

Understanding Your Rights in Response to a Congressional Subpoena

As Congress begins its 2014 session, all signs point to an agenda dominated by aggressive congressional investigations. From the implementation of the Affordable Care Act to the conduct of the NSA surveillance program to perennial concerns over financial services regulation, Congress is likely to investigate a wide variety of matters that will impact public and private parties. In this primer, Mayer Brown lawyers discuss the general contours of Congress's investigative authority and subpoena power. They also provide some practical advice regarding the protections available to the subjects of congressional investigations.

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Most Americans understand that the United States Congress is constitutionally vested with the power to make laws. What is often less well understood—but may be just as important to those who are subject to its jurisdiction—is Congress’s power to investigate matters through the issuance of subpoenas and other compulsory processes. Put simply, Congress can compel the production of documents and sworn testimony from almost anyone at almost any time. And unlike the judicial process overseen by the courts, the congressional system offers relatively few procedural protections for those individuals or companies who find themselves subject to, what founder and early Supreme Court Justice James Wilson called, “the grand inquest of the state.”¹ As an independent and coequal branch of government, Congress’s investigative power is largely unchecked by the courts, as a matter of constitutional design. Thus, the true limitations upon Congress’s authority are pragmatic and based upon institutional and political power dynamics.

In this article, we discuss the contours of Congress’s investigative authority and subpoena power. We also provide some general advice regarding the protections available to parties that are subject to a congressional investigation. Although this article is intended to provide a basic primer, it is no substitute for a tailored response strategy. Each congressional investigation is different. The strategies and opportunities that are available to a party in a given investigation will be as varied as the matters that the Congress may seek to investigate. For that reason, it is essential that individuals or companies that learn they are subject to a congressional investigation seek out the advice of experienced legal counsel as soon as possible. In addition to the authors, Mayer Brown has a wide array of lawyers with litigation, regulatory, and government expertise and substantial experience representing individuals and corporations that find themselves the targets of congressional investigations.

The Scope of Congress's Subpoena Power

Congress has long been held to possess plenary authority to investigate any matter that is or might be the subject of legislation or oversight. And as the Supreme Court observed over 35 years ago, this authority includes the power to use compulsory processes, such as the issuance of subpoenas. *See Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491, 504 (1975). The scope of Congress's power "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Id.* at 504 n.15 (quoting *Barenblatt v. U.S.*, 360 U.S. 109, 111 (1959)). Put another way, although Congress ought not to delve needlessly into the "private affairs" of the citizenry, it has the power to inquire about and investigate any issue "on which legislation could be had." *Id.* (quoting *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927)). So long as Congress stays within this "necessarily broad" grant of constitutional authority, courts have little power to restrain its action. *See Id.* at 508 ("The wisdom of congressional approach or methodology is not open to judicial veto.").

As a practical matter, this means that courts generally will not interfere with a congressional subpoena absent a truly opprobrious violation of an individual's constitutional rights. Indeed, in the entire history of American jurisprudence, courts have sought to limit congressional investigations in only a handful of cases and, there, only in the face of blatant constitutional violations. *See, e.g., McSurely v. McClellan*, 521 F.2d 1024, 1043 (5th Cir. 1975) (holding that the Fourth Amendment applied to congressional inquiries, and explaining that congressional staff did not have immunity from a civil lawsuit alleging that they participated in an unlawful search and seizure by removing documents from a private residence); *see also Exxon Corp. v. FTC*, 589 F.2d 582, 590 (D.C. Cir. 1978) (declining to issue an injunction to protect purported trade secrets from congressional subpoena because, "[a]lthough the courts will intervene to protect constitutional rights from infringement by Congress, including its committees and members, where constitutional rights are not violated there is no warrant for the judiciary to interfere with the internal procedures of Congress.")

In sum, the legal authority of Congress to seek and use investigatory information is extremely broad and is subject to only minimal oversight by the courts. Absent clear violations of substantive constitutional rights, there are few formal restraints on congressional action, and recourse to the judiciary for relief from such action is extremely limited.

