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Congress and the Power To Investigate: What You Need To Know

Theodore M. Hester
Eleanor J. Hill

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Bridging Business and Government

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Preface

Earlier this year, the National Legal Center hosted the 2007 General Counsel Conference, *The First 72 Hours of a Government Investigation*. By all accounts, it was a real success; however, had time permitted, we would have used that occasion for a panel presentation devoted to congressional investigations. To remedy that shortcoming, we are pleased to dedicate this issue of the *Briefly* series to a serious discussion of this important and timely topic.

We are grateful to the authors, Theodore M. Hester and Eleanor J. Hill, for their insights and practical advice on how to navigate this unique and hazardous area of the law. The powers of the Congress to investigate are great and the safeguards are few, particularly when compared to the more familiar terrain of civil and criminal litigation. Many corporations and individuals have been scorched by underestimating the skill, tactics, and capacity of investigative committees and staff.

Congressional investigations often occur concurrently with ongoing agency inquiries and criminal investigations, increasing the exposure and stakes in already complex and challenging multi-front proceedings. As an independent branch of government, the Congress has the right to investigate as it believes appropriate, and it will rarely be deterred from pursuing what it believes to be a legitimate inquiry regardless of the potential consequences in another forum.

The reach of congressional authority is enormous. We believe you will find this *Briefly* to be a valuable resource in better understanding and, if need be, for responding to a congressional inquiry. Please keep this *Briefly* nearby.

Richard A. Hauser
President, National Legal Center

I. Introduction

The arrival of the 110th Congress has prompted talk of a new era of rigorous and far-reaching congressional investigations on any number of topics. The new Chairs of some of the most powerful—and most storied—congressional committees have already launched a number of investigations, and the list is growing. Those schooled in the procedures that govern law enforcement and regulatory investigations may soon find themselves facing largely unfamiliar territory in the legislative arena. The congressional oversight and investigative powers are formidable and very different, in significant ways, from the investigative authorities of executive branch agencies. Far too often, those whom Congress investigates mistakenly assume, to their great detriment, that congressional investigations involve little more than sitting through an hour or two of political grandstanding, with few lasting consequences. To the contrary, congressional investigations are serious matters that do indeed pose formidable legal and public relations risks for entities and individuals under congressional scrutiny.

While some have suggested that legislative oversight waned in recent years, the Congress is clearly not a new player in the oversight and investigative arena. In 1792, Congress first exercised its oversight authority to investigate the Army's defeat and loss of 600 soldiers in a battle with the Miami and Shawnee Indian tribes near the headwaters of the Wabash River. Over the years, Congress has not hesitated to embark on investigations of other, high-profile issues across a wide range of activity: scandals (Teapot Dome, Watergate, campaign finance, House pages); national security issues (Iran-Contra, the Church Committee, the Joint Inquiry on the September 11th Attacks, the review of pre-Iraq War intelligence); crime (organized crime via the testimony of Joe Valachi, labor racketeering, arson, insurance fraud, and defense procurement fraud); health (pharmaceutical issues, medical errors, nursing homes, blood safety, Medicare and Medicaid fraud); education (student loan abuses, Pell grant fraud); compliance and regulatory issues (aviation safety, offshore tax shelters, nuclear and port security) and corporate America (collapse of Enron, the tobacco companies, gasoline pricing, banks and credit card lending practices, insider trading).

The list goes on, reflecting the nearly limitless congressional power to investigate. Implied in the Constitution, that power is as broad as the scope of the congressional power to legislate. If Congress has the power to act, then it necessarily also has the power to investigate the facts and circumstances that pertain to its decision to act—or not to act—in a particular area. Under that authority, coupled with the courts' general reluctance to interfere in the legislative branch, there are amazingly few restrictions on a Congress that is armed with the political will to investigate. This article is intended as a primer on congressional investigations; the authorities, the methods, the tools, and the unique and difficult issues—and risks—that confront agencies, companies, and individuals facing congressional investigative scrutiny.

II. Congressional Investigative Authority

Although the Founding Fathers did not specifically enumerate the power to investigate in the Constitution, the Supreme Court has repeatedly confirmed that congressional investigative authority is clearly implied in the Constitution, noting that the "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to legislative function."[1] The legislative oversight and investigative function is not uniquely American: its roots can be found in British parliamentary history. William Pitt, in his 1742 support of a House of Commons investigation, noted, "We are called the Grand Inquest of the nation, and as such it is our duty to inquire into every step of public management, either abroad or at home, in order to see that nothing has been done amiss."[2] So, too, must our Congress be informed to legislate, and investigation is recognized as a logical way for Congress to gain access to the information it needs.

[1] McGrain v. Daugherty, 273 U.S. 135, 175 (1927). In *Watkins v. United States*, 354 U.S. 178 (1957), the Court reversed the contempt of Congress conviction of a man called to testify before the House Committee on Un-American Activities. Petitioner was prosecuted for refusing to disclose the Communist-party status of certain people. The Court held that in order to support a contempt of Congress conviction, the investigating committee must state for the record the subject matter of the inquiry. In reaching its ruling, the Court said, "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad .... It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action." *Id*. at 187.

[2] Sam Nunn, *The Impact of the Senate Permanent Subcommittee on Investigations on Federal Policy*, 21 Ga. L. Rev. No. 1, at 18 (1986), *citing* T. Taylor, Grand Inquest: The Story of Congressional Investigations 8-9 (1955).

As any seasoned investigator knows, inquiries do not always follow their initial road map: they uncover new leads, new issues, and end up covering territory that might never have been anticipated at the outset. As such, the courts have put few real limits on where a congressional investigation may lead. The power to investigate is as broad and as sweeping as the universe of not only existing laws and proposed bills, but also any legislation that could possibly result from the investigation. Absent extreme circumstances, the courts generally have been reluctant to interfere in seemingly legitimate congressional inquiries. Whether or not a congressional investigation actually produces legislation, for example, does not negate the congressional authority to investigate. In *Eastland v. United States Servicemen's Fund,*[3] the Supreme Court reinforced the breadth of the congressional investigative power:

> The wisdom of the congressional [investigative] approach or methodology is not open to judicial veto .... Nor is the legitimacy of a congressional inquiry to be defined by what it produces. The very nature of the investigative function—like any research—is that it takes the searchers up some "blind alleys" and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result.

The Supreme Court has acknowledged that some limits on congressional inquiries, while few, do exist: Congress cannot investigate solely for the sake of investigating or to "expose the private affairs of individuals without justification in terms of the functions of the Congress ..." *Kilbourn v. Thompson*.[4] As a practical matter, however, it is extremely difficult to convince a court that there is no nexus to some possible legislative function.

III. Committees: Setting the Investigative Agenda

Within the Congress, committees traditionally have been the force driving the investigative power. While individual Members have, at times, made individual investigative requests, they do not, by contrast to committee and subcommittee Chairs, have the authority and the resources that are necessary to drive real investigations. The Chairs generally have broad discretion

[3] 421 U.S. 491, 509 (1975).

