of those pre-hearing interviews. They are deadly earnest. You should prepare your witness with the same level of intensity and seriousness that you would bring to preparation before an appearance in the grand jury or at trial. The questioner (and his or her task) must be treated with the utmost respect.

The Hearing

The preparation for the hearing itself is another order of magnitude. Most witnesses, even high-level corporate executives ordinarily comfortable in public, will not have experienced anything like it. Some will have watched highly publicized hearings on television. But there is a world of difference between watching a bullfight and being the bull.

Your client will have to be prepared for questions of every variety, from the most probing to the most far-fetched. Some will be more in the nature of speeches by the members than questions. Some will be in the "when-did-you-stop-beating-your-wife" genre. If, as is likely, there are partisan viewpoints on the subject under investigations, there might be some softball questions, as well as hardball ones. Sometimes the television lights will be on; sometimes off. The nature of the hearing might change accordingly.

Your client will have to endure all this with good grace, at the same time answering questions honestly and forthrightly. Preparation for the testimony, then, might require the skills not simply of lawyers (e.g., how to recognize and deal with the questions that may be without foundation, how to recognize and deal with questions of privilege, etc.), but, depending on the issues involved, media consultants, public relations experts and the like.

Before the hearing begins, you may have the opportunity to submit written statements. Committees often ask for these. And even if they don't, you may want to ask to do so. An obvious benefit in submitting a statement is the opportunity to tell a story, in the individual's or company's own words, and to establish the themes on which the witness will testify. On the other hand, a written statement provided in advance may give members an opportunity to prepare a more effective attack. There is also the risk of the written statement being used against the client in a subsequent proceeding.

In addition, counsel should be aware that the House and Senate have rules that provide for hearings to be held in private executive sessions if necessary to protect a witness from questioning that would "defame, degrade or incriminate" him or her, "expose an individual to public contempt," disclose trade secrets, or improperly invade one's privacy.[29] Although these rules are seldom employed, if circumstances warrant, counsel should make a request for an executive session.

During the hearing, you will not have the right to cross-examine witnesses who might say things harmful to your client's interest. That does not mean you are entirely powerless. Perhaps there are members whose policy or political perspectives are closer to your client's and who may be willing to probe. If so, you could seek the opportunity to provide information, and possibly cross-examination material, to that member or to his or her staff. You won't be asking the questions, but it's better than nothing.

When the hearing ends, you should ask to review the hearing transcript. You and your client should make sure that all the statements are accurate and should ask to supplement the record to correct any inaccuracies.

Testimonial Privileges

Finally, a word about testimonial privileges.

A witness before a congressional committee retains his or her Fifth Amendment privilege against self-incrimination and cannot be compelled to incriminate him or herself without a grant of immunity. The privilege against self-incrimination also extends to the production of subpoenaed documents if the act of production itself would

be incriminating. Although no special formula is required to invoke Fifth Amendment protection, if a witness is asked an incriminating question, the invocation of the privilege should be made clear. Generally, witnesses are not permitted to make blanket assertions of the privilege. If subpoenaed, they must appear before the committee and bring with them any subpoenaed documents. The witness is often required to invoke the privilege in response to each question or request for an incriminating document.[30]

If a witness refuses to testify by invoking the Fifth Amendment, Congress can compel testimony by granting immunity. Pursuant to §6002 and 6005 of Title 18 of the United States Code, by majority vote of either house of Congress, or a two-thirds vote of a committee, Congress may request a federal court to grant the witness immunity so that he or she may testify.[31]

The First and Fourth Amendments also protect an individual in a congressional hearing. The Supreme Court has held in discussing a congressional hearing that "where first amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[32] Thus, while the First Amendment may provide some protection from being forced to testify, that protection is not absolute. With respect to the Fourth Amendment, the Supreme Court has stated that the protections against unreasonable searches and seizures apply to congressional investigations.[33]

