

## Separating Substance From Politics: Two Attorneys' China Investigations Tool Box

Many major U.S. corporations are currently assessing their vulnerabilities in any investigation by the 'China Committee', mapping out in detail how they will address vulnerabilities and what their defensive narrative will be in any investigation.

**BY CHRISTINE SCHIFFNER**

*Welcome to The National Law Journal's Inadmissible feature, a regular Q&A series with Washington, D.C., legal professionals. The interviews take a short, to-the-point look at an issue at the intersection of law and politics and strategic risk mitigation led by professionals in the nation's capital. If you are interested in being profiled, reach out to [cschiffner@alm.com](mailto:cschiffner@alm.com).*

*In this edition, Covington & Burling partners Brian D. Smith and Robert K. Kelner discuss their legal advisory role and risk mitigation strategies in light of a push by the Select Committee on the Strategic Competition with China for an increase of congressional investigations.*

**With the creation of the Select Committee on the Strategic Competition with China – what issues do you expect to arise over the next few months?**

**Robert Kelner:** This new select committee has a very broad remit regarding China and we expect it to cover everything from Taiwan to U.S. companies' investments in China to ESG, including the question of whether American companies are treating ESG issues in the United States differently than they treat them in China.

In addition, the committee will probably cover any new issue that arises over the next



Courtesy photos

**Brian D. Smith (left) and Robert K. Kelner, partners with Covington & Burling.**

two years relating to China, and there are constantly new issues arising.

**Brian D. Smith:** Given the breadth of the committee's mandate, they'll have a lot of things from which to choose. I do expect that there will be an interest in starting in areas of more bipartisan cooperation.

We've seen that there is some consensus in Congress about the strategic approach to China. We saw that in the Chips and Science Act and I think the committee will probably

have an inclination to start in those areas where there is bipartisan agreement on the strategic approach to China.

Over time though, I think it'll probably get into areas that are a little more contentious.

**RK:** The fact is that this will practically be the only bipartisan committee in all of Congress, at least at the start. A big question for those of us watching the committee is whether or not Chairman Gallagher will be able to maintain that unique bipartisanship.

One challenge he'll face is that it may be difficult for him to criticize the Biden administration from this platform without jeopardizing the bipartisan spirit on the committee. Yet at the same time, every committee chairman will be under some pressure in the House to exercise oversight over the Biden administration and criticize it. That's a fundamental strategic challenge that he will face.

**Given that this committee may be a bit less polarized, what priorities do you focus on when working with clients who may have to testify at upcoming hearings?**

**BDS:** All hearings are challenging. Actually, where there is a bipartisan consensus, the hearings are more challenging. Not always, but sometimes they are. I do think the issues themselves are likely to be to some degree or another polarizing and challenging.

In the makeup of the committee there will be alignment around their priorities, around the strategic relationship with China.

Relevant to your question is, the name of this committee is the strategic relationship between the United States and the Communist Party. As a result, it's often a question of the connections between industry in China and the party.

There are some businesses that are just businesses in China. There are others that are more closely associated with the Communist Party. I think for the private sector in

the United States, sometimes that's hard to discern and for Congress it's sometimes hard to discern.

As we go into these investigations, that is going to be a real critical question. To what degree are U.S. businesses engaging just in regular business activity to reach consumers in China versus entities or companies that do have a connection to the Communist party.

The name of the subcommittee is noteworthy in that respect. That relationship between the Chinese Communist Party and business in China is sometimes difficult to discern. For the private sector we need to focus on what activities are they in fact doing? Where are they investing? Who are their partners? What are they doing in China and does it have that nexus to the party?

**RK:** Frankly, I think chairman Gallagher and probably some of the other leaders of this new select committee would like to dramatically scale back American investment in China. Investigating the ties between American companies and the Chinese Communist Party effectively is a way to drive a wedge between them and ultimately reduce the scale of American investment in China.

In terms of the big picture, that's probably the crux of chairman Gallagher's agenda. Although we'll have to see how that plays out in practice. To go back to your question about how companies will deal with this — many companies will have to decide whether they want to actively engage with this committee or whether they want to be in a defensive posture where they are preparing for investigations by the committee but not necessarily actively trying to influence the committee.

That's a fundamental strategic choice. At this very moment, there are many major U.S. corporations that are assessing their



vulnerabilities in any investigation by this new select committee, mapping out in detail how they will address those vulnerabilities and what their defensive narrative will be in any investigation.

We are seeing a lot more pre-investigation preparatory work by corporations with respect to this committee and others than we've seen in prior Congresses.

**Looking at the two sides of corporations already having large investments in China and some members of the committee favoring a further decoupling from the Chinese economy, how do you mitigate risks for clients moving forward?**

**RK:** One thing that we know for sure is that when congressional committees investigate companies, they often focus on collecting emails and other communications within the company and between the company and government agencies. That's just the bread and butter of congressional investigations.

Companies that are seeking to mitigate their exposure to congressional investigation risk have to think about the nature of their communications with the U.S. government and with the Chinese government, and how they're communicating within the company about U.S.-China competition.

It's not rocket science to figure out, and hardly a state secret, that this select committee and other congressional committees will be asking to see those communications. That's an obvious area for risk mitigation efforts, meaning that companies should be thoughtful about their ongoing communications with U.S. and Chinese government officials.

**BDS:** Congressional investigations are always a mix of substance and politics.

Understanding the substance of our clients' arguments about their investments — wherever it is, China included — but also understanding the politics, they have to understand both.

There are some in Congress who believe that any investment in China is against the U.S. national interest. Understanding that substantive position and understanding from a corporate perspective — they may disagree with that substantive position — they need to be able to articulate that substantive position why it is in the U.S. business interest to engage in China in certain ways. They then need to understand the politics that there may be some who, no matter how much you argue with them about the positives of investment, are going to disagree with you.

You have to anticipate both of those, the substantive arguments you want to advance as well as the political dynamics.

**RK:** Picking up on Brian's last point — the one thing we don't really know yet about the new select committee is whether it will principally focus on substance or whether it will aim to be flashy and splashy in terms of drawing media attention, because those are two very different approaches.

Any committee chairman really has to decide which of those directions to go. For example, we've heard some indications that the select committee might want to do field hearings, which are relatively unusual in congressional investigations —àà holding the hearing either some place else in the United States other than Washington D.C., or holding the hearing overseas.

That has the potential to be more of a media event and to be less substantive. I think it remains to be seen which of those fundamental paths the committee chooses to take.