[4] 103 U.S. 168, 204 (1880).

to initiate investigations on matters that fall within the jurisdiction of their respective committees or subcommittees. On rare occasions, the House or Senate leadership may be involved in determining how and by whom matters of major significance will be investigated. For the most part, however, the decision to investigate rests with the Chairs and reflects a combination of their personal preference and the applicable jurisdictional grants contained in the House and Senate rules and in the authorizing resolutions for the individual committees. The jurisdictional grants range from broad to fairly narrow and can, at times, overlap with the jurisdiction of another committee.[5]

High-profile allegations that trigger intense public and media interest are prime candidates for congressional investigation. In those kinds of circumstances, overlapping jurisdictions can result in more than one committee investigating the same or similar allegations and matters. For example, the House Committee on Financial Services, the House Committee on Homeland Security, the House Committee on Oversight and Government Reform, and the Senate Homeland Security and Governmental Affairs Committee each have jurisdictional grants that are broad enough to encompass part or all of the federal government's response to Hurricane Katrina. In the aftermath of Katrina, they all investigated various aspects of the government's response to the storm. In fact, the Senate Homeland Security and Governmental Affairs Committee and the House Government Reform Committee conducted separate investigations, held separate hearings, and issued separate reports on the adequacy of the government's entire response to the storm.

To the extent that competing committees claim exclusive jurisdiction over an issue, the dispute can prompt negotiation between the competing Chairs, with occasional intercession from House or Senate leadership.

[5] Some examples of congressional committees with broad jurisdiction are the House Oversight and Government Reform Committee, the House Energy & Commerce Committee, and the Senate Committee on Homeland Security and Governmental Affairs. *See* Rule XXV(k)(1), Standing Rules of the Senate (Apr. 27, 2000) (granting broad legislative and investigative jurisdiction to the Committee on Homeland Security and Governmental Affairs); Rule X(1)(m)(6), Rules of the House of Representatives (Jan. 24, 2007) (granting jurisdiction to the House Committee on Oversight and Government Reform over "overall economy, efficiency, and management of government operations and activities, including Federal procurement"). *But see* Rule X(1)(f), Rules of the House of Representatives (Jan. 24, 2007) (granting jurisdiction to the House Committee on Energy and Commerce over several specific areas, including biomedical research, interstate energy compacts, and conservation of energy resources).

Again, this is an area of considerable congressional discretion. While committees may argue among themselves about investigative jurisdiction, efforts by a subject of congressional scrutiny to derail a committee investigation on jurisdictional grounds are generally not productive.

IV. Standing and Select Committees

Over the years, investigations have been led by standing, select, and, on occasion, "special" committees. Standing committees are permanently established to address issues in a specific public policy arena (e.g., House Committee on Agriculture, House Committee on Appropriations, House Committee on the Judiciary, Senate Armed Services Committee, Senate Finance Committee, Senate Health, Education, Labor and Pensions Committee) and have significant legislative responsibilities that demand much of their time and resources. The competing demands of those other responsibilities can, at times, make it difficult for them to sustain lengthy investigative efforts. To permit the kind of focused, labor-intensive work that investigations often require, a growing number of both standing and select committees have established oversight and/or investigations subcommittees that are dedicated to investigative work and often staffed with seasoned investigators, former prosecutors, and detailed personnel from federal audit and enforcement agencies. They are designed to handle lengthy and complex investigations in a reasonably professional manner. At last count, eight committees now have Investigations and/or Oversight Subcommittees:

Senate Finance Committee
(Subcommittee on Taxation and IRS Oversight);

Senate Homeland Security and Governmental Affairs
Committee (Permanent Subcommittee on Investigations);

House Energy and Commerce Committee
(Subcommittee on Oversight and Investigations);

House Financial Services Committee
(Subcommittee on Oversight and Investigations);

House Foreign Affairs Committee
(Subcommittee on Oversight and Investigations);

House Small Business Committee
(Subcommittee on Regulatory Reform and Oversight);

House Ways and Means Committee
(Subcommittee on Oversight); and

House Permanent Select Committee on Intelligence
(Subcommittee on Oversight).

Two of those subcommittees are particularly well known for their lengthy and aggressive track records in investigations. The Senate's Permanent Subcommittee on Investigations (PSI) was created in 1948 as the successor to the Truman Committee's investigation of inefficiency and fraud in the war effort.[6] PSI's investigative jurisdiction covers the entire panorama of federal government activity: health, welfare, and public safety; national security; crime and lawlessness; syndicated and organized crime; energy shortages; compliance or noncompliance of corporations and companies; labor and management groups; and the operations of all branches of the government. For nearly 60 years, PSI has built a high-profile investigative tradition, with a long string of inquiries covering that jurisdictional waterfront, including organized crime (testimony from, among others, Joe Valachi, Angelo Lonardo, Tony Accardo, Russell Bufalino), espionage (testimony from Christopher Boyce of *Falcon and the Snowman* notoriety), Communist infiltration (the Army-McCarthy Hearings), fraud and abuse (in Medicare, student aid programs, insurance and health care), offshore tax shelters, the collapse of Enron, labor racketeering, and the spread of chemical and biological weapons.

PSI is also notable because it is one of the few congressional forums where investigations are, to a large degree, a bipartisan effort; in fact, numerous PSI investigations and hearings have been led by the Minority, with the support and cooperation of the PSI Majority. It also has its own procedural rules at the subcommittee level; not surprisingly, those rules are intentionally drafted to maximize PSI access to a broad range of powerful investigative authorities.[7] Moreover, PSI has not been reluctant to use

[6] Chaired by then-Senator Harry Truman, that committee was formally designated as the Special Committee to Investigate the National Defense Program.

[7] *See* Rule 9 (Depositions), Rules of Procedure for the Senate Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs (Feb. 16, 2007) (establishing rules for notice, counsel, procedure, and filing relating to the taking of depositions by PSI). *See also id.* at Rule 2 (Subpoenas for witnesses).

those authorities: in 1981, it prompted the Senate's first use of 28 U.S.C § 1365, which authorizes the Senate, on its own initiative, to initiate civil contempt proceedings in federal court. In the 110th Congress, PSI is being chaired by Senator Carl Levin (D-Mich.), a long-standing and very experienced Member of the subcommittee. In recent years, as PSI's Ranking Minority Member, Senator Levin led numerous lengthy and complex investigations in such areas as money laundering, tax shelters, and the collapse of Enron. Under his leadership, the subcommittee is expected to continue its role as a leading force in congressional investigations.

In the House, the Oversight and Investigations Subcommittee of the Energy and Commerce Committee (O&I) has, like PSI, established its prominence in investigations over the years. The subcommittee has investigative jurisdiction that covers the activities of at least seven components of the executive branch: the Departments of Energy, Commerce, Health and Human Services, and Homeland Security; the Federal Trade Commission; the Consumer Product Safety Commission; and the Environmental Protection Agency. It has a history of strong, aggressive Chairs who have led a variety of noteworthy investigations over the years. In his previous years as Chairman of O&I, Rep. John Dingell (D-Mich.) led inquiries into, among others, the safety of the American blood supply; health insurance costs; wasteful Defense Department spending; and alleged abuses of federal contracts by research universities. Former Rep. Billy Tauzin (R-La.), as a past Chairman of Energy and Commerce, led full committee and O&I subcommittee investigations into corporate pretexting; corporate accounting misconduct; the Firestone tire recall; the government's response to the SARS outbreak; and abuses of the federal E-Rate program.

With John Dingell returning to the Chair of the full committee in the 110th Congress, Rep. Bart Stupak (D-Mich.), as O&I's new Chair, has already announced investigations on nuclear security, drug safety, National Institutes of Health (NIH) conflicts of interest, medical errors, and direct-to-consumer marketing of prescription drugs. Given its long-standing investigative tradition, O&I is staffed with experienced and seasoned investigators who have the abilities and focus needed for major investigations. At least in the past, that staff has been supplemented by O&I's reliance on investigative personnel from agencies such as the Government Accountability Office (GAO). By all accounts, O&I appears poised to con-

tinue its tradition of high-profile, aggressive investigative work in the 110th Congress.