Whether common law privileges, such as the attorney-client privilege, apply in the course of a congressional investigation is not as clear. Congress has often recognized these privileges. Nonetheless, members, their staffs and congressional sources also say that whether the privilege is recognized is within the sound discretion of the House or Senate or committee.[34] As part of this discretion, committees will often make their own determination whether the claim of privilege is valid and balance the need for the information against the potential injury to the witness.[35]

The applicability of the attorney-client privilege was raised in a 1986 investigation by the Subcommittee on Asian and Pacific Affairs of the House Committee on Foreign Relations. Members of the subcommittee questioned two attorneys concerning real estate investments allegedly made on behalf of former Philippine President Ferdinand Marcos. During the course of questioning, the attorneys refused to answer questions on the grounds of attorney-client privilege. The subcommittee rejected the invocation of the privilege. The full House voted to hold the attorneys in contempt on the grounds that the privilege claim would not have been upheld in court, and referred the matter to the U.S. Attorney for prosecution. The matter, however, was not prosecuted because two months later the attorneys answered the questions they had previously refused to answer.[36] So the matter was never litigated in court.

To date, there has been no Supreme Court decision definitively determining whether the attorney-client privilege is applicable in congressional proceedings.[37] In 1874, a case in the Supreme Court of the District of Columbia presented the issue; but it was not decided. The court there upheld the House's authority to jail a witness for contempt after he refused to answer questions which, he claimed, sought privileged information. The court, however, neither examined nor discussed the applicability of the privilege. Instead, it simply held that the House had jurisdiction to punish the witness for contempt, thereby leaving the issue unresolved.[38]

In short, although a validly asserted privilege claim may be recognized in congressional investigations and hearings, it may not be; and whether it is or not will in all likelihood be decided by the committee itself. If it is anticipated that the attorney-client or other common law testimonial privileges will be asserted, it is advisable to raise the issue with the members of the committee or staff and attempt to work out an agreement regarding any claims of privilege beforehand.

Representing clients in congressional hearings requires counsel to combine the skills of a trial lawyer, a negotiator, a policy analyst and a political analyst, among others. If the new majority party is true to its word, many more of us are going to learn how challenging, and satisfying, a task this is.

1. William Safire, The Office Pool, 2007, N.Y. TIMES, Dec. 29, 2006, at A25.

2. Paul Krugman, One-Letter Politics, N.Y. TIMES, Oct. 16, 2006, at A19.

3. J. Richard Broughton, Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?, 21 WHITTIER L. REV. 797, 803-04 (2000).

4. U.S. CONST. art. 1, §8, cl. 18; *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959); *Watkins v. United States*, 354 U.S. 178, 187 (1957).

5. *McGrain v. Daugherty*, 273 U.S. 135, 172-74 (1927); *Barenblatt*, 360 U.S. at 111-12; *United States v. Bryan*, 72 F. Supp. 58, 61-62 (D.D.C. 1947), judgment aff'd on other grounds, 167 F.2d 241 (D.C. Cir. 1948).

6. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503-506 (1975).

7. *McGrain*, 273 U.S. at 172-74.

8. *Watkins*, 354 U.S. at 187.

9. House of Representatives Rule XI(2)(m) and Senate Rule XXVI(1). For example, Senate Rule XXVI(1) provides:

> 1. Each standing committee, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures out of the contingent fund of the Senate as may be authorized by resolutions of the Senate. Each such committee may make investigations into any matter within its jurisdiction, may report such hearings as may be had by it, and may employ stenographic assistance at a cost not exceeding the amount prescribed by the Committee on Rules and Administration. The expenses of the committee shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman.

10. Congressional Oversight Manual, Report for Congress, Congressional Research Service, at CRS-33 (Oct. 21, 2004).

11. *Eastland*, 421 U.S. at 505.

12. *Exxon Corp. v. Federal Trade Commission*, 589 F.2d 582, 592 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979).

13. Congressional Investigations: Subpoenas and Contempt Power, Report for Congress, Congressional Research Service, at CRS-7 (April 2, 2003) (citing House of Representatives Rule XI(2)(m) and Senate Rule XXVI(1)).