Protections, Privileges and Procedural Rules

Each chamber of Congress has exclusive authority to determine and construe its own internal procedural rules. U.S. CONST., Art. I, § 5, cl. 2. This authority includes the discretion to apply, construe, and/or waive procedural requirements governing the conduct of congressional investigations. *See AFL-CIO v. U.S.*, 330 F.3d 513, 522 (D.C. Cir. 2003) (explaining that Congress has “broad discretion” to conduct investigative proceedings and to decide what aspects of such proceedings are to be made public). Although it is not uncommon for individual members to make informal requests for information, the true constitutional authority of Congress to investigate using compulsory process is vested in each chamber’s various standing committees. Individual members acting on their own have no ability to issue subpoenas or compel compliance. Those powers are resident solely in the various committees and are governed primarily by committee rules. The procedural protections afforded to responding parties, therefore, will vary depending upon the rules of the committee pursuing the investigation and the goals of that committee’s chairman and other senior members.²

Given the wide latitude afforded to committees, strategies for managing congressional investigations generally involve understanding the policy and political purposes of the investigation and engaging committee staff on those issues. Any protections afforded to the responding party will typically be the product of negotiations with committee staff and/or political constraints on the committee. In this section, we discuss the process by which committee investigations generally advance, and we identify some issues that are commonly negotiated between counsel and committee staff, including the availability of legal privileges, the confidentiality of information, and the need for witness testimony.

The Enforcement Process. Congressional investigations often begin informally, with the interested committee or subcommittee first seeking information on a voluntary basis (i.e., by sending a letter request or asking for an informal interview), rather than by issuing compulsory subpoenas. Although there is no legal obligation that a party comply with such a request, it is typically in the responding party’s best interest to do so, except where privileged or other sensitive information is involved, as discussed in more detail below. These informal requests present an important first opportunity for the responding party to shape the views and perceptions of the committee staff. Congressional staff members are required to work on a wide range of issues. They will rely heavily on

a responding party whom they view as trustworthy to educate them on the issues under investigation. In addition, cooperating with an initial request allows the responding party to demonstrate that it is compliant and respectful, favorably influencing the staff and potentially mitigating the risk that members will publicly attack the responding party for noncooperation.

As we noted above, there are few judicial limits placed upon the scope of a congressional investigation. As a practical matter, however, the mechanisms that Congress must use to enforce a subpoena or to sanction a party for contempt are time-consuming and cumbersome, with each escalating step in the process requiring a greater level of political commitment. For example, most committees' rules authorize their subcommittees or chairpersons (occasionally in consultation with the ranking members) to issue subpoenas requesting documents or information. If a responding party fails to comply with the subpoena, committee rules then typically require a majority vote of the full committee before a resolution of noncompliance may be reported to the parent chamber. This additional requirement operates as a political brake on any committee or subcommittee hastily citing a party for contempt.

If there are insufficient votes in committee to report a resolution of noncompliance to the full chamber, the committee may simply reject the resolution and pursue no further action. If there are sufficient votes in favor, the report must typically then pass from the committee to the parent chamber (either the House or the Senate) to face a floor vote before a resolution of contempt may be issued. The level of support necessary to pass a resolution of contempt by chamber vote is obviously significantly greater than that needed to issue the subpoena in the first instance. In many cases, there will be insufficient interest in the chamber for a resolution of contempt to pass. One wild card in this equation, however, is press coverage. Issues garnering substantial media attention and public interest are much more likely to capture the interest of members and to move quickly through the enforcement process.

Assuming that a resolution of contempt is approved, Congress must then pursue one of three options for actually enforcing its contempt order. *First*, either chamber may invoke its inherent contempt power by instructing its sergeant-at-arms to arrest the noncompliant party and bring him or her before the chamber's presiding officer. Theoretically, the chamber is empowered to hold the noncompliant party in the Capitol jail until the end of the legislative session. In practice, however, this practice has long been dormant and has not been

employed by either chamber for over 80 years. *See Journey v. MacCracken*, 294 U.S. 125, 147-48 (1935) (addressing the last invocation of the inherent contempt power). *Second*, the presiding officer of either chamber may refer the matter to the U.S. Attorney for the District of Columbia to pursue criminal contempt proceedings, pursuant to 2 U.S.C. §§ 192, 194. *Third*, the Senate rules authorize the Senate to initiate a civil action in federal district court, seeking a court-ordered injunction to compel compliance with Senate process. Any person failing to comply with such an order would be subject to contempt of court under traditional judicial processes.

