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118th Congress: Investigative Tools And Potential Defenses

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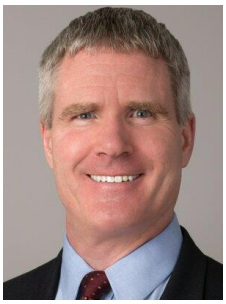

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More so than litigation or executive branch investigations, congressional investigations often arise with little warning and immediately attract the media spotlight.

An understanding of Congress' investigative and enforcement authority, as well as available defenses and common mistakes, is critical to navigating these inquiries and preparing effective responses.

As the business of the U.S. House of Representatives and U.S. Senate is now underway, we have a fuller picture of lawmakers' plans to investigate a range of issues.

This two-part article lays out what companies and individuals can expect with regard to congressional investigations in the 118th Congress. Part 1 discussed new investigative priorities and rule changes in both the House and the Senate. Part 2 examines Congress' broad authorities in this arena, and potential defenses in the case of an investigation.

Investigatory Tools of Congressional Committees

Congress' power to investigate is inherent in its authority to "enact and appropriate under the Constitution," as the U.S. Supreme Court articulated in its 1959 Barenblatt v. U.S. decision.[1]

While Congress' power to investigate must further a valid legislative purpose,[2] the term "legislative purpose" is understood broadly to include gathering information not only for the purpose of legislating, but also for overseeing governmental matters and informing the public about the workings of government.[3]

Congress has many investigatory tools at its disposal, including requests for information, interviews, depositions, hearings, referrals to the executive branch for prosecution, and subpoenas.

If these methods fail, Congress can use civil enforcement or contempt authorities to try to compel the

production of documents or testimony.

Requests for Information

Any member of Congress may issue a request for information to an individual or entity.

Absent the issuance of a subpoena, responding to such requests is voluntary as a legal matter.

Interviews

Interviews also are voluntary. They are led by committee staff, who may take notes if the interview is not transcribed.

Although interviews are typically not conducted under oath, false statements to congressional staff can be criminally punishable as a felony under Title 18 of the U.S. Code, Section 1001.

Depositions

Depositions can be compulsory. They are transcribed and taken under oath. As such, depositions are more formal than interviews.

Given recent rule changes that have made the deposition process more efficient, congressional staff in the House are expected to use depositions more frequently going forward.

Hearings

Testimony at hearings is typically conducted in a public session led by the members themselves.[4]

Most akin to a trial in litigation — though without many of the procedural protections applicable in judicial proceedings — congressional hearings are often high-profile and require significant preparation to navigate successfully.

Executive Branch Referrals

Congress also has the power to refer its investigatory findings to the executive branch for criminal prosecution.

After a referral from Congress, the U.S. Department of Justice may charge an individual or entity with making false statements to Congress, obstruction of justice or destruction of evidence.

Importantly, the executive branch retains the discretion to decide whether to prosecute.

Subpoena Power

Congress will typically seek voluntary compliance with its requests. But if requests are met with resistance, Congress may compel disclosure of information or testimony through the issuance of a subpoena.[5]

There is no explicit constitutional provision granting Congress the right to issue subpoenas,[6] but the

U.S. Supreme Court has recognized that it is "a legitimate use by Congress of its power to investigate," as articulated in its 1975 Eastland v. U.S. Servicemen's Fund decision.[7]

Congressional subpoenas are subject to few legal challenges[8] and are almost never subject to preenforcement review.[9]

The authority to issue subpoenas is initially governed by the rules of the House and Senate, which delegate further rulemaking to each committee.[10]

While nearly every standing committee in the House and Senate has the authority to issue subpoenas, the specific requirements for issuing a subpoena vary by committee.

For example, several House committees authorize the committee chair to issue a subpoena unilaterally and require only that notice be provided to the ranking member.

Others, however, require approval of the chair and ranking member, or, upon the ranking member's objection, require approval by a majority of the committee.

Contempt of Congress

Failure to comply with a subpoena can result in contempt of Congress or a civil enforcement action.