14. Id. at CRS-7-8.

15. See, e.g., *United States v. Groves*, 18 F. Supp. 3, 4-5 (D.C. Pa.1937).

16. See *Yellin v. United States*, 374 U.S. 109, 123 n. 8 (1963).

17. Congressional Oversight Manual at CRS-36-37, supra note 10.

18. Id. See also *Watkins*, 354 U.S. at 206-07; *Jurney v. MacCracken*, 294 U.S. 125, 151 (1935); *In re Chapman*, 166 U.S. 661, 671-72 (1897); *Anderson v. Dunn*, 19 U.S. 204, 232-34 (1821).

19. Congressional Oversight Manual at CRS-37, supra note 10. See also *Jurney*, 294 U.S. at 151; *In re Chapman*, 166 U.S. 661 at 671-72.

20. *In re Application of the United States Senate Permanent Subcommittee on Investigations*, 665 F.2d 1232, 1238 n. 27 (D.C. Cir. 1981).

21. Congressional Oversight Manual at CRS-37, supra note 10.

22. 2 U.S.C. §192.

23. Congressional Oversight Manual at CRS-37, supra note 10.

24. 2 U.S.C. §194 (setting forth the procedure for a contempt certification).

25. *Braden v. United States*, 365 U.S. 431, 435-37 (1961), rehearing denied, 365 U.S. 890 (1961). See also 2 U.S.C. §192 (applies to refusal to answer "any question pertinent to the question under inquiry").

26. *United States v. Orman*, 207 F.2d 148, 153 (3d Cir. 1953).

27. 2 U.S.C. §288d and 28 U.S.C. §1365. This procedure cannot be used against federal government officials acting in their official capacities. See 28 U.S.C. §1365(a).

28. Many of the comments in this and the next section are based on the personal experience of one of the authors and on the writings and experience of partners of Arnold & Porter's Washington D.C. office, who have been engaged in representing clients before congressional bodies for decades. See, especially, Martha L. Cochran and Robert S. Litt, Congressional Oversight Investigations: What to Expect and How to Respond, BNA's Corporate Counsel Weekly, Vol. 22, No. 4 (Jan. 24, 2007); James F. Fitzpatrick, Enduring a Congressional Investigation, 18 NO. 4 Litigation 16 (1992).

29. House of Representatives Rules XI(2)(g)(1) and (2)(k)(5), and Senate Rule XXVI(5)(b)(3).

30. The Supreme Court has stated that privilege against self-incrimination can be waived if not invoked; thus it is important for a witness to invoke the privilege to any and all potentially incriminating questions. See *Rogers v. United States*, 340 U.S. 367, 370-71 (1951), rehearing denied, 341 U.S. 912 (1951).

31. 18 U.S.C. §§6002, 6005. The statute authorizes a grant of "use immunity," which immunizes a witness against the use of his compelled testimony and evidence derived therefrom in a subsequent criminal proceeding. This is very different from "transactional immunity," which accords immunity from prosecution for an offense to which the compelled testimony relates. See *Kastigar v. United States*, 406 U.S. 441, 453-54 (1972).

32. *Barenblatt*, 360 U.S. at 126.

33. *Watkins*, 354 U.S. at 188 ("Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure."). See also *In re Chapman*, 166 U.S. at 668-69; *United States v. Fort*, 443 F.2d 670, 678 (D.C. Cir. 1970), cert. denied, 403 U.S. 932 (1971).

34. Congressional Oversight Manual at CRS-40-41, supra note 10.

35. Id.

36. See Glenn A. Beard, Note, Congress v. The Attorney-Client Privilege: A "Full and Frank" Discussion, 35 AM. CRIM. L. REV. 119, 126-27 (1997); Jonathan P. Rich, The Attorney-Client Privilege in Congressional Investigations, 88 Colum. L. Rev. 145, 145-46 (1988).

37. Congressional Oversight Manual at CRS-40, supra note 10.

38. *Stewart v. Blaine*, 1 MacArth. 453, 1874 WL 17266 (D.C. 1874).