There is also at least one standing committee, the House Committee on Oversight and Government Reform (formerly the House Committee on Government Reform), that appears determined to conduct substantial investigative activity at the full committee level in the 110th Congress. The new Chair, Rep. Henry Waxman (D-Cal.), who in 1998 created a "Special Investigative Division" at the committee, reportedly stated, just after the Democrats regained control of the Congress, "I'm going to have an interesting time because the Government Reform Committee has jurisdiction over everything."[8] True to those words, he has already launched oversight investigations covering a broad spectrum of topics: federal contracting, postwar Iraq reconstruction, pharmaceutical pricing and safety issues, and the role of White House officials in the leak of a CIA officer's identity. Underscoring the Chairman's focus on investigations, Rule 22 of the Committee's Rules for the 110th Congress adds the authority to order sworn depositions to the committee's preexisting investigative authorities.[9] Representative Waxman is indeed no stranger to aggressive, high-profile investigations: in April 1994, he led an inquiry into the conduct of U.S. tobacco companies that culminated in the dramatic, televised testimony of company CEOs.

V. Special Investigations and "Special" Committees

Perhaps some of the most visible and well known congressional investigations have been the product of "special committees" created for the sole purpose of investigating a particular issue that has become the focus of intense public attention and debate. By creating a special committee or committees to address the issue, Congress demonstrates its willingness to tackle the problem and to devote the time and resources needed to establish credibility in the public eye. Sometimes, as in the case of the Senate Watergate Committee,[10] a committee from one Chamber conducts the inquiry. On other occasions, the House and Senate leadership, for whatever reason, decide to bring two House and Senate committees and their respective staffs together to conduct a joint investigation. In 1987, for example, the House and Senate each created separate special committees that, together, investigated what is commonly referred to as "The Iran-Contra Affair."[11] Supported by their combined staffs, the committees conducted a single investigation, held joint closed and public hearings, and issued a single, joint report. In 2002, the House and Senate Intelligence Committees came together to conduct the Joint Inquiry on the Activities of the Intelligence Community with regard to the Terrorist Attacks of September 11, 2001. The Joint Inquiry was unique in that it brought together two permanent committees, with a newly hired, single professional staff, in a bipartisan, bicameral investigative effort. Over a period of 18 months, the Joint Inquiry reviewed hundreds of thousands of intelligence reports, conducted hundreds of interviews, held nine closed and thirteen open hearings, issued a lengthy report in both classified and unclassified forms, and prompted the creation of the 9/11 Commission by first discovering and disclosing to the American public numerous "missed opportunities" by the Intelligence Community with regard to the 9/11 attacks.[12]

These kinds of "special" committees are particularly well equipped to conduct lengthy, complex, and professional investigations. They typically have the strong support of the congressional leadership and a prioritized and focused mission. They have the time and the resources to hire professional,

[8] *To the Point: Waxman To Hold Several Probes*, Investor's Bus. Daily, Nov. 13, 2006, at A02. More recently, Chairman Waxman has said, "Oversight is just as important, if not more so, than legislation." *Revival of Oversight Role Sought*, Wash. Post, Apr. 25, 2007, at A01.

[9] *See* Rule 22 (Deposition Authority), Rules of the Committee on Oversight and Government Reform, 110th Cong. (establishing rules for notice, counsel, procedure, and filing relating to the taking of depositions).

[10] The Senate Watergate Committee, formally known as the "Select Committee on Presidential Campaign Activities," was convened by the U.S. Senate to investigate the Watergate break-in and ensuing scandal. It held its first hearing on March 28, 1973, and issued its report on June 27, 1974.

[11] In 1987, the Senate convened the Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition. The Senate Select Committee was chaired by Sen. Daniel K. Inouye (D-Haw.). The House convened the Select Committee to Investigate Covert Arms Transactions with Iran. The House Select Committee was chaired by former Rep. Lee Hamilton (D-Ind.). Joint hearings were held from May 5 to August 3, 1987, and a report was issued on November 17, 1987.

[12] At the time, the Senate Intelligence Committee was led by a Democrat, Sen. Bob Graham (D-Fla.), while the House Committee was led by a Republican, Rep. Porter Goss (R-Fla.). Working with the committees' respective Ranking Minority Members, Sen. Richard Shelby (R-Ala.) and Rep. Nancy Pelosi (D-Cal.), they emphasized the need for a bipartisan and professional investigation in the wake of the September 11th attacks.

experienced staff. Their procedural rules are designed to give them broad investigative authority and a wide range of investigative tools. Member participation is generally at a high level, given the historical importance of the issues and the intense media and public interest. In short, these efforts can produce sustained, in-depth investigations that can pose significant challenges for agencies, companies, and individuals that come under their scrutiny.

VI. Rules v. Discretion

Lawyers who have proven their mettle as litigators in the federal and state courts are accustomed to relying on the certainty and the protection afforded by the procedural and evidentiary rules. While there are rules that apply to congressional investigations and hearings, they are not nearly as extensive or as definitive as those that typically govern courtroom proceedings. Something akin to the Rules of Evidence, for example, simply does not exist in the congressional setting. Major investigative decisions fall, for the most part, within the discretion of the committee or subcommittee Chair, making uncertainty far more common and negotiation far more important. To the extent there are rules that apply, they usually serve to bolster the broad power that rests with the Chair.

At least two, and sometimes three, sets of rules can apply to congressional investigations. The House and Senate each adopt their own rules, with their respective committees being subject to those rules as well as to each committee's own Rules of Procedure. Subcommittees that conduct investigations may, in addition, have their own sets of rules. In the House, Rule XI specifically addresses committee procedures, and includes a number of provisions that are relevant to congressional investigations (e.g., open and closed hearings, witness counsel, subpoena power, witness transcripts). In the Senate, Rule XXVI governs committee procedures (including subpoena power, the taking of testimony, and procedures for calling witnesses suggested by the Minority party). The broad authorities granted in the House and Senate rules, however, allow for a range of different procedures among the committees. As a result, individual committee and subcommittee rules vary in their procedural requirements. For example, some committees require a committee vote in order to issue a subpoena, while

others permit the Chair to issue a subpoena on his or her own signature.[13] While not all subcommittees have their own procedural rules, some investigative subcommittees, such as the Senate's Permanent Subcommittee on Investigations (PSI), have adopted rules that are clearly designed to facilitate their investigative work. The PSI rules, for example, require that all testimony be under oath, authorize sworn depositions by Members or staff, confirm the Chair's authority to remove witness counsel on conflict grounds, and strictly limit the role of counsel for hearing witnesses.[14]

All these rules are silent in some critically important areas that remain within the discretion of the Chair. Beyond jurisdictional relevance, there is, for example, no guidance on what areas are or are not appropriate for questioning. There are no rules setting time limits on investigations. There are no evidentiary rules to limit the types of questioning or the introduction of documentary evidence. There are no "discovery" rules that would guarantee a witness access to interview memoranda, staff reports, witness testimony, and documentary evidence prior to being confronted with that material at a public hearing or in the press. There are no rules dictating how a committee should treat a request for confidentiality for proprietary and other material produced in response to a committee request. There are no rules dictating how a committee should treat a claim of privilege by a witness. There is no guidance on whether a committee should or should not require a witness to invoke his or her Fifth Amendment privilege in a public, nationally televised session. There are no rules identifying the factors to be considered in ruling on requests for immunity. There is no rule requiring committees to advise individuals of "target" status, to notify them when an investigation is initiated or concluded, or to advise individuals and the public when an individual has been cleared or exonerated. These are all matters that ultimately fall within the discretion of the Chair.

