

# Congressional Investigations 101

Reginald J. Brown

[Reginald.Brown@wilmerhale.com](mailto:Reginald.Brown@wilmerhale.com)

Partner

Chair, Congressional Investigations Practice

Vice Chair, Crisis Management and Strategic Response Group





# Congressional Investigations 101

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- II. Congress' Power to Investigate
- III. Phases of a Congressional Investigation
- IV. Key Considerations
- V. Active Committees
- VI. Areas of Focus for 2019



# OVERVIEW



# Welcome to Congress

- Congressional investigations are often a unique hybrid of litigation and crisis PR
  - Not a neutral fact-finding forum
  - The target may have been selected to play a role in the Member's narrative on an issue
  - You typically cannot “win” a Congressional hearing in the traditional sense
- The stakes may be very high
  - Stock price and public perception
  - The job of the witness is often on the line
  - The media is often deeply involved
  - Parallel inquiries (prosecutors, regulators)
- No recourse against the investigator
  - You often can't readily appeal a request in court
  - If you don't cooperate, you may be attacked in the press



## Issues Congress Investigates

- Typically, hearings are reactive and in response to a recent event.
  - Major news stories
- Survey hearings may critique an industry or round out an in-depth multi-month to multi-year inquiry
- Pet issues of Committee Chairs
- Oversight (OPM data breach, Agency members' personal travel, Medicaid and opioids)



# CONGRESS' POWER TO INVESTIGATE



## Broad Authority to Investigate

- “The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad.” *Watkins v. United States*, 354 U.S. 178, 187 (1957).
  - “It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.” *Id.*
  - “The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.” *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).



## Authority Is Not Without Limits

- Power is not unlimited. Must have a valid legislative purpose. *Watkins*, 354 U.S. at 187; *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975).
- Investigation of business interests generally presumed related to legitimate legislative purpose. See, e.g., James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 Am. Crim. L. Rev. 1115, 1123 (2007).





## Subpoena Power – Backpage Case Study

- *Senate Permanent Subcomm. on Investigations v. Ferrer*, 199 F. Supp. 3d 125 (D.D.C 2016): PSI subpoenaed Backpage’s CEO Carl Ferrer for a narrower set of documents and ordered him to appear at a hearing on November 19, 2015. Backpage produced a limited set of documents to the Subcommittee, but it continued to object to a further response on First Amendment grounds. Ferrer refused to appear at the hearing.
- The court upheld the PSI subpoena, holding:
  - The subpoena was tied to a legitimate legislative purpose and Congress has the power to investigate on any subject which it can legislate.
  - The First Amendment did not protect Ferrer from testifying: “[A]ny responsive document that has not been produced contains constitutionally-protected information that no governmental need could possibly overcome” is “untenable and without legal support.” *Id.*
  - The subpoena did not violate Ferrer’s due process rights.



## Subpoena Power – Fusion GPS v. Valeant

- *Bean LLC d/b/a Fusion GPS v. John Doe Bank*, No. 17-2187 (RJL) (D.D.C. Jan. 4, 2018): HPSCI subpoenaed Fusion GPS's banking records in order to determine who paid for the Steele dossier. Fusion GPS sued to enjoin its bank from producing records on the grounds that it was overbroad and not tied to a valid legislative purpose, violated Fusion GPS's First Amendment rights, and violated financial privacy laws.
- The court upheld the HPSCI subpoena. However, negative press was limited.

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- In contrast, when Valeant CEO J. Michael Pearson refused to testify before the Senate Special Committee on Aging, Congress initiated contempt proceedings, causing the stock to drop.



