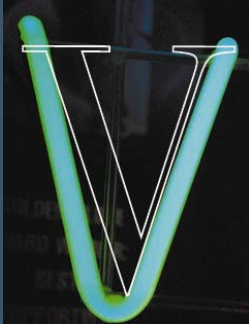




**Point of Order:
An Insider's Guide to Surviving
Congressional Investigations**

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"I have here in my hand a list of two hundred and five [people] that were known to the Secretary of State as being members of the Communist Party and who nevertheless are still working and shaping the policy of the State Department" – Senator Joseph R. McCarthy (R-WI).

Much of the public's understanding of congressional hearings was shaped by Senator 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.

More recently, Congress has turned its attention to more legitimate topics, including: excessive executive compensation; food recalls and the safety of the food supply; use of TARP funds; corporate tax havens; credit card fees and practices; the safety of imported toys; waste, fraud and abuse in government contracts at home and in Iraq and Afghanistan; backdating of stock options; steroid use in sports; the Enron debacle; abusive tax shelters; money laundering; fraud at the United Nations; tax abuse by corporations and government contractors; and abuses in the credit counseling industry. 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.

The single most important thing organizations involved in a congressional hearing can do is be prepared. Organizations exponentially increase the possibility of a positive outcome during a congressional hearing or investigation by retaining qualified counsel, thoroughly investigating the facts at issue, and understanding the rules, players, and process of the committee conducting the hearing. Qualified counsel will know how to help your company develop a nuanced response strategy that:

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

This article 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.

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. In addition to responding to issues as they appear in the headlines, the following are but a few examples of topics which likely will be examined by the oversight committees/subcommittees in the 111th Congress:

- **Senator Carl Levin** (D-MI), Chairman of the Senate Permanent Subcommittee on Investigations, is aggressively investigating such issues as corporations with subsidiaries in off-shore “tax havens” and whether certain tax breaks are being used consistent with Congressional intent.
- **Reps. Henry Waxman** (D-CA), Chairman of the House Energy and Commerce Committee, and **Bart Stupak** (D-MI), Chairman of the Oversight and Investigations Subcommittee, intend to examine such issues as nuclear power plant safety, prescription and OTC drug marketing practices, safety of the food supply, hospital-acquired infections, business practices in the individual health insurance marketplace, and medical device safety.
- The new Chairman of the House Committee on Oversight and Government Reform in the 111th Congress, **Rep. Edolphus “Ed” Towns** (D-NY), intends on focusing the Committee’s attention on such issues as private sector contracting reform, use of TARP funds by financial institutions, as well as the rights and duties of federal employees.
- Ferreting out waste, fraud and abuse in federal contracting is such an enormous undertaking that the Senate Homeland Security and Governmental Affairs Committee created a new subcommittee to examine half a trillion dollars a year in federal contracts. **Senator Claire McCaskill** (D-MO) will head the new Ad Hoc Subcommittee on Contracting Oversight and has indicated that she expects to hit the ground running.
- **Senators James Webb** (D-VA), **Claire McCaskill** (D-MO) and **Susan Collins** (R-MA) have been actively engaged in investigating defense contractors within their respective committees and by chartering and supporting the Commission on Wartime Contracting in Iraq and Afghanistan.

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 Roger Clemens testifying under oath before a "standing room only" crowd at the House Oversight Government Reform Committee, which was investigating Clemens' alleged use of steroids as a major-league baseball player? Clemens' aggressive and unwavering denials rang hollow and led to his referral to the Department of Justice to determine whether the seven-time Cy Young award winner lied to Congress. His reputation and his career are tarnished forever because of the accusations made at that congressional hearing and his inability to respond in an appropriate manner.

Thorough preparation by qualified legal counsel can help individuals and organizations facing the scrutiny of a congressional investigation minimize the damage to their personal and professional reputations.

Congress' power to investigate

Congress' 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.ⁱ

Congress and its committees and subcommittees have several legal instruments at their disposal when conducting congressional 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 and subpoenas *ad testificandum*, requiring testimony from individuals at a deposition or a congressional hearing. They may also grant immunity in certain situations, and hold witnesses in contempt.

Beginning an investigation

Congressional committee hearings may be broadly classified into four types: *legislative*, *oversight*, *investigative*, and *confirmation*.ⁱⁱ 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 investigation, and staff investigators will begin researching the issue to determine the pertinent facts and witnesses.