[13] *See* Rule 2 (Subpoenas), Rules of Procedure for the Senate Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs (Feb. 16, 2007) (providing that subpoenas for witnesses may be authorized by the Chairman or any other Member of the subcommittee authorized by the Chairman, with notice to the Ranking Member. *See also* Rule 19(d) (Additional Duties of Chairman), Rules of the Committee on Oversight and Government Reform (110th Congress) (providing that it is a duty of the Chairman to authorize and issue subpoenas for committee investigations. *But see* Rule 10 (Subpoenas), Rules of Procedure, Senate Committee on Finance (Jan. 17, 2007) (providing that witnesses may be subpoenaed by the Chair, but with either the agreement of the Ranking Member or a majority vote of the committee.

[14] *Id.* at Rules 6, 8, and 9, Rules of Procedure, *supra* note 13.

VII. Tools of the Trade: The Investigative Arsenal

A. Subpoenas

A wide range of investigative tools make congressional committees extremely well equipped to exercise their power of inquiry. Perhaps the most obvious of these tools is the subpoena power. The Supreme Court has long recognized that the issuance of subpoenas falls squarely within the legislative authorities of Congress and within the protections of the Speech and Debate clause:

> We have already held that the act of "authorizing an investigation pursuant to which … materials were gathered" is an integral part of the legislative process …. The issuance of a subpoena pursuant to an authorized investigation is similarly an indispensable ingredient of lawmaking; without it our recognition that the act "of authorizing" is protected would be meaningless. To hold that Members of Congress are protected for authorizing an investigation, but not for issuing a subpoena in exercise of that authorization, would be a contradiction denigrating the power granted to Congress in Art. 1 and would indirectly impair the deliberations of Congress.[15]

Senate Rule XXVI(1) and House Rule XI(2)(m)(l), taken together, grant all standing committees and subcommittees the power to issue subpoenas for the testimony of witnesses and the production of documents. In the case of special investigations and select committees, the subpoena power often is found in the resolution authorizing the investigation and/or the committee. As noted above, the procedures for issuing subpoenas vary from committee to committee, with specifics detailed in a particular committee and/or subcommittee's rules. Both the House and Senate rules allow committees to delegate the committee's authority to issue subpoenas to the committee Chair, thus facilitating the ease with which investigative subpoenas can issue. A number of committees with substantial investigative agendas, like the House Committee on Oversight and Government

[15] Eastland v. United States Servicemen's Fund, 421 U.S. 491, 505 (1975).

Reform, the Senate Finance Committee, and PSI, have rules authorizing the Chair to issue a subpoena on his or her own signature.[16]

Despite having ample authority to issue subpoenas, this is not always the first choice of congressional investigators seeking information. As a practical matter, some committees are far more accustomed to issuing subpoenas than others. In cases where Members are unfamiliar with the process or where a required vote may be difficult to secure, investigative requests may be made via letter signed by the Chairman, as opposed to a formal subpoena. Increasingly, even the investigative committees seem to prefer that practice, reserving the use of subpoenas for matters where they anticipate an uncooperative or less than candid response.

Congressional subpoenas, like federal grand jury subpoenas, can require the production of a huge universe of records and documentary material. While some congressional committees aim for quick turnaround time on hearings and minimal document review, others are willing to devote considerable time and effort to the review of huge volumes of subpoenaed materials. The strength of the congressional subpoena power is perhaps best underscored when one considers the scarcity of options available to those who wish to challenge a congressional subpoena. In an action to enjoin the implementation of a Senate subpoena, the Supreme Court's decision in *Eastland v. United States Servicemen's Fund*[17] effectively insulated congressional subpoenas from the types of attacks on process, such as motions to quash, that typify courtroom litigation. The respondents had argued that the subpoena was intended to chill their First Amendment rights, thus requiring the courts to intervene to protect those rights. The Court declined to do so, concluding that:

> [W]here we are presented with an attempt to interfere with an ongoing activity by Congress, and that activity is found to be within the legitimate legislative sphere, balancing plays no part. The speech or debate protection provides an absolute immunity from judicial interference. Collateral harm which may occur in

[16] *Supra* note 12. The PSI rules do require written notice of the Chair's intent to issue a subpoena to the PSI Ranking Minority Member and to the Chairman and Ranking Minority Member of the full Committee on Homeland Security and Governmental Affairs.

[17] *Supra* note 15, at 510.

> the course of a legitimate legislative inquiry does not allow us to force the inquiry "to grind to a halt".

By contrast to the courtroom, there is thus no equivalent "motion to quash" option in the congressional setting. A party receiving a congressional subpoena essentially has only two avenues left to attack the process: an appeal to the discretion of the committee Chair (rarely successful) or objections to the subpoena raised as a defense in a contempt prosecution (where the stakes—a finding of contempt of Congress—are even higher).[18]

It is also important to note that responses to congressional subpoenas fall within the purview of the federal statutes that criminalize the obstruction of a congressional inquiry or investigation[19] and the making of false or misleading statements to, among others, Congress and congressional investigators.[20] Moreover, those statutes apply with equal force to responses to congressional investigative requests made via letter, as opposed to subpoena.

In that context, accuracy and completeness are critical in responding to any congressional investigative request or subpoena. Production should be numbered, inventoried, copied, and accompanied by a cover letter that explains any qualifications and clarifies in advance any area of potential misunderstanding regarding the production. Proprietary or confidential material should be clearly marked as such and accompanied by a request that the committee maintain that confidentiality.[21] As with so many other issues, the decision on that request falls squarely within the discretion of the Chair.

B. Depositions

Over the years, congressional investigations often have relied on the power to subpoena testimony, not only to be presented at hearings, but also to be taken in private, sworn depositions. Depositions provide committees with the ability to secure and test the testimony of witnesses long before those witnesses testify publicly. The practice also enables a committee to develop

[18] *See* discussion in Section F below.
[19] 18 U.S.C. § 1505.
[20] *Id.* § 1001.
[21] While there is no guarantee that a committee will honor that request, a written request highlights the issue, ensures some consideration of the request, and may increase the chances of a favorable, or at least receptive, response.

an extensive record of sworn testimony to support its findings, while still keeping public hearings at a manageable level. Finally, the use of depositions greatly increases the likelihood that new investigative leads will be developed and covered during the prehearing investigative phase, that public hearings will be based on a strong factual foundation, and that any inconsistencies between a witness's deposition and hearing testimonies will be identified and referred for prosecution. In short, the power to depose witnesses vastly enhances Congress's investigative capabilities while at the same time increasing the legal and public relations risks that confront congressional witnesses.

In the past, congressional deposition authority often was authorized in the case of major investigations being conducted by special investigating committees. The Senate Select Committee on Watergate, the House Assassinations Inquiry, and the House and Senate Iran-Contra Committees, for example, were all granted some type of deposition authority. Not surprisingly, depositions have proven to be a well-used and formidable tool in special investigations. The record of the Senate-House Iran-Contra investigation, for example, includes more than 190 depositions.

Aside from special investigations, deposition authority has also been granted to, and used by, other congressional committees and subcommittees. In the Senate, for example, the Rules of the Permanent Subcommittee on Investigations have authorized, since the early 1980s, the use of the subpoena power for private, sworn depositions of witnesses to be conducted by Members or staff. The use of PSI depositions proved so successful in investigative efforts that, in 1987, the deposition authority for the Iran-Contra Committees was patterned, at least in part, on the language of the PSI rule. In 1997, the significance of the deposition power was demonstrated when a company executive was convicted on federal perjury charges, based on alleged inconsistencies between his PSI deposition testimony and his PSI hearing testimony.

