Point of Order: An Insider's Guide to Congressional Investigations

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POINT OF ORDER:
AN INSIDER’S GUIDE TO
CONGRESSIONAL INVESTIGATIONS

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INTRODUCTION

Much of the public’s understanding of congressional hearings was shaped by Senator Joseph McCarthy’s 1951 hearings into the United States Army. They were the first televised congressional hearings in American history, and the image of an overbearing and verbally abusive Senator shouting over witnesses and repeatedly screaming the catch-phrase “point of order” left an indelible impression on the American public.

Though today’s hearings have little of McCarthy’s bombast, they are public, often televised, and rarely offer a positive outcome for the witnesses called to testify. Depending on the committee, congressional investigations and oversight hearings can be a mixture of political theater, investigative tool, forum for policy development, and soap box. Merely being forced to testify under oath can permanently scar the public’s perception, resulting in damaging economic consequences for companies and professional consequences for individuals called to testify.
In recent years, Congress has turned its attention from rooting out communists to investigating decisions made in the corporate boardroom. Investigations in recent years have focused on the Enron debacle, the Ford/Firestone tire recall, abusive tax shelters, money laundering, oil pipeline safety, tax abuse by corporations and government contractors, and abuses in the credit counseling industry.

Although a company cannot control whether it will be ensnared in a congressional investigation, it can be prepared and respond effectively. Organizations that retain qualified counsel exponentially increase the possibility of a positive outcome during a congressional hearing or investigation. In addition to being able to thoroughly investigate the facts at issue and understanding the rules, players, and processes of the committee conducting the hearing, knowledgeable counsel will know how to help a target develop a nuanced response strategy that:

- Unambiguously tells its side of the story
- Minimizes any collateral damage from a public hearing
- To the greatest extent possible, prevents the dissemination of privileged, confidential or propriety information.

This CONTEMPORARY LEGAL NOTE provides some insight into the different phases of a congressional investigation; the critical differences between criminal proceedings and congressional investigations; the legal devices committees and subcommittees utilize in their investigations; and the basic rules of congressional hearings.
I. CURRENT INVESTIGATIONS AGENDA

The general consensus in Washington is that very few topics falling under the jurisdiction of House and Senate oversight committees will be left unexamined. As The Washington Post correctly noted when assessing the potential for congressional investigations in the 110th Congress, “Every company that does business with the government could feel the impact, but contractors that benefited most from work in Iraq and Afghanistan, from homeland security initiatives or from Hurricane Katrina are especially likely to be under the microscope. Big ticket weapons programs are expected to garner special attention [as well].”

- Senator Carl Levin, Chairman of the Senate Permanent Subcommittee on Investigations, will aggressively investigate tax shelters, excessive credit card fees and interest rates as well as the role commodity speculation plays in the high cost of oil.

- Speaker of the House Nancy Pelosi, Senate Majority Leader Harry Reid, and various committee heads “are planning several investigations into the Administration and its relationship with companies that the federal government hired or regulated.”

- Senator Max Baucus, Chairman of the Senate Finance Committee, will conduct vigorous oversight of rising health care costs across the country.

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4John Stanton, Democrats Think Big on Oversight, ROLL CALL, Nov. 20, 2006.
• Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, will investigate the “President’s program of warrantless wiretapping.”

• Rep. Bart Stupak, Chairman of the House Energy and Commerce Oversight and Investigations Subcommittee, will examine the unregulated oil futures market, gasoline price gouging, online pharmaceutical sales and food safety, among other issues.

• Rep. Henry Waxman, Chairman of the Oversight and Government Reform Committee and perhaps the House’s most dogged investigator, plans to “review whether there’s profiteering going on, war profiteering or any other abuse by major corporations, of American citizens and consumers, whether they be pharmaceutical companies or the oil companies.”

However, no subject will garner more congressional investigations than Iraq contracting. Four of the most experienced and tenacious Committee Chairmen, Rep. John Dingell, Senator Joseph Lieberman, Rep. Waxman, and Senator Leahy, intend to investigate post-invasion contracts awarded in Iraq. Leahy bluntly stated that he will investigate the “accountability over the use and abuse of billions of taxpayers’ dollars sent as development aid to Iraq.”

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10U.S. Senator Patrick Leahy, Ensuring Liberty Through Checks and Balances,
Since congressional hearings occur in an open forum and are often televised, witnesses are put in the unenviable position of publicly defending themselves – or their organizations – from a representative making accusations of corruption or criminal wrongdoing.