Although Congress does not frequently resort to its contempt power to enforce its subpoenas, it has three potential avenues for seeking to implement its authority to compel testimony and production of documents.

Inherent Contempt Power

The first, and least relied upon, form of compulsion is Congress' inherent contempt power.

To exercise this power, the House or Senate must pass a resolution and then conduct a full trial or evidentiary proceeding, followed by debate and — if contempt is found to have been committed — imposition of punishment.[11]

Cumbersome, inefficient and potentially fraught with political peril for legislators, it is unsurprising that Congress has not used its inherent contempt power since 1934.[12]

Statutory Criminal Contempt Power

Congress also possesses statutory authority to refer recalcitrant witnesses for criminal contempt prosecutions in federal court.

Congress enacted this criminal contempt statute as a supplement to its inherent authority.[13] Under the statute, a person who refuses to comply with a subpoena is guilty of a misdemeanor and subject to a fine and imprisonment.[14]

While Congress initiates an action under the criminal contempt statute, it is the executive branch that prosecutes it, at its discretion.[15]

Civil Enforcement Authority

Finally, Congress may seek civil enforcement of its subpoenas, which is often referred to as civil contempt.

The Senate's civil enforcement power is expressly codified and authorizes the Senate to seek enforcement of legislative subpoenas in a U.S. district court.[16]

In contrast, the House does not have a civil contempt statute, but — as one of us wrote in a 2015 Cornell Journal of Law and Public Policy article — most courts have held that it may pursue a civil contempt action "by passing a resolution creating a special investigatory panel with the power to seek judicial orders or by granting the power to seek such orders to a standing committee."[17]

Defenses to Congressional Inquiries

While potential defenses to congressional investigations are limited, they are important to understand.

Jurisdiction and Legislative Purpose

A congressional investigation is required to relate to a legislative purpose, and must also fall within the scope of legislative matters assigned to the particular committee at issue.

In a challenge based on these defenses, a party may argue that the inquiry does not have a proper legislative purpose, that the investigation has not been properly authorized, or that a specific line of inquiry is not pertinent to an otherwise proper purpose within the committee's jurisdiction.

Because courts generally interpret legislative purpose broadly, these challenges can be an uphill battle.

Constitutional Defenses

Constitutional defenses under the U.S. Constitution's First and Fifth Amendments may be available in certain circumstances.

While rarely litigated, these defenses should be carefully evaluated by the subject of a congressional investigation.

As held in Barenblatt, when an investigative target invokes a First Amendment defense, a court must engage in a "balancing ... of competing private and public interests at stake in the particular circumstances shown."[18]

The Supreme Court further noted that the critical element in this balancing is the "'existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness.'"[19]

Though the Supreme Court has never relied on the First Amendment to reverse a criminal conviction for contempt of Congress, it has recognized that the First Amendment may restrict Congress in conducting investigations.[20]

Courts have also recognized that the First Amendment constrains judicially compelled production of

information in certain circumstances,[21] so it would be reasonable to contend that it limits congressional subpoenas to the same extent.

The Fifth Amendment's privilege against self-incrimination is available to witnesses — but not entities — who appear before Congress.[22]

The right generally applies only to testimony, and not to the production of documents,[23] unless those documents satisfy a limited exception for testimonial communications.[24]

Congress can circumvent this defense by granting transactional immunity to an individual invoking the Fifth Amendment privilege.[25] This allows a witness to testify without the threat of a subsequent criminal prosecution based on the testimony provided.

Attorney-Client Privilege and Work-Product Defenses

Although House and Senate committees have taken the position that they are not required to recognize the attorney-client privilege, in practice the committees generally acknowledge the privilege as a valid protection.