# **PHASES OF A CONGRESSIONAL INVESTIGATION**



# The Calm Before the Storm

- The investigation often starts before the first subpoena
  - There is often an informal inquiry before a formal investigation
  - Is intervention possible to prevent the inquiry from escalating?
- Look around corners
  - Anticipate subjects and targets of investigations
  - Build relationships early
    - Understand lawmakers' needs and develop your message accordingly
    - Proactive targeted outreach to Members of Congress and Committees
  - Prepare for subpoena or request before it arrives



## Initial Request/Subpoenas

- Committee rules govern the issuance of subpoenas.
  - Some delegate power to committee chairman. See, e.g., Rules of the H. Comm. on Oversight and Government Reform, 114th Congress, Rule 15(a).
  - Some require agreement of ranking member or a majority vote of committee members. See, e.g., Rules of the S. Comm. on Banking, Housing, and Urban Affairs, 114th Congress, Rule 4(d).
- To formally challenge legal sufficiency, witnesses generally must first refuse to comply and then raise arguments as a defense in a contempt proceeding.
- Courts have interpreted the permissible scope of a Committee's inquiry broadly.
  - "To be a valid inquiry there need be no predictable end result." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509 (1975).



## Document Production

- Senate and House rules empower all standing committees and subcommittees to require the production of documents through the subpoena power. Senate Rule XXVI(1), House Rule XI.2(m)(1). *See also, McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).
- “Act of Production” Doctrine: In some cases, producing a document may be deemed testimonial in nature, and thus protected by the Fifth Amendment privilege. This is determined by courts on a case-by-case basis. *CRS Reports & Analysis Legal Sidebar: The Fifth Amendment in Congressional Investigations*. *See also United States v. Doe*, 465 U.S. 605 (1984).



## Document Production

- Document all contacts with committee staff regarding the scope and terms of production.
- Make sure to include appropriate caveat language regarding the scope of materials produced and any limits on discovery.
- Productions deemed inadequate by a committee can be costly.



## Committee Staff Briefings

- There are three key kinds of staff briefings, each with its own pros and cons:
  - **Informal Briefings.** Informal staff briefings are an opportunity to informally interview the witness in advance of the hearing. They help staff prepare for hearings and help witnesses understand the direction and tone of the investigation.
  - **Briefings on the Record.** In some cases, staff may ask to conduct a briefing on the record. This is less formal than a deposition, but more formal than an off-the record briefing.
  - **Depositions.** Staff depositions require a formal grant of authority by the Committee and have been used increasingly in recent years.
    - Depositions allow the Committee to obtain sworn testimony more easily than through a formal hearing. Statements can be verified before they are repeated in an open hearing.
    - False statements made during congressional proceedings, including depositions, are subject to criminal prosecution. 18 U.S.C. §1001.





## Hearings – Prepared Testimony

- Witnesses prepare both written and oral testimony.
- Written testimony must be submitted a few days before the hearing and sent to Committee staff. Generally, it is posted on the Committee's website before the hearing.
- This is an opportunity to present the client's affirmative narrative.
- Written and oral testimony require careful preparation since both will appear in writing, as published by the Committee and in the hearing transcript.



## Preparing for Oral Testimony

- Hearings are high-stakes events
- Senior executives are often forced to testify
- Hearing prep is essential
  - Multiple days, intense, well-organized
  - Full-scale mock hearings
  - Details matter
- Customize prep to the witness
- Make witness as comfortable as possible for the hearing
- Be completely prepared, but adapt to changes on the ground
- Hearings are both substantive and visual – attire and body language are important



# Congressional Testimony: Rules of the Road

1. Tell the truth. There are substantial legal risks that can accompany inaccurate or incomplete responses
2. Be respectful and cooperative. You may get tired of the questions, the process and the pressure. Be patient and try not to take their questions personally or get offended.
3. Take your time. Breathe, listen to the question, and pause before you answer.
4. Don't be surprised if questions include allegations that are without foundation, or just plain wrong.



# Congressional Testimony: Rules of the Road (Cont.)



5. If asked about a document that you don't have, ask to see and read a copy of the document before answering the question. Avoid referencing documents or individuals by name unless necessary.
6. Where appropriate, begin your answer by noting "To the best of my knowledge . . . " or "My understanding is . . . ."
7. If you receive a question for which you do not know the answer, you may note that you will follow up with the Committee to provide that answer.
8. If a question is asked of the entire panel, you do not need to volunteer to answer and may want to defer to other panelists who would like to respond. Where appropriate, you can defer to their responses.
9. Pay attention to your posture and body language. Sit up on the front of your seat.





