

Handling Investigations of Members of Congress and Congressional Staff

A How-To Guide for Chiefs of Staff

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Election and Political Law

“Call the office asap!”

Those may be the most feared words in the English language for Chiefs of Staff to Members of Congress. This primer covers what to do when that call reveals that a Member or staffer is under federal investigation.

In the highly politicized world of investigations involving Members of Congress, taking the right steps in the first hours and days can mean the difference between a swift resolution and a years-long crisis. Below we provide an overview of how these investigations work, and we outline “best practices” to help Chiefs respond to investigations of Members and staff.

The First 24 Hours and Beyond

There is no shortage of authorities empowered to launch investigations of Members of Congress and staff. Enforcers include the Public Integrity Section of the U.S. Department of Justice (“DOJ”), the 93 United States Attorney’s Offices, the Office of Congressional Ethics, the House Ethics Committee, the Senate Select Committee on Ethics, the Securities and Exchange Commission, and the Federal Election Commission.

Regardless of the enforcer, however, Chiefs of Staff must act quickly upon learning of a potential investigation, taking specific steps to ensure that initial actions (or inaction) do not jeopardize a successful resolution down the road.

Finding the Facts and Retaining Counsel

When a Chief of Staff learns of an investigation, it is important to move quickly, but carefully, to understand the facts. To help ensure that this fact-finding exercise will be privileged, whenever possible, counsel should take the lead. If staff conducts a slapdash internal review without the meaningful involvement of counsel, the staff’s findings and communications may well be discoverable. “Discovery” is the process by which investigative authorities marshal their facts by obtaining and reviewing documents, conducting interviews, and taking testimony. Documents that are reviewed by investigators during discovery typically include emails, texts, calendars, financial records, voicemails, social media, and hard copy notes and materials—whether housed in the office, at home, on personal devices, or in the “cloud.”

When initial fact gathering is done by staff in a panic, often in an effort to anticipate and respond to press inquiries, many things can go wrong. Dozens or hundreds of emails may be generated that are not protected by the attorney-client privilege and that contain rumors or inartful language that could later be misconstrued. Witnesses' recollections may become muddled. Worse still, the fact-gathering exercise itself could later be viewed by an investigator, fairly or not, as an effort to coerce witnesses or to "get stories straight."

Ideally, early fact gathering would be conducted by counsel with the protections of the attorney-client privilege and the attorney work product doctrine. While the privilege may attach to some work conducted by staff who serve as "counsel" to the Member, or to work done by Counsel to the House or Senate, some investigative agencies, including the Ethics Committees, may resist recognizing the privilege for staff lawyers. The privilege is on much stronger ground when the Member or staffer under investigation retains personal outside counsel who is not an employee of the House or Senate.

If outside counsel will eventually be retained, it is far better to retain them at the outset of the investigation. It is common, however, for Members to delay retaining counsel until the last possible moment. They worry that they will have to report attorneys' fees on their FEC reports, drawing media attention. They worry, too, that hiring a lawyer will be viewed as evidence of guilt. But the downside of delay is significant because of the implications for the attorney-client privilege and because actions taken in the initial days of an investigation may shape its future course and ultimate outcome.

Chiefs should keep in mind that a lawyer hired to represent the Member is the Member's lawyer, and not the lawyer for individual members of the staff. When the interests of staff members diverge from those of the Member, or of other staff, certain staff may require their own personal counsel. Counsel fees can sometimes be paid using campaign funds, after consultation with the Ethics Committees and possibly the FEC.

Preserving Documents

The obligation to preserve documents is triggered when there is awareness of a reasonably likely complaint or investigation. Papers, computer files, emails, texts—almost anything stored physically or electronically—must be preserved if they are relevant to the investigation. This obligation could extend to office, campaign, and PAC documents, as well as anything else in the Member's or staffer's possession, custody, or control.

A "document hold memo" should be circulated promptly to instruct staff to retain relevant documents. Both the distribution list and the wording of the hold memo should be considered carefully. The memo should be distributed broadly enough to be effective, but the more widely it is circulated, the less likely it is that news of the investigation will remain confidential. Technical issues to be mindful of include ensuring that automatic deletion protocols on email systems and calendars are turned off, backup system files are retained, and documents on home computers and personal devices are preserved. It is important to keep in mind that relevant data (including emails, texts, and voicemails) may exist in personal email accounts, on personal phones and tablets, and in other personal electronic media. Such data, if relevant to the investigation, must also be preserved.