While not all congressional committees have deposition authority, there are a growing number that do. In the 110th Congress, the intensified focus on investigations and oversight was again underscored by the grant of deposition authority to the House Committee on Oversight and Government Reform, as set forth in Rule 22 of the committee's rules.

As with other aspects of congressional investigations, congressional depositions are very different from the pretrial depositions that are found in civil and even criminal litigation. The deposition is taken under oath, in a private setting, and the record is transcribed. The Rules of Evidence do not apply, and questioning is limited only by the committee's predictably broad view of relevancy. Not all committees require that those who conduct the deposition be lawyers. The House Committee on Oversight and Government Reform, for example, does, while PSI does not. While a witness may be accompanied by his or her lawyer, no "party," other than the Congress, has a right to ask questions, and so the lawyer's role is limited to advising the client and making objections to questions on the record. The fate of those objections is determined not by a judge, but by the Chair or, in some cases, some other designated Member of the committee. There are few, if any rules, on the logistics of how or when rulings on objections will be made. Both the Majority and Minority sides of the committee are entitled to have a selected Member or staffer pose questions on their behalf. While a witness generally has a right to review and correct any typographical or nonsubstantive errors in the deposition transcript, the witness generally is not entitled to a copy of the transcript.

C. Compelling Document Production and Testimony: Privileges

Those who find themselves the subject of a congressional investigation should not assume that traditional notions of attorney-client, work product, and other judicially recognized privileges will necessarily apply in this setting. Congress does not consider itself to be bound by common law, judicially enforced privileges and often has chosen to ignore such privileges in favor of conducting as broad and limitless an investigation as possible. During its investigation of the Imelda Marcos affair in 1985, the House Subcommittee on Asian and Pacific Affairs ruled that attorney-client privilege was not available as a right during its proceedings.[22] Congress has also refused to honor a claim of attorney-client privilege despite a previous judicial decision upholding that privilege in a civil suit. In its 1990 investigation of the Medicare Secondary Payer program, PSI subpoenaed documents from Provident Life & Accident Company. Provident refused to give up the documents because of the attorney-client privilege, arguing that a federal court ruling upholding the privilege protection of the documents was binding on the Congress.[23] However, that federal court denied Provident's request for an injunction against producing the documents to Congress, stating that its earlier ruling on the privileged nature of the documents was "certainly not binding on the Congress of the United States."[24] The outcome of the Provident investigation is clear evidence that there is little stopping a congressional committee from deciding not to honor the attorney-client privilege.

Further muddling the question of privilege in the context of the congressional investigation is the split in judicial opinions on the issue. In *Stewart v. Blaine*,[25] plaintiff refused to reveal information to Congress that he considered confidential attorney-client information and was held in contempt. In upholding his conviction, the Supreme Court of the District of Columbia found support in the idea that Congress has the authority to overrule common law privileges. *Id*. In contrast, in *United States v. Keeney*,[26] the District Court for the District of Columbia assumed that common law privileges *were* applicable to congressional settings.

As is the case with other aspects of congressional investigations, Congress has nearly complete discretion to honor these kinds of privileges as it chooses. In the context of congressional committees, the issue is decided on a case-by-case basis. Some committees are more willing to honor such privileges than others. It is up to those claiming the protection of common law privileges to raise them and do their best to persuade committee Chairs to honor them. The Rules of Professional Conduct that bind attorneys may also not provide much protection for the interests of those under investigation, as many State Bar Associations accommodate the eventuality of an attorney being forced to violate privilege in order to cooperate with a congressional investigation.

[22] *See* Jonathan P. Rich, Note, *The Attorney-Client Privilege in Congressional Investigations*, 88 Colum. L. Rev. 145, 159 (1988) (attorney-client privilege is considered a substantive, not procedural, right at common law, but it is generally seen as founded upon utilitarian pretexts).

[23] Kalah Auchincloss, Note, *Congressional Investigations and the Role of Privilege*, 43 Am. Crim. L. Rev. 165, 181-86 (2006).

[24] In the Matter of Provident Life & Accident Co., CIV-1-90-219 (E.D. Tenn. 1990).

[25] 8 D.C. (1 MacArth.) 453 (D.C. 1874).

[26] 111 F. Supp. 233, 234-35 (D.D.C. 1953).

D. Compelling Testimony: The Fifth Amendment

While Congress does not have to abide by the Rules of Evidence and other procedural rules of the courtroom, Congress does have to abide by the Constitution, including the Fifth Amendment privilege against self-incrimination. In the context of litigation, there is an abundance of case law addressing not only the right against self-incrimination but also the prejudice and unfairness associated with requiring an individual to invoke that privilege in front of a jury. Some courts have found prosecutorial misconduct in cases where a prosecutor, knowing a witness would invoke the Fifth Amendment privilege, called the witness to testify solely for the purpose of emphasizing the claim of privilege to the jury. *United States v. Coppola;*[27] *San Fratello v. United States;*[28] *United States v. Tucker.*[29] Requiring public invocation of the privilege can also occur in Congress, where the rules and standards are far less clear. In Congress, the issue turns on the fairness of requiring an individual to invoke the privilege in a highly publicized and often nationally televised congressional hearing.

Both the House and Senate rules provide committees with the flexibility to receive testimony that would be prejudicial to an individual in closed, executive session. Senate committees and subcommittees may meet in closed, executive session in cases where the testimony:

> will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of the individual ....

Senate Rule XXVI(5)(b)(3).

In the House, executive session testimony may be taken in cases where the testimony, if taken in public, "would tend to defame, degrade, or incriminate any person ...." House Rule XI(2)(g)(1).

Neither of those rules, however, is mandatory: the decision to close a hearing is clearly within the discretion of the relevant committee or

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[27] 479 F.2d 1153 (10th Cir. 1973).

[28] 340 F.2d 560 (5th Cir. 1965).

[29] 267 F.2d 212, 215 (3d Cir. 1959).

subcommittee. Witnesses in the House can also argue for a closed session based on House Rule XI(2)(k)(5), which gives a witness the right to assert that open session testimony would "tend to defame, degrade, or incriminate the witness." Once that assertion is made, the committee can only proceed if "the committee, a majority being present, determines that such evidence or testimony will not tend to defame, degrade or incriminate any person." In any case, a decision to close the hearing, even for purposes of invoking the Fifth Amendment privilege, ultimately falls within the discretion of the committee.

The Senate and House rules provide no further guidance for committee Chairs on where or how a witness should invoke the Fifth Amendment privilege. It is not unusual for witness counsel to advise a congressional committee in advance that the witness will invoke the Fifth Amendment privilege and request that the witness not be required to appear before the committee to do so. Such requests are usually in writing and, in the past, often cited District of Columbia Legal Ethics Committee Opinion No. 31. That opinion held that staff attorneys acting for congressional committees should not require a witness who was also a target of a grand jury to invoke the Fifth Amendment privilege in a televised congressional hearing, when it was known in advance that the witness would invoke the Fifth Amendment and refuse to testify. The opinion suggested that the witness could instead be called in a closed, executive session, noting that "there is certainly no need to have the test of claim of privilege take place in a televised open hearing with the resultant inevitable prejudicial publicity for the witness."