Who can forget the image of Mark McGuire attempting to dodge questions regarding his alleged use of steroids as a major league baseball player? Because the accusation was made in a public forum, whether he used or did not use steroids became irrelevant. His reputation and his home run record are tarnished forever, as is evidenced by his recent rejection for induction to the Baseball Hall of Fame, because of the accusations made at that congressional hearing and his inability to respond in an appropriate manner.

II. CONGRESS’S POWER TO INVESTIGATE

Congress’s power to investigate is plenary. Thus, Congress and its committees and subcommittees have enormous power to get information from private citizens and organizations. Typically, Congress uses its investigative power to aid legislative functions such as passing legislation, overseeing government agencies, investigating regulated activities, or confirming government appointees such as Ambassadors and Supreme Court Justices.\(^{11}\)

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\(^{11}\)The Senate is the only branch of Congress with the authority to conduct confirmation hearings.
Congress and its committees and subcommittees have several legal instruments at their disposal when conducting investigations. All committees can ask for voluntary cooperation from subjects of the investigation. Some committees, such as the Senate Homeland Security and Government Affairs Committee and the House Oversight and Government Reform Committee have the power to issue subpoenas *duces tecum* for documents, subpoena *ad testificandum* which require testimony from individuals at a deposition or a congressional hearing, grant immunity in certain situations, and hold witnesses in contempt.

### III. BEGINNING AN INVESTIGATION

Congressional committee hearings may be broadly classified into four types: legislative, oversight, investigative, and confirmation.\(^\text{12}\) Members of Congress may initiate investigations when they discover or identify issues that require new or updated legislation or congressional oversight. Topics for investigations might come from any number of sources, such as an exposé in a press article, a tip from a whistleblower, or notification from the Government Accountability Office. While some members of Congress do not publicize their investigatory activities, others will issue press releases announcing their call for an investigation. Thereafter, when required by rule, committees or subcommittees vote to launch an

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investigation, and staff investigators will begin researching the issue to determine the pertinent facts and witnesses.

IV. “CHAIRMAN’S LETTERS” AND SUBPOENAS _DUCES TECUM_

Once the staff identifies relevant witnesses, the committees will request documents related to the investigation. They can do so in two different manners. One method, called a “Chairman’s Letter,” is a voluntary request. The second method is issuance of a subpoena _duces tecum_, which requires documents to be produced by a specific date under penalty of law.

Receipt of a “Chairman’s Letter” or subpoena _duces tecum_ is generally how an organization first learns that it is involved in a congressional investigation. It is also the point when fear and concern often arise. Because involvement in such investigations is a rare occurrence, most organizations do not have contingency plans to assess and respond to congressional subpoenas. This can place the organization's staff in the difficult position of trying to determine, on their own, what constitutes a responsive document while rushing to meet an impending deadline.

A qualified lawyer with experience in congressional investigations can greatly assist an organization in this situation. Such a lawyer can:

- Build a good-faith working relationship with congressional staff
- Negotiate with staff investigators and often limit the scope of the subpoena
- Get an extension on the subpoena’s return date and effectuate “rolling productions” of requested documents if necessary
- Allow the organization to focus on running its day-to-day business

The lawyer also can assist the organization by taking over primary responsibility for the response, gathering the appropriate documents, reviewing them for substance, cataloguing them, and delivering them to staff investigators.

V. APPLICABILITY OF THE ATTORNEY-CLIENT PRIVILEGE

The doctrine of separation-of-powers has a substantial impact on two basic legal principles: the attorney-client privilege and the work-product doctrine. Simply stated, the common law rules of the judiciary do not apply to the legislative branch. Specifically, neither the attorney-client privilege nor the attorney work-product doctrine has any basis in law with respect to the legislative branch of government.

The applicability of attorney-client privilege and the work-product doctrine rests solely in the discretion of the congressional committee, regardless of whether or not a court would uphold the claim. While most congressional committees will respect the attorney-client and work-product protections, it is by no means guaranteed that they will do so. In fact, there have been numerous occasions where Congress has refused to respect these protections.
VI. INTERVIEWS

Unfortunately, complying with a “Chairman’s Letter” or subpoena ducès tecum is often not the end of the congressional inquiry. On the contrary, it is often only the beginning. Based on a review of the documents, staff investigators will refine their list of the organizational representatives they would like to interview. If the organization hires a lawyer, the staff investigator will often informally request through the lawyer that specific witnesses make themselves available for interviews.

Arguably, the single most important part of any congressional investigation for an organization is the interview. How an organization and its witnesses respond will directly impact the tenor of any subsequent hearings. Furthermore, if the congressional staff believe that an organization is acting in good faith, this greatly increases the likelihood that the congressional representative conducting the hearing will also. It is imperative that the organization, its staff, and legal counsel establish a good-faith working relationship with the congressional staff in order to negotiate the potential scope of the interview and to maximize the protection the committee might afford to trade secrets or privileged information.