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 put 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 law firm with experience in congressional investigations can greatly assist an organization in this situation. Such a law firm 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 of the subpoena’s return date and effectuate “rolling productions” of requested documents if necessary; and
- Allow the organization to focus on running its day-to-day business.

The firm 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.

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. Because the application of the privilege and doctrine is discretionary, it is best to have a qualified law firm assist the organization in arguing that these most basic tenets of American law and fairness are applicable and should be respected by the committee.

Interviews

Unfortunately, complying with a “Chairman’s Letter” or subpoena *duces tecum* is not always 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 law firm, the staff investigator will often informally request through the firm 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 law firm to prepare thoroughly before participating in these interviews. The law firm 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 law firm does its job appropriately, it 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 law firm conduct a limited internal investigation into the subject area of the congressional hearing. By having the law firm 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.ⁱⁱⁱ

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.

The differences between a voluntary interview and a deposition

The voluntary interview can be more relaxed and less formulaic than a deposition.^{iv} 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.^v 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 law firm 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 hold him or her in contempt.

The congressional hearing

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 email.

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.

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, 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.

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’ 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 \$10 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.

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)^{vi} 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.

Parallel Investigations

In addition to the supplementary tools mentioned above, the current emphasis on oversight to root out waste, fraud and abuse increases the likelihood that the target of an investigation by one body will be simultaneously investigated by another. Accountability and oversight are the buzz words of the day with respect to the current Administration and Congress. In fact, funding for oversight and investigations and more stringent regulations have been a highly touted element of recent stimulus programs. Any Congressional or government entity that suspects impropriety falling within its area of responsibility is likely to at least consider conducting its own investigation.

Such parallel investigations require especially adept counsel to consider such issues as preserving privileged information, conveying a consistent truthful message, and negotiating with investigative entities to minimize duplication of effort and disruption to the client's business and personal resources. In addition, there is an ever-increasing web of laws and regulations creating the potential for criminal or civil liability for even unintentional misstatements or omissions. For example, a government contractor who cooperatively discloses information to a Congressional Committee may have an obligation to self-report the same information to an Inspector General under a new federal Mandatory Reporting Rule and could be barred from working on any future contracts for failure to do so.

Conclusion

Congressional investigations and hearings are unique proceedings that have separate and distinct rules which differ from traditional litigation 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 unique 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 propriety information.

Without a doubt, the 111th Congress faces a nation which is frustrated with, and angry at, many corporate segments of the American economy; those who find themselves in the crosshairs of an aggressive committee and fail to acknowledge the seriousness of that frustration and anger expose themselves to unnecessary danger. Congressional leaders have made it abundantly clear that the 111th Congress will continue to 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.

Raymond Shepherd's first hand knowledge of the Congressional oversight and investigative process enables him to advise clients on the most appropriate strategies when preparing for, or responding to, a Congressional investigation, voluntary request for information, subpoena, or testimony under oath. During more than a decade serving on Capitol Hill, Mr. Shepherd has earned intimate knowledge of the legislative and investigative process having served as Staff Director and Chief Counsel of the Senate Permanent Subcommittee on Investigations (PSI) as well as Oversight Counsel for the House Energy and Commerce Committee. He can be reached at 202.344.4745 or rvshepherd@Venable.com.

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ⁱ The Senate is the only branch of Congress with the authority to conduct confirmation hearings.

ⁱⁱ Richard C. Sachs, *House Committee Hearings: Types of Committee Hearings*, CRS Report 98-317 (2004).

ⁱⁱⁱ Because Congress does not necessarily recognize the attorney-client and work-product protections, this privileged information may have to be relinquished to congressional investigators. In some circumstances, this could result in inadvertent waiver of these protections, thereby allowing criminal prosecutors and civil litigants access to confidential information. However, organizations represented by a qualified law firm familiar with congressional investigations and privileges may be able to save these protections by taking steps to ensure that these important protections are not inadvertently waived.

^{iv} However, some committee investigators are infamous for their demanding, day-long and in-depth interviews.

^v Some committees, like the Senate's Permanent Subcommittee on Investigations (PSI), are precluded from publicly releasing subpoenaed information absent an “official committee action” such as a hearing or a report.

^{vi} The investigation was titled “The Defense Travel System: Boon or Boondoggle?”