Scope of the Inquiry. Whatever formal enforcement mechanism Congress may ultimately decide to pursue, the process will inevitably require a significant commitment of time, resources, and political will. As a result, members and committee staff generally prefer to resort to formal processes only when they are absolutely necessary, giving the responding party some limited ability to negotiate the scope of an information request (i.e., by seeking to limit the time frame or subject area of the requests). The standard practice, therefore, is for the responding party's counsel to engage with the committee staff in a negotiation regarding scope, while at the same time still attempting to be reasonable and compliant with the request. In practice, congressional staff members are aware of the reputational costs that the investigative process imposes upon private parties, yet they vigorously pursue documents that they believe may be important to the goals of their investigation.

Legal Privilege and Work Product Protections. One of the most important distinctions between congressional investigations and those conducted by law enforcement agencies is that Congress is not judicially obligated to acknowledge the attorney-client privilege or work product doctrines. Because these privileges are not generally recognized as constitutional guarantees, it is usually within the investigating committee's discretion to decide on a case-by-case basis whether to recognize the attorney-client privilege or work product doctrine. *See, e.g., M. Rosenberg, Report for Congress On Investigative Oversight*, Congressional Research Service (1995) at 7. Again, this is often a point of negotiation between the committee and counsel for the responding party. In many cases, privilege concerns can be addressed by counsel persuading committee staff that certain privileged materials are not critical to the investigation, or by negotiating a compromise to provide the factual information to the committee without producing the privileged documents in which the facts may be embedded.

The ability to negotiate protections for privileged information will turn on the facts of the particular investigation, as well as the policy and political purposes motivating the investigation. Obviously, committee staff will be less willing to negotiate with a responding party that they regard as a bad actor or an attractive political target. To maximize the potential for success, therefore, the responding party must work diligently to cultivate credibility with the committee and to allay any concerns that the privilege will be used inappropriately.

It must be noted that there is a fundamental tension between a responding party's obligation to cooperate with a congressional demand for privileged information and the need to demonstrate resistance to such a demand in order to prevent a voluntary waiver of the privilege for purposes of private litigation. "[I]f a party voluntarily discloses part of an attorney-client conversation, the party may have waived confidentiality—and thus the attorney-client privilege—for the rest of that conversation and for any conversations related to the same subject matter." *Williams & Connolly v. SEC*, 662 F.3d 1240, 1243 (D.C. Cir. 2011) (emphasis in original). Thus, although Congress ultimately has the ability to insist upon the production of privileged information, responding parties are advised to strenuously "seek to quash or limit [a congressional] subpoena on all available, legitimate grounds" in order to protect the privilege. *See Ethics Opinion No. 288*, District of Columbia Bar (1999) (considering an attorney's ethical obligation to protect client information in the face of a congressional subpoena). Initial strenuous resistance to a congressional demand may help to preserve the privilege in other contexts (including private litigation against third parties) by showing that the disclosure of the privileged information is compulsory, heading off arguments that the privilege has been voluntarily waived. At a minimum, navigating the dual imperative of cooperating with Congress and protecting the privilege will pose a series of difficult strategic decisions for the responding party throughout the Congressional investigation.