In some cases, to ensure adequate preservation of data on House and Senate servers, it may be necessary to consult with the House or Senate Sergeant at Arms, Counsel to the House or

Senate, or other administrative offices. Such consultations themselves may be sensitive if the investigation is not yet public, however.

Communicating Inside and Outside the Office

It is important to be aware of privilege and discovery issues during the course of an investigation and even when an investigation may not have formally been initiated but can reasonably be anticipated. Communications within the office that do not include counsel may not be privileged, and participants could be asked to testify about those conversations later. Communications with other offices, even leadership, will likely be discoverable in any investigation or legal proceeding. Staff should not consult about the investigation outside the office unless absolutely necessary.

Communicating with the Press and Social Media

There will be great pressure to give an immediate statement to the press once the investigation becomes public. But any early statements to the press or social media that later are determined to be inaccurate could be extremely damaging both legally and politically. The best statements often say as little as possible. Outright or blanket denials can be dangerous, especially before all the facts are known. Keep in mind that drafts of press statements and talking points may be discoverable by investigative authorities, and they will certainly be discoverable if they are not prepared in consultation with counsel. If drafts are obtained by enforcers during an investigation, any differences between drafts and the final versions will draw attention.

Avoid Giving Investigators New Reasons to Investigate

Unfortunately, even in cases where there may be no basis for the original investigation, Members and staff sometimes dig themselves deeper into the hole by taking actions that investigators later perceive to have obstructed the investigation. Obstruction of justice, false statements to investigators, and perjury allegations can be more damaging than the original allegation of wrongdoing. This is an old Washington story: The cover-up may be worse than the alleged crime. Make sure everyone on the staff understands the importance of not interfering with the investigation. Pay particular attention to junior staff who may not have the maturity or experience to put things in perspective without some help.

Handling Department of Justice Investigations

In addition to the best practices described above, successfully navigating an investigation requires familiarity with the procedures and tactics that the relevant investigative agency employs. Of all the enforcers, investigations conducted by the DOJ can be the most daunting because they involve potential violations of criminal laws and because the DOJ can use the powers of the grand jury and court orders—such as search warrants and witness immunity orders—to compel the production of information or documents.

Department of Justice Enforcers

The DOJ tasks two enforcers with handling investigations involving public corruption allegations: (i) DOJ's Public Integrity Section ("PIN"), and (ii) local United States Attorney's Offices.

PIN, which was formed after the Watergate scandal, primarily prosecutes bribery, illegal gratuities, criminal conflict of interest, post-government employment lobbying ban violations, and

criminal campaign finance law violations. In recent years, high-profile PIN cases have included the ongoing case against Senator Robert Menendez and the prosecutions of Jack Abramoff and his associates, Governor Bob McDonnell, Senator Ted Stevens, Congressman William Jefferson, Congressman Richard Renzi, Doug Hampton (former Chief of Staff to Senator John Ensign), and numerous others.

In addition to the Washington-based PIN, all 93 United States Attorney's Offices across the country have prosecutors who focus on public corruption work and may even have formal public corruption units. Recent prosecutions pursued by public corruption units of United States Attorney's Offices include those of Congressman Chaka Fattah, Congresswoman Corrine Brown, Congressman Michael Grimm, Congressman Jesse Jackson, Jr., and former Illinois Governor Rod Blagojevich. Some of these investigations are conducted solely by the United States Attorney's Offices, although PIN is typically apprised of these investigations pursuant to DOJ policy to the extent the conduct of a Member is under scrutiny. Other investigations are conducted jointly with PIN.

Both PIN and the United States Attorney's Offices rely on FBI field offices to do the actual investigating. Like U.S. Attorney's Offices, many FBI field offices around the country have one or more specialized public corruption squads. Since 2002, the FBI reportedly has more than doubled the number of special agents assigned to public corruption matters, and public corruption has been identified as a top enforcement priority within the FBI's criminal division.

Working with DOJ and the U.S. Attorney's Office

At the outset of any DOJ investigation, it is important to clarify the legal status of the Member or staffer who is under investigation. Depending on the circumstances, it may make sense for counsel to contact DOJ. Counsel might ask whether the Member or staffer is a "target," "subject," or "witness" in the investigation.

