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Congress's Sweeping Power to Conduct Investigations

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Congressional investigations are uniquely risky legal and business challenges. They can quickly escalate into all-consuming, all-hands-on-deck events that drain significant time from a company's most senior executives. Along with the legal risks, these investigations are deeply infused with politics, and virtually no rules govern them.

Many companies that have not been through a congressional investigation may lack a full appreciation for the time and energy that congressional investigations consume or the genuine legal risks they entail. They can result in turning over thousands of sensitive documents without effective means to preclude public disclosure, or public testimony of the company's most senior executives. They can also spawn parallel regulatory, Department of Justice, or state attorneys general investigations; outfit plaintiff's lawyers with documents that could not be obtained as easily in court; disrupt pending acquisitions and business transactions; and interrupt key customer and business-to-business relationships. Despite these unique and significant risks, congressional investigations' risks can be managed. With foresight and careful preparation, companies can position themselves to react quickly and effectively to investigations.

Congress's Authority to Investigate

Congress is authorized to investigate nearly any topic, even if it only tangentially ties to a legislative purpose. The Supreme Court has held that Congress can investigate anything within the "legitimate legislative sphere," regardless of whether legislation is

actually contemplated. Because Congress's legislative reach is so broad, and its investigative authority is coextensive with its legislative authority, this sphere can seem virtually limitless.

Further, the rules of the House and Senate allow each congressional committee to conduct investigations within the committee's area of legislative jurisdiction. For example, the House Energy and Commerce Committee can investigate anything that implicates commerce, an exceedingly broad remit. The House Committee on Oversight and Accountability, moreover, can conduct investigations of "any matter" at "any time."

Congress's Investigatory Toolbox

Congressional committees can deploy a range of tools when pursuing investigations.

Document Requests and Interrogatories

Congress may issue voluntary document requests, typically written with broad and sweeping language. The deadline for these requests is often impossible to meet, even if the company used its best efforts to respond comprehensively and accurately. Seasoned practitioners usually treat broad document requests as an opening salvo that signals the staff's early views of what it thinks Congress needs, which often may not be well informed, or as a starting point for negotiations.

Congress may also send interrogatories to the company, usually drafted with strong language that suggests potential misconduct. These interrogatories frequently have an unrealistic deadline as well.

There are few, if any, due process protections governing these requests for documents and information. The rules that do exist tend to focus on internal congressional procedures and interests, offering virtually no protection for the targets of congressional attention. Objections to document requests and interrogatories, if they are even considered, are heard and ruled upon by the same committee chairman who issued them. There generally is no opportunity to argue a company's case before the chairman, and objections are nearly always overruled. There are no restrictions on the number of interrogatories or the scope of document requests. No protective orders are available from Congress, nor are there any binding guarantees of confidentiality. Anything produced to a congressional committee is liable to be released by the committee, either formally in a report or at a hearing, or informally through leaks to reporters.

Privilege in Congressional Investigations

Congress does not recognize the attorney-client privilege, the work product doctrine, or other non-constitutional privileges. For well over a century, the House and Senate have taken the view that these common law privileges apply only in judicial, not legislative, proceedings. Because both the House and Senate insist they are not bound to respect the attorney-client privilege or the attorney work product doctrine, Congress has often used threats to compel production of privileged documents as a source of leverage. No court has definitively held that Congress must respect common law privileges.

In a recent Supreme Court decision, however, Chief Justice Roberts wrote for the Court, in what is likely nonbinding *dicta*, that recipients of congressional subpoenas "have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications." This has shifted the balance of power somewhat in negotiations with congressional committees concerning demands for privileged documents or testimony. In general, corporations now have a stronger hand and are less likely to be compelled to produce genuinely privileged documents. Indeed, in a subpoena enforcement case involving Professor John Eastman, the House chose to oppose Eastman's claims of privilege by disputing whether the documents were privileged in the first place, rather than on the basis that the House was entitled to compel production of privileged documents.

Depositions or Informal Interviews

Congress may conduct depositions, informal interviews, or a hybrid that Congress calls a "transcribed interview." For the most part, there are no limitations on the length of depositions or interviews, and again there is virtually no opportunity to object to the terms under which they are conducted. Witnesses may be examined by multiple questioners, sometimes including Members of Congress. Depositions have been known to last far longer than would be permitted in civil litigation, dragging on late into the night. Very recently, some committees have begun making video recordings of depositions and transcribed interviews. Unlike in civil litigation, there are no restrictions on the committee's use of the recording. It is likely that in the near future, we will begin to see such recordings cherry picked for out-of-context clips that could be shown at a hearing or posted on social media.

Subpoenas

Perhaps most significantly, Congress can issue a subpoena to a company, either to require certain documents to be produced or to require executives to testify. In recent years, this tactic has become increasingly common, with Congress issuing more

subpoenas and issuing them more quickly in a given investigation. The subpoenas are frequently delivered with only a few days' notice—or with no advance notice—and they often place recipients in an unenviable position because of the unique nature of congressional subpoenas. Unlike traditional subpoenas, recipients cannot seek legal process to quash or modify a congressional subpoena. Instead, the recipient must refuse to comply, wait to be held in contempt of Congress, and wait for Congress to institute litigation to enforce the subpoena before having the opportunity to raise defensive arguments in court. During this time, Members of Congress are almost certain to vilify the company and accuse it and its executives of obstruction. Moreover, when a subpoena is served on a company by a congressional committee, it is frequently addressed to the company's CEO, placing the CEO at risk of being held in contempt personally. Committees do this as a means of applying maximum pressure on the company.