Confidentiality. Put simply, concerns about the confidentiality or privacy of information will not generally operate to limit the scope of a congressional subpoena. Courts have repeatedly held that subpoena respondents may not refuse to provide information to Congress based on purported concerns about sensitive information. *See Exxon Corp.*, 589 F.2d at 590; *see also FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980) ("Once documents are in congressional hands, courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties.") Likewise, documents that are usually protected from

disclosure by the Trade Secrets Act, 18 U.S.C. § 1905, the Privacy Act, 5 U.S.C. § 552, or under exceptions to the Freedom of Information Act, 5 U.S.C. § 552, are *not* exempt from production to Congress. Nor will courts act to “block disclosure of information in Congress’s possession, at least when the disclosure would serve a valid legislative purpose.” *Owens-Corning*, 626 F.2d at 970 (citing *Doe v. McMillan*, 412 U.S. 306 (1973)). And once documents are in Congress’s possession, there are no legal restraints on its ability to release them or otherwise disclose sensitive information. A responding party must expect, therefore, that any information provided to Congress—even information that is otherwise entitled to protection as confidential or privileged—may become public. As with the other areas we have noted, certain privacy concerns may be raised with committee staff and negotiated on a case-by-case basis.

Testimony at Public Hearings. In addition to their power to compel the production of documents, congressional committees also have the ability to issue testimonial subpoenas requiring individuals to appear at public hearings. For the same procedural reasons described above, committees nevertheless typically prefer to request voluntary testimony rather than issue formal testimonial subpoenas. This presents responding parties with an opportunity to attempt to negotiate who may testify (i.e. whether senior executives or PR representative will be permitted to testify on a company’s behalf) as well as the subjects of the testimony.

A public hearing is usually one of the last things to occur in a congressional investigation, and it typically signals the end of the committee’s fact-finding efforts. Often, the hearings themselves have no fact-finding purpose and are simply opportunities for the members to make their views known to the public or to embarrass witnesses or their employers. Indeed, in some cases, the committee may release a preliminary report of its findings prior to conducting any hearing. Hearings generally begin with an opening statement by the chairman, followed by tightly scripted member statements and questions for the witness (often these “questions” are themselves short speeches).

Witnesses testify under oath and may be represented by counsel, but counsel’s role is limited. For example, counsel is not generally permitted to interpose objections to questions. Witnesses may make brief opening statements covering the crucial points of their testimony, and they may request that a fuller written statement be made part of the record. In answering questions before a committee, witnesses are advised to choose their words carefully and to avoid

direct confrontation with the questioners. Federal criminal statutes akin to perjury and obstruction of justice apply in the context of congressional testimony, so it is important that witnesses are well-prepared to answer questions honestly while limiting responses to only those questions that are actually asked. The Fifth Amendment privilege against self-incrimination also applies in the context of congressional hearings.

Political and Institutional Opportunities

Ultimately, understanding the political dynamics at work in a congressional investigation is as important as understanding the procedural rules. More often than not, it is political calculation (including an evaluation of potential reputational harms and follow-on legal risks), rather than any procedural rule, that will drive the course of a congressional inquiry. Fundamentally, congressional committees and their members wish to be perceived by the public as effectively responding to highly important public issues. Media coverage and high-publicity events, therefore, have the potential to dramatically affect the pace and tone of an investigation. By the same token, investigations that may appear troubling at their outset often come to nothing as the lawmakers and the public shift their focus to other concerns. Parties that are sensitive to the relevant political issues can often avoid missteps that would make them attractive investigative targets.

To effectively navigate the congressional investigation process requires skill, creativity, and experience. It also requires strategic planning and thinking. At Mayer Brown, we have assembled a diverse and bipartisan team of experts designed to handle the disparate political, regulatory, and media challenges that arise in these situations. We encourage our clients or prospective clients facing a congressional inquiry to contact us as early in the process as possible, so that we can deploy an effective response strategy specifically tailored to their needs. ♦

Endnotes

- ¹ THE WORKS OF JAMES WILSON 415 (1967 ed.).
- ² It is important to understand the different capacities in which members may request information. For example, Representative Darrell Issa is an individual member with an interest in issues that impact his constituents in California's 49th Congressional District. He is also, however, Chairman of the House Committee on Oversight and Government Reform. In this latter capacity, Issa has a significant

institutional ability to direct committee staff to subpoena documents, conduct hearings, and to shape any investigation conducted under the auspices of the Oversight Committee. For example, the Oversight Committee's rules expressly give the Chairman unilateral subpoena authority. Other individual Members, acting without the support of their Committee leadership, do not have the same unilateral subpoena authority.

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