Likewise, all witnesses must work with the lawyer to prepare thoroughly before participating in these interviews. The lawyer must have in-depth knowledge of all of the facts pertinent to the congressional investigation and understand each witness’s knowledge of those facts. If the lawyer does his or her
job appropriately, he or she will be in a position to determine whether the organization or the organization’s witnesses have any potential criminal and/or civil liability that may be exposed in the interview. If there is possible criminal and/or civil exposure, the organization may want to decline to participate in the interview, a decision which must be determined on a case-by-case basis. To determine if there is possible civil or criminal exposure, organizations should have the lawyer conduct a limited internal investigation into the subject area of the congressional hearing. By having the lawyer conduct the internal investigation, any information discovered during the process will be protected by the attorney-client privilege and the attorney work-product doctrine thereby keeping it from the reach of criminal prosecutors and civil litigants.

Should the organization decide to participate in an interview, there are two ways in which it may occur: the voluntary interview or the deposition. The goals of both are the same – to gather information relating to the congressional investigation – but the methods with which they are undertaken are markedly different.

**VII. THE DIFFERENCES BETWEEN A VOLUNTARY INTERVIEW AND A DEPOSITION**

The voluntary interview can be more relaxed and less formulaic than a deposition. Often, the individuals present include the staff investigator(s), the witness, and the witness's attorney(s). The staff investigator will ask questions
related to the investigation and the witness should respond truthfully. The witness's attorney is there to advise the witness during the interview; ensure that the staff investigator does not ask inappropriate questions; make sure the witness answers all questions appropriately; and take accurate notes detailing the staff investigator's questions and the witness's answers.

The deposition is similar to the informal interview, but is taken under oath and a stenographer is present to record the entire proceeding. The transcript is provided to the members of the committee for their review and they may publicly release it. Certain legal ramifications arise because statements made during the interview are taken under oath and recorded by a stenographer. First, if witnesses make any false statements, the government can potentially charge them with perjury. Second, because there is a written record, others may use the transcript to impeach these witnesses at any later judicial proceeding.

Even if the statement is not taken under oath, witnesses may still face criminal sanctions if they make a false statement. For example, 18 U.S.C. § 1001(2) criminalizes the making of “any materially false, fictitious, or fraudulent statement or representation” in any matter within the jurisdiction of the legislative branch of government. This includes congressional investigations and any relating interviews or depositions. Another possible criminal charge is obstruction of proceedings before departments, agencies, or committees (18 U.S.C. § 1505). Therefore, if there are any doubts concerning the completeness or veracity of a
witness’s testimony or if there is a parallel criminal investigation, it may be prudent to consider declining the offer to participate in any voluntary interviews.

Deciding to participate in the interviews does not mean that the organization’s involvement in a congressional investigation is complete. The interview is, generally, just the intermediate step in the investigative process. Most often, staff investigators will follow up the interview by telephoning or sending a letter to the lawyer asking if the organization’s witnesses will “voluntarily” appear at a congressional hearing. However, if the corporate witnesses refuse “voluntarily” to appear, the committee or subcommittee can simply issue a subpoena ad testificandum compelling the witness to appear or risk having the committee or subcommittee holding him or her in contempt.

VIII. THE CONGRESSIONAL HEARING

A. General Overview

Most congressional committees and subcommittees require witnesses to provide a written statement detailing their proposed testimony. The written statement is, most often, the basis for any opening statement made by the witness. It is often submitted to the committees via e-mail.

A lengthy written statement should provide the committee with the information it needs to understand the organization’s position on the issue. The oral presentation, however, should be concise and highlight the most pertinent
aspects of what the witness wants to tell the committee regarding the subject matter at hand.

While an organization does not have a Fifth Amendment right against self-incrimination, the privilege may be applicable to its witnesses. If witnesses invoke their Fifth Amendment privilege against self-incrimination, they should do so in a manner that leaves no doubt as to their intention. If they make the mistake of explaining why they are invoking the Fifth Amendment, they run the risk of inadvertently waiving the very right they are relying on for protection. In those cases, the committee chair will determine whether the witness has waived the right.

B. The Hearing

Generally, all congressional hearings follow roughly the same format. Each member, starting with the chairperson, gives an opening statement. Then the witnesses are introduced and, if the committee is required or chooses to, sworn in. The witnesses are then allowed to give a brief opening statement, which most often is a summarized version of his or her written statement. Once the witnesses finish their opening statements, each committee member is afforded the opportunity to question the witnesses. While this is often referred to as the “five-minute rule,” the length of time for questioning varies between committees. Once the first round of questioning is complete, the committee may decide to continue questioning the witnesses or they can excuse the witnesses, call the next panel of witnesses, or
close the proceedings. If the chairperson chooses to end the questioning and the hearing, he or she often will make a final statement.