The United States Attorney's Manual defines a "target" as a "person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." A "subject" is "a person whose conduct is within the scope of a grand jury's investigation." "Witnesses" are individuals with potential knowledge of the facts. You want to be a witness. You do not want to be a target or subject. The subject designation is a very broad category, however. One might be a subject bordering on being a target, or a subject bordering on being a witness. These nuances matter a great deal.

Understanding whether the Member or staffer is a target, subject, or witness can inform how the Member or staffer responds to interview and document requests and subpoenas. A person who is merely a witness might, for example, be willing to sit for an interview while a target or subject might seek to avoid an interview, seek formal or informal immunity from DOJ, or even invoke the protections of the Fifth Amendment. These are sensitive judgment calls that depend very much on context, but a critical first step is to determine the Member or staffer's formal status.

Regardless of an individual's status, it is not prudent for Members or staffers to be interviewed by the FBI or prosecutor without counsel present. Working to ensure that those interviewed are prepared and represented by able counsel is essential to ensuring that the rights of all parties are protected. Because the FBI will sometimes approach individuals whom they wish to interview on the street or at their homes to catch them off guard, it may be important to advise

staff of this possibility. This must be done carefully, and with due care to avoid anything that might inappropriately obstruct the Government's investigation. Most critically, while it is perfectly appropriate to advise staff that they are not required to speak to the FBI, and on the advantages of obtaining counsel before doing so, any suggestion that staff are not permitted to speak to the FBI if they so choose may be viewed as obstruction.

In responding to subpoenas or informal requests for interviews or documents from DOJ, it is also important to keep in mind the Speech or Debate Clause protections that may apply to a Member. In every public corruption investigation involving Congress or its Members, decisions about whether to assert the protections that might be afforded to a Member under the Speech or Debate Clause are critically important. In some instances, it will make sense to assert those protections right away as to particular documents or areas of inquiry; in other circumstances, it may be more helpful to reach an accommodation with DOJ and make particular documents available, even if they may be protected from use by DOJ under the Speech or Debate Clause. In any event, it is critically important for a Member to be aware of the protections that might apply, including whether the Member should assert the Speech or Debate Clause protections in connection with certain questions that may be posed by DOJ or the FBI not just to the Member, but also to the Member's staff.

Handling OCE and Ethics Committee Investigations

Sometimes it is not the FBI that comes knocking, but an enforcer within the federal legislative branch. These enforcers include the Office of Congressional Ethics ("OCE"), the House Ethics Committee, and the Senate Select Committee on Ethics. Below we describe each enforcement body and provide tips and best practices for resolving these legislative enforcement matters.

Office of Congressional Ethics

OCE was established in March 2008 as an independent body that investigates allegations of misconduct involving Members, officers, and staff of the House. It does not investigate allegations of misconduct against Senators or Senate staffers. OCE is governed by an eight-person Board of Directors, all of whom are private citizens. Based on its review of allegations of misconduct, OCE can refer potential violations to the House Ethics Committee.

Since its creation, OCE has been very active. According to the most recent data, in the 114th Congress, OCE began a preliminary review of at least 35 matters. A significant portion of its preliminary reviews have involved campaign activities. Other subjects include travel, outside income and employment, gifts, official allowances, conflicts of interest, and financial disclosures. In the last two Congresses, OCE referred at least 33 matters to the House Ethics Committee for review.

OCE lacks subpoena authority, but it makes up for that by using very aggressive investigative tactics. Its investigators, who appear to have an ample travel budget, often fly across the country to conduct interviews with witnesses, including campaign donors, constituents, lobbyists, and others. Because OCE cannot compel staff to testify, it often threatens to embarrass witnesses by declaring them to be uncooperative in public documents and drawing an "adverse inference" from their unwillingness to submit. Members face pressure to lean on witnesses to testify because OCE sometimes unfairly draws an adverse inference against the Member when a third-party witness declines to testify.

OCE investigations are fast-paced. OCE may launch its own investigation, or it may act on a complaint. Sometimes an investigation is triggered by nothing more than a news article. Once a complaint is filed, OCE does an initial review and launches an investigation if it finds a “reasonable basis” for the allegation, which appears to be a very low threshold. A two-stage process follows.