That argument has not always, however, proved persuasive with congressional committees. There have been instances where a committee or subcommittee Chair has, over counsel's objection, required a witness to publicly and repeatedly invoke the Fifth Amendment privilege under the glare of the cameras. From the congressional viewpoint, the argument is that this tactic may further the progress of the investigation: an uncooperative witness may suddenly decide to testify when confronted with the prospect of a public hearing. In fact, there have been cases where congressional witnesses who had stated their intent to claim the privilege later chose to testify rather than assert that privilege in a public setting. Whatever the merits of the individual case, witnesses and their counsel should understand that, despite a plethora of arguments about fairness,

public degradation, and prejudice, congressional committees can still, if they so choose, require a very public invocation of the Fifth Amendment privilege.

E. Compelling Testimony: Immunity Grants

Should a witness invoke his or her Fifth Amendment right against self-incrimination, Congress, like prosecutors, does have the ability to seek and procure an immunity order ultimately compelling the testimony of the witness. Federal statutory provisions specifically authorize a U.S. District Court to issue an immunity order in appropriate cases involving "any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses …."[30] Such an order compels a witness to testify, but ensures that the witness receives, in return, "use immunity":

> no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 2002.

Section 2005 addresses only "Congressional proceedings," setting forth the specific requirements that govern immunity orders pertaining to congressional matters. The section requires a federal district court judge to grant a congressional request for an immunity order, if he or she finds that:

> (1) in the case of a proceeding before or ancillary to either House of Congress the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;
>
> (2) in the case of a proceeding before or ancillary to a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and
>
> (3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

[30] 18 U.S.C. § 2005.

The statute permits the court, upon request of the Attorney General, to delay the issuance of the immunity order for up to 20 days from the initial request. However, the Attorney General has no right to be heard in opposition to the immunity request and no authority to prevent the issuance of the order, absent a decision by Congress to withdraw the request. *Application of U.S. Senate Select Committee on Presidential Campaign Activities*.[31] Where the procedural steps listed above have been met, the court is "compelled to grant unconditionally" the requested immunity order and has no authority to judge the "wisdom of granting immunity or appropriateness of coverage by broadcast media." *Id*.

Obviously, immunity orders can be a critically important tool in congressional investigations. According to the Congressional Research Service, Congress has secured approximately 345 immunity orders since 1970, of which nearly half were related to the 1978 investigation of the assassinations of President John F. Kennedy and Rev. Martin Luther King, Jr.[32] While helpful in many investigations, the congressional decision to grant immunity has also been criticized.

In the aftermath of the 1987 Senate-House investigation of the Iran-Contra affair, many suggested that the committees' decision to immunize Lt. Colonel Oliver North and Rear Admiral John Poindexter ultimately resulted in the postconviction dismissal of prosecutions against both men. In *United States v. North*,[33] the court vacated Oliver North's convictions for obstruction of Congress, destroying, altering, or removing official National Security documents, and accepting an illegal gratuity because the government had inappropriately used North's immunized testimony before Congress in getting his conviction. In *United States v. Poindexter*,[34] the

[31] 361 F. Supp. 1270 (D.D.C. 1973).

[32] Cong. Res. Service Report for Congress, Congressional Oversight Manual, at 36 (Jan. 3, 2007).

[33] 910 F.2d 843 (D.C. Cir. 1990), *modified*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

[34] 951 F.2d 369 (D.C. Cir. 1991).

court vacated John Poindexter's convictions for conspiracy to destroy official documents, obstruction of Congress, and making false statements because the Independent Counsel did not carry his burden of demonstrating that defendant's compelled immunized testimony before Congress was not used against him at his trial in violation of 18 U.S.C.S. § 6002 and the Fifth Amendment of the Constitution. The decision to grant immunity, particularly in the case of North, had been a matter of considerable internal debate within the committees, with the view that the testimony was critical for both the investigation and the public's understanding of the events ultimately prevailing. The congressional immunity decisions were also a source of public controversy, given their prominent role in the *North* and *Poindexter* cases.

Even in the aftermath of those cases, Congress has shown little interest in relinquishing its ability to seek immunity orders. While its potential impact on relevant criminal proceedings now demands careful consideration, immunity remains a powerful, and discretionary, investigative tool for congressional committees and subcommittees.

F. Civil and Criminal Contempt

The full force of the congressional investigative powers depends, to a large degree, on the congressional enforcement powers. Unless Congress can force an unwilling individual to provide the needed information, its investigative demands and immunity orders become meaningless. The contempt power provides the leverage that enables Congress to demand, and obtain, compliance with its investigative requests.

The power to hold a witness in contempt is inherent in the constitutional legislative authority granted to both the House and the Senate. In order to carry out the legislative functions, Congress must have the ability to remove and/or punish those who would obstruct that process, either by creating a disturbance in the Chamber or by refusing to comply with legitimate investigative demands. The Supreme Court has long recognized the importance of the contempt remedy.

> That "the safety of the people is the supreme law," not only comports with, but is indispensable to, the exercise of those powers in their public functionaries, without which that safety cannot be guarded. On this principle it is, that Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.

Anderson v. Dunn, 19 U.S. 204, 227 (1821).

While the vision of a witness being forcefully removed pursuant to a contempt order of a committee Chair may provide the most drama, it does not reflect standard current practice in the exercise of the congressional contempt power. Even in cases where Congress, years ago, did rely on its inherent contempt power, the process was more complicated. The noncooperative witness was brought before the Chamber, tried by the Chamber, and, if convicted, subject to imprisonment, for a specific period of time or until he or she chose to cooperate. According to the Congressional Research Service, given the cumbersome nature of that process, Congress has not exercised this version of the contempt power in more than 70 years.[35]

Instead, Congress has exercised its other contempt options: statutory criminal contempt and also, in the Senate, statutory civil contempt. Both the House and Senate can refer a contempt citation for the failure to testify or produce documents to the United States Attorney for criminal prosecution under 2 U.S.C. §§ 192 and 194, a misdemeanor carrying a maximum penalty of a $100,000 fine and imprisonment for a period of one year. The referral cannot be made until after the relevant committee or subcommittee issues a contempt citation against the offending witness and that citation is approved by the full House or Senate. According to the Congressional Research Service, since 1975, 10 different cabinet-level or senior executive officials have been cited for contempt by a subcommittee, a committee, or by the House or Senate. All these cases were, however, resolved through compliance with the congressional demand, thus avoiding the need for criminal proceedings.[36] The statute provides that the House or Senate shall certify the facts constituting the contempt to the United States Attorney, "whose duty it shall be to bring the matter before the grand jury for its action." The statute is silent on any required timetable for presentation to the grand jury. The ability of Congress to compel an

[35] *Id.* at 37.
[36] *Id.*

unwilling or recalcitrant United States Attorney to initiate and encourage grand jury action in a congressional contempt proceeding has not been tested in the courts.

Rather than rely on the action of the United States Attorney, the Senate can choose to initiate civil contempt proceedings under 28 U.S.C. § 1365. The statute allows the Senate, but not the House, to apply directly to a federal district court for an order requiring compliance with a Senate subpoena. If the witness refuses to comply, he or she is tried in summary proceedings before the court. For a congressional witness, the defense in a contempt proceeding is the only opportunity, albeit a very limited one, to obtain judicial scrutiny of a congressional subpoena. Under the statute, however, the court has little, if any, discretion in finding contempt: if the subpoena is relevant to the legislative function, properly issued, and the witness refuses to comply, the court must find the individual in contempt and impose sanctions designed "to compel obedience to the order of the Court."[37] The statute covers Senate contempt proceedings against private individuals, specifically exempting cases involving the refusal to comply by federal government officers or employees acting within their official capacities. Consistent with that provision, the Senate has used these proceedings to enforce compliance by private individuals: in 1981, in the initial case brought under the statute, immunized witness William Cammisano was imprisoned for two years for his refusal to testify before the Senate's Permanent Subcommittee on Investigations regarding alleged organized crime activity.