# Questions for the Record (QFRs) and Post-Hearing Follow-Up

- Committee members may submit QFRs.
- After the hearing, the witness may formally correct any misstatements made during the hearing, or provide additional information as requested by members of the Committee.
- The Committee might also make a transcript of the hearing available to the witness and give the opportunity for any non-substantive corrections. The transcript is then reviewed for any errors or misattributions and returned to the Committee with a letter of the proposed changes.



# Reports

- Some committees will release reports on their investigation
- Understand the process for finalizing reports
  - Ask to see an embargoed version
  - Ask for opportunities to address errors prior to publication
  - Be aware that the version released to the press is often not final
- Decide how vigorously to contest the report
- Work with communications team to determine the tone for statements to the press



# KEY CONSIDERATIONS



## Understanding the Political Landscape

- The purpose might be to push for policy change, or simply might be partisan (Benghazi, Russian interference, Uranium One)
  - Democrats tend to investigate the private sector
  - Republicans tend to investigate the government and companies doing business with the government
- Committee members' comments leading up to and during a hearing might mischaracterize facts
- Consider any new regulation that might arise out of a hearing or investigation





## Media

- Monitor press coverage for articles related to the investigation
- Investigation can affect stock prices, proposed legislation or regulation, and public opinion
  - Generally, the best anticipated result out of a Congressional investigation is the least amount of coverage possible
- Carefully consider public statements



## Timing

- Responding quickly to an investigating Committee can signal a cooperative attitude and establish a good working relationship with the Committee and its staff.
- However, there are times where proceeding at a more reserved pace can have advantages.



## Privilege and Confidentiality

- Long-standing position of most members of Congress is that common-law privileges, including Attorney-Client privilege, do not apply.
- Recognition of privilege falls within the discretion of investigating committee.
- May be possible to work with committee to craft productions that do not implicate privilege.
- Congress frequently releases confidential documents produced in the course of an investigation. Document productions should always be accompanied by confidentiality language reserving the right to contest the release of confidential and sensitive information pursuant to House or Senate rules.



## Waiver

- A witness may invoke his or her Fifth Amendment privilege in congressional hearings, or in the investigative context. See *Emspak v. United States*, 349 U.S. 190 (1955).
- In most jurisdictions, answering questions in one proceeding does not prevent a witness from asserting the privilege in another proceeding. See, e.g., *Slutzker v. Johnson*, 393 F.3d 373, 389 (3d Cir. 2004), *Poretto v. United States*, 196 F.2d 392, 394 (5th Cir. 1952), and *United States v. Miranti*, 253 F.2d 135, 140 (2d Cir. 1958).
  - *But see*, DC Circuit minority rule: a witness who answers questions in a formal proceeding under oath may not later invoke the privilege as to the same topic. *Ellis v. United States*, 416 F.2d 791 (D.C. Cir. 1969).



## Procedure/Committee Rules

- Usually, Committee rules require either concurrence or consultation with the ranking member before the chairperson initiates a formal investigation.
- Committee chairs can begin informal inquiries through inquiry letters, scheduling of hearings, or staff studies and interviews without committee vote or minority party participation.
- A legal obligation to surrender documents requested arises at the time of the official request. *See, e.g., Ashland Oil v. FTC*, 548 F.2d 977, 991-81 (D.C. Cir. 1976).
- Committees must adopt and publish their rules of procedure and publish them in the Congressional Record. House Rule XI.2(a) and Senate Rule XXVI(2).
- Committees must provide at least one week's public notice for the holding of a hearing.