First, staff conducts a 30-day preliminary review. If the Board finds probable cause, the investigation continues. *Second*, during a 45-day second-phase review (with a possible 14-day extension), the Board determines whether there is “substantial reason to believe” that a violation occurred. If it reaches this conclusion, OCE refers the matter to the House Ethics Committee.

During these review periods, OCE often demands that Members produce large volumes of emails and other documents, and that the Member and his or her staff submit to transcribed interviews. These can be very burdensome, time consuming, and expensive exercises. OCE often also demands production of emails and other documents by private parties, including corporations, lobbyists, and campaign volunteers or donors. This can generate media attention concerning the investigation.

Referrals by OCE to the House Ethics Committee are accompanied by a lengthy report and often numerous deposition transcripts. The report frequently makes sensational allegations. When a matter is referred to House Ethics for further review, OCE’s report generally becomes public within 90 days, unless the Ethics Committee empanels its own investigative subcommittee to pursue the matter. The OCE report, which usually reads like an indictment, can be very damaging to a Member’s reputation once it is released, even though OCE (unlike the House Ethics Committee) has no legal authority to adjudicate guilt or innocence.

The House Ethics Committee

In addition to its authority to investigate a matter referred by OCE, the House Ethics Committee—consisting of five Members from each party—can launch an investigation on its own initiative or when a Member makes a complaint. When it concludes that a violation occurred, the Committee can refer the matter to federal and state authorities and recommend sanctions to the House, including expulsion, censure, dismissal, reprimand, or fines.

Unlike OCE, the House Ethics Committee does have subpoena authority and uses it. During the 113th Congress, House Ethics conducted fact-gathering in 89 separate investigative matters; authorized 60 subpoenas (up from just nine in the 112th Congress); conducted 78 voluntary witness interviews; publicly addressed 34 matters; and released nearly 1,900 pages to the public about its investigations. Throughout the 113th Congress (the most recent period for which a report is available), House Ethics commenced 53 new matters; received 21 referrals from OCE; and empaneled investigative subcommittees for investigations of four Members.

Senate Select Committee on Ethics

Like House Ethics, the Senate Select Committee on Ethics—led by three Senators from each party—is empowered to initiate its own investigations. It is authorized to receive and investigate allegations of “improper conduct which may reflect upon the Senate, violations of law, violation of the Senate Code of Official Conduct and violations of rules and regulations of the Senate.” In 2015, the most recent year for which data is available, the Committee reviewed 55 alleged violations of Senate rules. The Committee tends to dig deeply into the matters under review, and its investigations can sometimes be very protracted.

Tips for OCE/Ethics Committee Investigations

Preparing for Interviews and Testimony

Preparation for interviews and testimony can be a daunting task for any witness and should be led by counsel. The in-person preparation with counsel can take a full day, sometimes more. It should include, among many other things, reviewing key documents produced to the investigators, mock interview questions, and tips for avoiding legal traps. When a Member will be interviewed, the Member should be scheduled an extended block of uninterrupted time for preparation. This is critical.

Testifying

Testifying is hard to avoid, for both current Members and staff. “Taking the Fifth” is possible when there is potential criminal exposure, but that often comes with consequences. Staff who assert their Fifth Amendment right against self-incrimination may be let go. Members, too, may find it difficult to remain in office once they have asserted their Fifth Amendment rights. The decision whether to assert the privilege is a delicate one, to be made after consultation with personal counsel.

Often the greatest risk a Member or staffer faces when interviewed by OCE or the Ethics Committees (or by the FBI or a prosecutor) is that they will be accused of making a false statement, which itself can be prosecuted as a crime. Even an informal interview, in which the witness is not sworn, can lead to a false statement prosecution because the federal False Statements Act, 18 U.S.C. § 1001, applies whether or not the witness is under oath. This is one reason why careful preparation is so important.

Document Production

Document requests need to be taken very seriously. The response at this stage can have a major impact later in the investigation.

The best way to respond to a document request is a centralized, counsel-led production process that may require coordination with the Sergeant at Arms to access and search all relevant documents. Allowing individuals to search their own documents, though permissible, can be risky. If the individual misses a key document (or, far worse, discards the document), the result could be an allegation of obstruction or even criminal prosecution.

A methodical and centrally managed document collection process is a way of protecting the individuals involved. Letting individuals collect their own documents may have the opposite effect: it puts them at risk by making them personally responsible for any mistakes or oversights.