G. Perjury, False Statements, and Obstruction Statutes

Aside from contempt proceedings, criminal prosecutions can also target attempts by witnesses and others to frustrate or obstruct congressional investigations. In responding to congressional investigative requests and subpoenas, individuals and entities should understand that a number of federal criminal provisions could apply to those responses. The legal risks that can accompany inaccurate or incomplete responses to Congress are substantial.

The general federal perjury statute, 18 U.S.C. § 1621, clearly applies to sworn testimony, whether in a hearing or in a deposition, given to a con-

[37] 28 U.S.C. § 1365(b).

gressional committee or subcommittee. Under that section, willfully false sworn testimony is a felony, punishable by a fine and/or imprisonment up to five years. Not all congressional hearing testimony is, however, given under oath. Some congressional committees and subcommittees do not require it or require it only in special cases. Some, like the Senate's Permanent Subcommittee on Investigations, require that all hearing testimony be sworn. With the increasing congressional use of depositions, which require sworn testimony, the applicability of the perjury statute to congressional investigations has expanded.

A great deal of congressional investigative work involves the receipt of information from witnesses and other sources that is not sworn or provided under oath. Congressional investigators, for example, may seek information in informal telephone conversations or via requested interviews or briefings with individuals or even groups of individuals. It is important to note that this kind of response, though not sworn, may also be subject to federal criminal provisions and, as such, can carry significant legal risks for those providing the information. The long-standing federal false statements felony provision, 18 U.S.C. § 1001, was amended in 1996 to, among other things, cover statements and representations to congressional investigating bodies. The scope of conduct covered is broad and specifically includes the provision of information in congressional investigations:

> "(a) whoever, in any matter within the jurisdiction of the executive, *legislative*, or judicial branch of the Government of the United States, knowingly and willfully—
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or,
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism …, imprisoned not more than 8 years, or both ….
>
> * * * *

(c) With respect to any matter within the jurisdiction of the *legislative branch*, subsection (a) shall apply only to—

* * * *

(2) *any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress*, consistent with applicable rules of the House and Senate." [emphasis added]

Given that broad statutory language, the need for accuracy and attention to detail in providing testimony or other information to congressional investigators cannot be overemphasized. That is particularly true when one considers that another, even broader federal criminal statute can also apply in these kinds of situations. The federal obstruction of justice offense[38] encompasses not only false statements but also misleading statements and other efforts to impede a congressional investigation. The relevant provisions state:

…Whoever corruptly, or by threats of force or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede, the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism … imprisoned not more than 8 years, or both.

The definition of "corruptly," as set forth in 18 U.S.C. § 1515(b), makes clear that a wide range of conduct can be considered criminal under these provisions:

(b) As used in section 1505, the term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

[38] Codified at 18 U.S.C. § 1505.

In short, providing information and documents to congressional investigators, even in the most informal of settings, can carry serious legal risks. Accuracy, consistency, and completeness are critical when dealing with a congressional investigation: in document production, in interviews, and in deposition and hearing testimony.

H. Access to Agency Information

Not only are there substantial legal penalties for providing false or misleading information to Congress, there is also a high likelihood that congressional investigators will be well equipped to quickly identify misstatements and/or false or altered documents. As representatives of the U.S. Congress, they have a tremendous range of contacts, both within and beyond government, and, with those contacts, a considerable ability to access and collect relevant information.

Long before reaching out to potential witnesses, congressional investigators can arrange briefings on relevant policy issues from government agencies, the Congressional Research Service, and a range of outside experts. As congressional representatives, they often have considerable access to government records. Official and unofficial contacts and sources within agencies can also provide valuable information. Regulators, including those at the state level, have also been known to bring matters to the attention of congressional investigators. If the issue under investigation has sparked media attention, you can be assured that congressional investigators will have scoured the press reports and learned as much as possible from friendly, but knowledgeable, reporters. Finally, whistle-blowers, both within agencies and private companies, often turn to congressional investigating committees, particularly when the committee has voiced interest in their area of concern. Congressional investigators can gain a great deal of potentially damaging information from whistle-blowers and other disgruntled employees and former employees.

In short, by the time a "target" of a congressional investigation is actually called before Congress, committee Members and the investigative staff that supports them may have a wealth of information with which to query and, if necessary, impeach the target witness. A good rule of thumb for counsel is to always assume that, if relevant information exists, congressional investigators will have already seen it by the time the witness is

interviewed. The potential for inconsistent or contradictory testimony can be considerable. In that kind of environment, every effort must be made to ensure that the witness is not only well prepared, but absolutely accurate in his or her testimony.

I. GAO, IGs, and Detailees

Congressional committees operate in a busy and extremely dynamic environment. One day's agenda may differ completely from that of the next, given the speed with which new issues emerge that demand immediate attention. As noted above, it is often difficult, particularly in the traditional legislative committees, to maintain the kind of dedicated focus and expertise that is needed to conduct in-depth, professional investigations.

Congress, however, is not without ways to buttress its investigative resources, both in terms of personnel and focused expertise. When facing a congressional inquiry, it is important to recognize that Congress may also engage and depend on the work of other, seasoned government investigators. Obviously, this can compound and complicate the challenges facing targets of congressional investigations. The Government Accountability Office (GAO), for example, plays an important role in many congressional investigations. GAO, an agency with more than 3,200 employees and a budget of more than $480 million, is responsible for investigating how the federal government spends taxpayer dollars. Focused on improving agency performance and ensuring government accountability, it serves as a "congressional watchdog" by responding to congressional requests for audits, evaluations, and investigations. On issues where it has limited expertise or insufficient in-house investigative manpower, Congress often turns to GAO. As a result, GAO investigations, and the reports and testimonies that those investigations generate, frequently replace or supplement efforts by congressional investigators. Congressional investigating committees work closely with GAO investigators and auditors, receiving regular briefings and providing direction on GAO work done in response to congressional requests. While not immediately apparent, a GAO request for information often may be but one part of a larger, and more complex, congressional investigation.

In 1978, Congress created the first federal Inspectors General (IG), another important source of support for congressional investigations. Today, federal statutory IGs exist at some 57 departments and agencies, providing

audit and investigative oversight for nearly every aspect of the operations of the federal government. The IG mission promotes economy, efficiency, and effectiveness in government, with a constant focus on the prevention and detection of waste, fraud, and abuse in government programs. In doing so, the IGs often serve as critical players in congressional investigations.

In creating the federal IG concept, Congress was, at least in part, prompted by recognition that congressional oversight capabilities were necessarily limited by ever-increasing legislative demands. The IGs were designed as independent agency watchdogs that would play an oversight role within the agencies, while complying with their statutory obligation to keep the Congress "fully and currently informed." In essence, they provide Congress with a guaranteed window into oversight issues that arise within the agencies and in the programs they administer. IGs testify regularly at congressional hearings, provide semiannual reports to the Congress on audit and investigative issues, and conduct numerous audits and investigations at the request of congressional Members, committees, and subcommittees. Not surprisingly, IG Semi-Annual Reports are a frequent source of topics for congressional investigations. Once a committee or subcommittee focuses on an IG issue, it is not uncommon for the relevant IG office to provide briefings and even detailed personnel to assist the congressional investigative team. IGs often provide critical testimony, and IG audits or investigations can, at times, fill much of the agenda in congressional investigative hearings.