Notably, in Trump v. Mazars USA LLP, the Supreme Court in 2020 for the first time acknowledged in dicta that the attorney-client privilege is presumed to apply in congressional investigations.[26]

The work-product doctrine protects documents prepared in anticipation of litigation. Accordingly, it is not clear whether or in what circumstances the doctrine applies to congressional investigations, as committees may argue that their investigations are not the type of adversarial proceeding required to satisfy the anticipation-of-litigation requirement.[27]

Top Mistakes and How to Prepare

Congressional investigations can be difficult to navigate. Some of the more common mistakes include those related to:

- Facts — a failure to identify and verify the key facts at issue;
- Message — a failure to communicate a clear and compelling narrative;
- Context — a failure to understand and adapt to underlying dynamics driving the investigation;
- Concern — a failure to timely recognize the attention and resources required to respond;
- Legal — a failure to preserve privilege and assess collateral consequences;
- Rules — a failure to understand the rules of each committee, which can vary significantly; and
- The big picture — a failure to consider how an adverse outcome can negatively affect other legal and business objectives.

Successfully responding to a congressional investigation requires mastery of the facts at issue, an

effective crisis communications plan, a keen understanding of how congressional investigations differ from traditional litigation and executive branch investigations, and careful consideration of collateral political events.

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[1] Barenblatt v. United States, 360 U.S. 109, 126 (1959). See also https://constitution.congress.gov/browse/essay/artI-S8-C18-7-3/ALDE_00013659/.

[2] See Wilkinson v. United States, 365 U.S. 399, 408-09 (1961); Watkins v. United States, 354 U.S. 178, 199-201 (1957).

[3] Michael D. Bopp, Gustav W. Eyler, & Scott M. Richardson, Trouble Ahead, Trouble Behind: Executive Branch Enforcement of Congressional Investigations, 25 Corn. J. of Law & Pub. Policy 453, 456-57 (2015).

[4] Id. at 456-57.

[5] Id. at 457.

[6] Id.

[7] Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 (1975).

[8] Bopp, supra note 3, at 458.

[9] Id. at 459. The principal exception to this general rule arises when a congressional subpoena is directed to a custodian of records owned by a third party. In those circumstances, the Speech or Debate Clause does not bar judicial challenges brought by the third party seeking to enjoin the custodian from complying with the subpoena, and courts have reviewed the validity of the subpoena. See, e.g., Trump v. Mazars, 140 S. Ct. 2019 (2020); Bean LLC v. John Doe Bank, 291 F. Supp. 3d 34 (D.D.C. 2018).

[10] Bopp, supra note 3, at 458.

[11] Id.

[12] Id. at 466.

[13] Id. at 461.

[14] See 2 U.S.C. §§ 192 and 194.

[15] Bopp, supra note 3, at 462.

[16] See 2 U.S.C. §§ 288b(b), 288d.

[17] Bopp, supra note 3, at 465. A panel of the U.S. Court of Appeals for the D.C. Circuit ruled in August of 2020 that the House may not seek civil enforcement of a subpoena absent statutory authority. Committee on the Judiciary of the United States House of Representatives v. McGahn, 951 F.3d 510 (D.C. Cir. 2020). On rehearing en banc, the D.C. Circuit reversed, concluding that "the Committee on the Judiciary of the House of Representatives has standing under Article III of the Constitution to seek judicial enforcement of its duly issued subpoena." Committee on Judiciary of United States House of Representatives v. McGahn, 968 F.3d 755, 760 (D.C. Cir. 2020) (en banc).

[18] Barenblatt v. United States, 360 U.S. 109, 126 (1959).

[19] Id. at 126-27.

[20] See id.

[21] See, e.g., Perry v. Schwarzenegger, 591 F.3d 1147, 1173 (9th Cir. 2009).

[22] See Quinn v. United States, 349 U.S. 155, 163 (1955).

[23] See Fisher v. United States, 425 U.S. 391, 409 (1976).

[24] See United States v. Doe, 465 U.S. 605, 611 (1984).

[25] See 18 U.S.C. § 6002; Kastigar v. United States, 406 U.S. 441 (1972).

[26] See Mazars, 140 S. Ct. at 2032.

[27] See In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 924 (8th Cir. 1997).