Counsel can help avoid common document production pitfalls. All relevant custodians should be searched, using carefully crafted and targeted electronic search terms. Forgetting a custodian or shared drive during the first go-round, or using unnecessarily broad search terms, can add significant time and cost burdens to responding to a document request. Make sure you have thought about all the places that data may reside, such as on backup drives, thumb drives, mobile devices, and personal email accounts. Few things roil the investigation waters more than a key document that turns up for the first time six months or a year after it was supposed to have been produced.

During document production, you must also be careful about materials that may be protected by the attorney-client privilege, work product doctrine, Speech or Debate Clause, or other common law privileges. Counsel can ensure that these issues are carefully considered before a production is made to an enforcer.

Handling FEC Investigations

The Federal Election Commission (“FEC”) conducts investigations involving alleged civil violations of the federal campaign finance laws. Potential violations could include anything from routine reporting mistakes to major violations such as personal use of campaign funds. The FEC is a six-member Commission, currently with three Republicans, two Democrats, and an Independent who generally votes with the Democrats. In recent years, the FEC has been a very quiet enforcement agency, and we are not likely to see major enforcement initiatives in the foreseeable future. But the FEC does aggressively investigate and pursue some matters, such as “straw donor” contribution reimbursement schemes and cases involving contributions from foreign nationals.

Even if no action is taken, FEC complaints can be costly to handle. Anyone can file a complaint. The candidate or other respondent submits a response explaining why the FEC should find no “reason to believe” that a violation occurred. If at least four of the six Commissioners find “reason to believe,” the agency proceeds either to settlement efforts or a full investigation. During this stage, the FEC can subpoena documents and witnesses. Based on the results of the investigation, the Commissioners then vote on whether there is “probable cause to believe” a violation occurred. If at least four Commissioners find probable cause, the FEC must negotiate concerning settlement before filing a civil action. Very few cases go to court, however. The vast majority are settled at some point along the way, and these days, most cases are dismissed by the FEC without even demanding a settlement.

In responding to an FEC complaint, the critical first step is to get on top of the relevant facts and to file a powerful motion to dismiss. A strong response to the complaint can result in dismissal and no further action, saving years of enforcement proceedings, legal fees, and political damage. Occasionally, it may make sense for an officeholder or candidate to take advantage of the FEC’s voluntary disclosure policy and to disclose a violation prior to the filing of a complaint. This can lead to an expedited resolution, but for obvious reasons, this is a step that should be taken only after careful consideration of the costs and benefits.

SEC Investigations

A relatively recent concern for Members and staff is the possibility of an investigation by the Securities and Exchange Commission (“SEC”) concerning insider trading. The Stop Trading On Congressional Knowledge Act (“STOCK Act”), enacted in 2012, was intended to subject Members, staff, and others to civil and criminal enforcement of the insider trading laws, in instances in which material nonpublic information obtained through Congress or other federal branches of government is used for securities trading purposes. In theory, the SEC may have had this authority even before enactment of the STOCK Act, but the new law makes the enforcement authority clear.

The SEC is known to have actively pursued STOCK Act investigations involving congressional employees, and we expect this to continue to be an area in which congressional offices must provide up-to-date training and be prepared to react promptly to any contacts from the SEC.

Parallel Investigations

Parallel investigations into the same conduct by DOJ, SEC, the OCE or Ethics Committees, and the FEC sometimes proceed simultaneously. In some cases, DOJ may ask the other agencies to stand down while the criminal investigation proceeds. In rare cases, though, the Ethics Committees may effectively force DOJ to stand down by seeking court ordered immunity of the target of the parallel investigations. These parallel investigations are complex, presenting many legal and political risks. Discovery taken by one investigative body may be shared with another. The Member's overall strategy will have to take into account how actions in one investigation may influence another.

Conclusion

In fast-paced, high-stakes, and potentially politicized investigations of Members of Congress or their staff, Chiefs of Staff must make smart decisions, very early in the process, based on limited information. The consequences of even a small mistake at the outset can be very significant and long-lasting. Chiefs would be wise to spend a little bit of time now, early in the new Congress, thinking about how they would react to an investigation in the first critical hours and beyond.

Covington has substantial experience representing Members and their staff in investigations. If you have any questions, or would like specific advice concerning an investigation matter, please contact the following Covington lawyers, all of whom have extensive government investigations experience:

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