Various congressional committees and subcommittees have also, over the years, secured "detailed" federal personnel from executive branch agencies as a way of increasing their investigative manpower. These "details" are generally prompted by a congressional request to the agency, are memorialized in some type of letter agreement, and can vary in terms regarding payment, reimbursement, length of detail, and so forth. "Detailees" can be housed in the congressional offices and, for all practical purposes, become part of the committee's investigative staff for the length of the detail. This practice effectively expands not only the size of the investigative staff but also the breadth of the expertise available to any particular investigation. Reflecting the broad range of investigative issues, past congressional detailees have come from a wide variety of departments and agencies, including the Federal Bureau of Investigation, the Department of Defense, the Department of Education, the Department of Labor, the Secret Service,

the Drug Enforcement Administration, and the Government Accountability Office, to name but a few. As a result, those undergoing congressional scrutiny may find themselves facing investigative teams that include highly experienced federal law enforcement agents and others with proven expertise in investigations.

J. Criminal and Regulatory Referrals

In terms of investigations, what begins in Congress does not necessarily end there. Even after a company or individual has weathered the full spectrum of the congressional investigations process—investigation, hearings, and report—the end may not yet be in sight. In cases where congressional investigations uncover evidence or other indications of potentially criminal activity, it is not unusual for a committee or subcommittee to formally refer the entire investigative record to law enforcement and/or prosecuting authorities for their review and consideration. While the committees cannot dictate that a criminal investigation or prosecution be initiated, the fact of a congressional referral is likely to at least garner some serious attention and review. While it is true that congressional investigations can be initiated in response to news of criminal investigations and prosecutions, the reverse is also true: there have been instances where significant criminal investigations and prosecutions were prompted by facts uncovered in congressional investigations.

As in other areas, there are no rules establishing standards or limits on congressional referrals. Aside from criminal referrals, committees and subcommittees can also refer compliance and other regulatory matters to the appropriate regulatory bodies, be they federal or state. As if to reinforce those referrals, congressional reports of investigation often include findings and recommendations regarding regulatory bodies that can, as a practical effect, increase the likelihood that the related referrals will receive substantial attention. Targets of congressional investigations can, as a result, be dealing with law enforcement and regulatory agencies long after the congressional inquiry is closed. Congress has the ability to give its investigative findings considerable exposure: to law enforcement agencies, to regulators, to the media, and to the public. In that context, one must always assume that the ultimate impact of a congressional investigation may go well beyond the legislative purpose that the inquiry was originally designed to serve.

VIII. What To Expect: The Process

Given all the discretion surrounding congressional investigations, it is not surprising that there can be wide variations in the way these investigations are conducted. Some committees can react immediately to allegations reported in the press with quick research, hastily scheduled briefings and interviews, a rapidly issued press release announcing an investigation, and an "investigative hearing" within a matter of a few days. Other committees can spend months, and even years, conducting a major, in-depth investigation that can entail numerous subpoenas, the review of thousands of pages of documents, briefings, interviews, depositions, and, ultimately, one or more series of investigative hearings. Whether a particular investigation follows either of those models, or some combination of both, is a function of the Chair and Members' preferences, the degree to which other committees may be claiming jurisdiction over the issue, the press of other legislative demands, and committee staffing and resource limitations.

There is, however, a very basic "blueprint" that usually typifies congressional investigations: investigation, hearings, report, and introduction of legislative proposals. Prompted by anything from a press account to an IG report to a constituent or whistle-blower complaint, a committee or subcommittee Chair can, on his or her own authority, direct the staff to initiate an investigation. In some committees, the beginning of the investigation may be announced publicly, while in others, that can be delayed until the public announcement of hearings, which can occur months later. In some cases, a "preliminary inquiry" to further assess the allegations may precede any decision to commit congressional resources to a full investigation.

The formal investigative phase, which can go on for as long as necessary, can include the use of some or all of the investigative tools discussed earlier in this monograph: interviews, subpoenas for documents, depositions, agency briefings, review of government records, and, to the extent necessary, reliance on immunity orders and contempt proceedings. Given the broad scope of most congressional investigations, it is not unusual for the investigation phase to uncover new, and unexpected, issues that can lead the investigation in a different direction or, in the extreme case, give rise to a completely new, and separate, congressional inquiry.

While not all congressional investigations give rise to congressional hearings, most clearly do. The hearing stage, which is generally conducted in the public eye, gives all Members of the committee or subcommittee the opportunity to hear and probe for themselves the evidence gathered by the investigative staff. It also provides a way of demonstrating to the public the congressional commitment to address and resolve the issue at hand. Congressional investigative hearings routinely attract substantial media interest and public attention. Staff reports, which can summarize and underscore the most damaging evidence, can at times be used to open the hearings, leaving witnesses the task of responding to evidence and conclusions that they may have never seen before. The challenges facing congressional witnesses can be substantial: they must be prepared to tackle new allegations, new facts, and any and all Member questions, in an accurate and calm manner, while facing a bevy of television cameras. Moreover, when they depart the witness table, they will no doubt be followed by more cameras and throngs of reporters.

In some investigations, the hearing may mark the end of congressional involvement in the issue. Most committees and subcommittees, however, view the investigation and hearing process as a means to a bigger end: legislative action to address the public policy concerns uncovered through the investigation. Preparation and approval of a committee or subcommittee final report on the investigation and hearings is an important step in building a record to support that kind of legislative action. A final report traditionally summarizes, in considerable detail, the facts and testimony gathered in the investigation and then sets forth the findings, conclusions, and recommendations of the committee or subcommittee that conducted the investigation. Preparation and approval of these kinds of reports can take months, with their public release coming long after the completion of the investigation. As a result, a target of an investigation can face intense media and public scrutiny all over again when the report is released. Moreover, targets and witnesses are not guaranteed any pre-release access to the report. A request for such access is, again, a matter that falls within congressional discretion.

Finally, once the report is released or, in some cases, even earlier, it is not unusual for the committee or subcommittee leadership, supported by other Members, to introduce legislation to correct problems uncovered in the hearings and investigation. To the extent that the report includes specific

legislative recommendations, those will normally be incorporated in the legislative proposals. As these proposals move through the legislative process, a strong investigative record at the committee or subcommittee level can be an important factor in solidifying congressional support for the proposal.

IX. Conclusion

Ultimately, the most successful and most productive congressional investigations are those that generate needed legislative action in important areas of public policy. That is, after all, the underlying justification for the congressional power of inquiry: Congress must be able to inform itself, as well as the public, on the matters on which it must legislate. There is no question that congressional investigations can, and often do, help ensure "good government" and sound public policy. In doing so, however, they can also pose huge risks, and carry significant consequences, for those subjected to congressional scrutiny. In this new era of intensified congressional oversight, it is important to understand and appreciate not only the benefits, but also the risks, that can surface when Congress chooses to investigate.

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Ms. Hill has extensive investigative experience in the private sector and the executive and legislative branches of government. She served most recently as Staff Director for the Joint Congressional Inquiry on the Terrorist Attacks of September 11, 2001. From 1995 through 1999, she served as Inspector General to the Department of Defense, having been appointed to that position by President Clinton; as Chair of the President's Council on Integrity and Efficiency; as the Co-Chair of the Intelligence Community Inspectors General Forum; and as a Member of the Attorney General's Council on White Collar Crime.

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