Congress can enforce a subpoena by any of three methods: (1) criminal contempt; (2) civil enforcement; and (3) Congress's inherent contempt power.

Failure to comply with a valid congressional subpoena is a criminal misdemeanor punishable by imprisonment of between one and twelve months and a fine between $100 and $1,000. When a subpoenaed witness fails to appear, the committee or subcommittee that issued the subpoena can initiate proceedings before the full House or Senate to cite the witness for criminal contempt.

If a witness is held in contempt, Congress, by statute, may refer the witness for criminal contempt to the U.S. Attorney for the District of Columbia, "whose duty it shall be to bring the matter before the grand jury for its action." Although the statute specifies that the U.S. Attorney "shall" pursue the matter, the Department of Justice has long maintained that it retains prosecutorial discretion, and historically it has often declined to pursue criminal contempt of congressional witnesses, particularly in inter-branch disputes where the witness is also a member of the Executive Branch.

In contrast to criminal proceedings, which involve penalties, civil enforcement proceedings more directly aim to ensure compliance with the subpoena. Recently, Congress has pursued civil proceedings more often than criminal contempt charges to obtain subpoenaed testimony. These civil enforcement proceedings can result in a court order compelling testimony, enforceable in turn by civil contempt proceedings.

In general, efforts by private parties to resist congressional subpoenas in court are rare and usually unsuccessful. For example, when Backpage and its CEO resisted a subpoena issued by the Senate Permanent Subcommittee on Investigations in connection with an investigation of human sex trafficking, a court ultimately ordered the company to comply with the subpoena within ten days.

Referrals for False Statements or Obstruction

Congress may refer a witness to the Department of Justice on the ground that the witness misled Congress through false testimony or sought to obstruct the congressional investigation, both of which are felonies under federal criminal law. Although Congress makes such referrals regularly, it is rare for the Department of Justice actually to charge a witness after such a referral. The referral itself is a reputational blow, as well as a source of distraction and expense, for the witness. Even the mere threat of a referral can be a powerful form of leverage that Congress deploys to obtain what it wants.

Public Pressure on Reluctant Witnesses

Congress has additional tools to deal with reluctant witnesses or intransigent companies. A frequent tactic is issuing a press release to major national media organizations accusing the company of stalling a congressional investigation. The press release may allege that the company is withholding critical documents or a witness is refusing to appear at an important congressional hearing. Congress may also threaten to refer the matter to the Department of Justice or regulators. Even the specter of such a move can be enough to startle company shareholders, board members, and other key stakeholders, sometimes affecting the company's stock price.

Practical Limitations on Congress

Although the deck, in many respects, is stacked in favor of Congress, and there is little due process afforded to corporations targeted with congressional demands, there are some practical limitations on Congress that sometimes help level the playing field. Because enforcing a subpoena in court generally requires action by the full House or Senate, it can be difficult for Congress to muster the bandwidth and votes for enforcement proceedings. Internal congressional politics can intervene, and corporations sometimes benefit from the crossfire between Republican and Democratic Members or within either party's caucus. Congress's own procedures, such as the filibuster rules in the Senate, can stand in the way of subpoena enforcement. Sophisticated corporations sometimes are able to navigate this political thicket in ways that avoid subpoenas or make enforcement of a subpoena less likely.

Preparing for Congressional Investigations

With the advice of experienced congressional investigations counsel, there are many steps a corporation can take to prepare itself for a potential congressional investigation, so that when Congress comes calling, the call can be answered swiftly

and effectively with minimal lasting damage. A few key steps are nearly always part of the defense playbook.

First, it is often possible to anticipate the potential topics for which the company may be the target of a congressional investigation and to prepare ahead of time the basic defensive narrative for each topic. Pinning down the key facts, the timeline of events, and answers to the most obvious questions in advance greatly fortifies the company's ability to respond.

Second, and relatedly, because congressional investigations arise quickly and often move quickly, the company can assemble in advance the materials it will need to prepare a witness, on very short notice, for televised hearing testimony and to respond to written questions from a congressional committee.

Third, the company can assemble a crisis response team with representatives from key departments (e.g., legal, communications, relevant business units, government relations) and designate a team leader, to enable a nimble response and prevent internal turf battles and confusion in the first critical days or weeks of an investigation. In most cases, the company should retain, in advance if possible, outside legal counsel and outside crisis communications advisors with specific experience in congressional investigations, so that internal and external teams are prepared and integrated in advance of a congressional inquiry.

Congressional investigations present curveballs and challenges few companies have experience handling. With a modest degree of preparation, most companies can greatly mitigate the risks they pose and avoid having a congressional investigation turn into a bet the company exercise.

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