# Parallel Investigations

- Criminal Proceedings
- Civil Litigation
- Regulatory Proceedings
- State AG Investigations



## Minority Only Investigations

- The powers of the minority party are limited, especially in the House.
- No ranking minority members or individual members can start official committee investigations, hold hearings, issue subpoenas, or attend informal briefings or interviews held prior to the institution of a formal investigation.
- Ranking members may be able to hold “roundtables,” modeled after hearings, in which they examine evidence and invite witnesses to testify.



## When to Engage Individual Counsel

- Firms like WilmerHale tend to represent corporations, but hearing witnesses are individuals. While it is not always necessary, there are times where a witness may need to engage individual counsel.





# ACTIVE COMMITTEES



## Key Senate Committees

- Homeland Security and Governmental Affairs
  - Permanent Subcommittee on Investigations (PSI)
- Finance
- Select Committee on Intelligence
- Judiciary
- Commerce, Science, and Transportation
- Special Committee on Aging
- Health, Education, Labor and Pensions (HELP)



## Key House Committees

- Oversight and Government Reform
- Judiciary
- Intelligence
- Energy and Commerce (including health care)
- Science, Space, and Technology



# **AREAS OF FOCUS FOR 2019**



## Current Areas of Inquiry

- Executive Branch Oversight and Integrity in Government
- Climate Change
- Oversight of Trump Administration changes to Obama-era regulations
  - Focus on relaxed regulations and actions by EPA, DOE, and DOI
- Speaker Pelosi's promised agenda also includes healthcare, consumer protection, and voting rights.



# Issues on Agendas of Key Committees

## *Integrity in government*



- Expect oversight of Cabinet members and other government officials
- Will extend to examining the role of lobbyists and interest groups in driving policy changes made during the first two years of the Trump Administration, as well as dealings with private businesses associated with Administration officials, particularly White House or Cabinet personnel
- Individuals and businesses that made large donations to the Trump Inauguration or who hired “new” Trump-friendly lobbying shops may be prioritized



# Issues on Agendas of Key Committees

## *Climate Change*

- The Green New Deal shows that a significant number of Democrats are ready to discuss far-reaching and potentially disruptive changes
- Senate Majority Leader Mitch McConnell promised a vote on the Green New Deal
- Trump Administration connections with the fossil fuel industry are already under review and we anticipate investigations of public statements by corporations regarding climate change and research funding
- Multiple House Committees will be active in this space: Energy and Commerce, Oversight and Reform, Natural Resources, and the new Select Committee on the Climate Crisis



# Issues on Agendas of Key Committees

## *Consumer Protection*

- Actions by the Consumer Financial Protection Bureau will be thoroughly reviewed
- Data privacy and anti-competitive practices in the tech sector may be an area of bipartisan collaboration on legislation and investigations
- Antitrust investigations and hearings will increase in the Democratic House
- Payday lending; credit reporting; privatized military housing
- Bank CEO and credit bureau hearings likely to be followed by a review of private equity firms and hedge funds





# Issues on Agendas of Key Committees

## *Voting Rights*



- Turnout issues and energizing base voters will be a Democratic priority
- Companies could be dragged into the fray over issues like election day leave policies, or based on brand issues – Starbucks, high profile private equity and hedge fund bundlers/donors
- Expect greater scrutiny of contributions to “dark money” organizations and of election-related activity – free rides to the polls, advertising policies on social media sites, search engine results
- Pressure will come from both sides, including the Senate Majority leader



# Emerging Players: First Term Members

- Strong voices; independent from party leadership
- Large social media following
  - E.g., Alexandria Ocasio-Cortez
    - House Committees on Financial Services and Oversight and Reform
    - Nearly 3.7M Twitter followers
    - Tweeting hearing clips to impose public pressure on institutions
- Intersection of Law and Government
  - Legal training and deposition skills
    - E.g., Rep. Katie Porter
      - House Committee on Financial Services
      - Former consumer advocate lawyer and law professor; litigation savvy
  - Hearing testimony can launch criminal investigations
  - Influence on civil litigation