There is no limit to the types of questions committee members can pose to a witness. However, if a committee member asks a question that the witness believes is irrelevant or not within the jurisdiction of the committee, the witness may object to the question through the chairperson. It is then up to the chairperson to decide whether to order the witness to answer the question. If the chairperson decides to allow the question, the witness must answer. If, however, the chairperson determines the question is irrelevant, the witness does not have to answer. However, most chairpersons will not rule a fellow committee member's question out of order.

C. Contempt

If a witness refuses to answer questions or refuses to comply with a congressional subpoena, the committee or subcommittee may attempt to hold the witness in contempt. Congress has three types of contempt power: Congress's inherent contempt power, criminal contempt, and civil contempt – which applies only to the Senate.

Congress has not used its inherent contempt power in more than 60 years. However, if Congress chose to use it today, the Sergeant at Arms would bring the witness before the House or Senate and he or she would be tried by that body. If the witness is held in contempt, he or she may be imprisoned in the Capitol jail for
a specified period of time, until the end of that congressional session, or until the
witness decides to provide testimony to the committee or subcommittee.

The second method of bringing a contempt charge against a witness
involves charging the witness with criminal contempt pursuant to the provisions of
2 U.S.C. §§ 192 and 194. Section 192 provides that a person who has been
summoned to appear before Congress or one of its committees and willfully fails to
deliver documents as ordered or having appeared refuses to answer questions
under inquiry is guilty of a misdemeanor, punishable by a fine not more than
$100,000 or less than $100 and imprisonment not less than one month nor more
than 12 months. Section 194 provides that the contempt citation must first be
approved by the subcommittee, then by the full committee, and finally by the full
House or Senate where the Speaker of the House or the President of the Senate
certifies the contempt charge. Congress then sends the contempt citation to the
appropriate U.S. Attorney and it is his or her “duty” to bring the matter before the
grand jury.

Finally, the Senate has a civil contempt option, which is not available to the
House of Representatives. Under this option, a federal district court must, at the
request of the Senate, issue an order to the witness compelling him to testify or
produce requested documents. If the witness continues to refuse, the court may,
in a summary proceeding, impose sanctions to impose compliance.
IX. GOVERNMENT ACCOUNTABILITY OFFICE AND INSPECTORS GENERAL

An additional tool often utilized by Congress is a supplementary investigation performed by either the Government Accountability Office (GAO) or the Inspector General of a specific government department or agency. As a result, an organization can face simultaneous inquiries from three separate investigatory bodies. For example, on November 16, 2006, the Senate Permanent Subcommittee on Investigations held a hearing on the Defense Travel System (DTS) where both the Acting Inspector General of the Department of Defense and the Director of the Financial Management & Assurance Team from GAO testified concerning the findings of their separate inquiries into DTS. This testimony supplemented the investigation performed by the subcommittee staff.

CONCLUSION

Congressional investigations and hearings are unique proceedings that have separate and distinct rules from judicial law as practiced by most law firms or legislative advocacy as practiced by most lobbying shops. In addition to those key differences, each committee and subcommittee has its own distinct rules and history. These factors make responding to a congressional investigation a complex and delicate task.

Thorough preparation and retention of qualified counsel exponentially increase the possibility of a positive outcome during a congressional hearing or
investigation. Qualified counsel will thoroughly investigate the facts at issue, and bring understanding of the committee, rules, players and processes that will drive the investigation. They will help your company develop a nuanced response strategy that will unambiguously tell “your side of the story,” minimize any collateral damage from a public hearing and, to the greatest extent possible, prevent the dissemination of privileged, confidential or proprietary information.

A new dawn has ascended Capitol Hill, and those who find themselves in the crosshairs of an aggressive committee and fail to acknowledge the sweeping changes that have occurred expose themselves to unnecessary danger. The new committee chairmen have made it abundantly clear that the 110th Congress will engage in thorough oversight and numerous investigations. Perhaps most portentous, is that this avowed aggressiveness is being applied to polarizing issues, such as the spiraling costs of healthcare, energy, and the war on terror. Organizations that previously had little reason to fear congressional oversight may find themselves publicly testifying before Congress. Any failure to fully prepare may lead not only to harsh judgment in the court of public opinion, but to additional congressional hearings, or indictment by a Federal Grand Jury.