



## Understanding and Defending Against a Congressional Investigation

By HAROLD DAMELIN AND JENNIFER PERU GARY

Since the members of the 110th Congress took their oaths of office in January 2007, there has been a substantial increase in the level and intensity of Congressional oversight and investigations in comparison to the climate of the previous six years. This increased aggressiveness has been exhibited by investigations into the firings of eight United States Attorneys by former Attorney General Alberto Gonzales, the importation from China of children's products containing lead paint, alleged misconduct by the Administrator of the General Services Administration and the Inspector General of the Department of State, and most recently, into the activities of private security companies operating in Iraq and Afghanistan.

Congressman Henry Waxman, Chairman of the House Oversight and Government Reform Committee, when recently discussing Congress's investigative powers, observed that, "[m]aybe it's even more important than legislation."<sup>1</sup>

### The Power to Investigate

Congressional oversight and investigative authority, though not expressly set forth in the Constitution, is implied as incidental to Congress's Article I legislative function to "make all laws which shall be necessary and proper."<sup>2</sup> This authority is extremely

broad, but not limitless. The basic premise is that all congressional investigations and subpoenas are proper so long as they pursue a legitimate legislative purpose.<sup>3</sup>

Congress, through its rules, has delegated the power to initiate and conduct investigations and issue subpoenas for both documents and testimony to all standing committees and subcommittees. Special or select committees also may be explicitly authorized to conduct an investigation through a House or Senate resolution.<sup>4</sup> Therefore, once a congressional investigation is initiated, it is exceptionally difficult to successfully challenge its validity on jurisdictional grounds.

Congressional investigations can be initiated in any number of different ways. Oftentimes a committee will request the Government Accountability Office (GAO) to conduct a study and prepare a report on a particular subject. Depending on the findings or recommendations in the report, the committee may initiate an investigation. Recently, the Senate Permanent Subcommittee on Investigations requested GAO to study the issue of credit card rates, fees and customer disclosures and to prepare a report. Based on the GAO report,<sup>5</sup> the Subcommittee: (1) launched an investigation; (2) held a

hearing which examined credit card practices, fees, interest rates and grace periods; and (3) subsequently introduced legislation<sup>6</sup> to eliminate certain abusive credit card practices.

Another fruitful resource on which many congressional investigations are based is information that has been received from an individual who contacted a committee member on a confidential basis. These individuals, commonly referred to as "whistleblowers," are a valuable asset to congressional committees, because they often possess highly sensitive or confidential information about which the committees would not otherwise know or to which the committee would not have access. The House Oversight and Government Reform Committee recently initiated an investigation, and will be holding a hearing, into the conduct of the Inspector General of the Department of State, based on allegations received from a number of present and former staff members, who came to the Committee on a confidential basis, and sought whistleblower status. At a hearing, it is common for these types of witnesses to testify from behind a screen with their voices disguised to protect their identities.

## Initial Steps

There is no standard format to any Congressional investigation. The course of such investigations are often unpredictable, and require strategic decisions that are distinctly different from those that apply in standard civil or criminal litigation.

Initial notification that your client is involved in a congressional investigation may likely be a telephone call from a committee staff member inviting him or her to a meeting to discuss some issues that the committee is examining.<sup>7</sup> Prior to such a meeting, it is crucial to learn who the key committee members and staffers are to best chart your client's course. A review of prior hearing records and committee reports also should be conducted in order to get an understanding of any action the committee may have already taken with regard to the subject matter they want to discuss with your client. It is also critical to develop a good rapport with the staff members of the committee conducting the investigation, as you want them to view you and your client as cooperative. Moreover, committee staff members usually will be your best source of ascertaining what information the committee already has, and what they are looking to obtain from your client. To devise the right strategy you need to know: (1) whether the committee intends to issue a subpoena for documents; (2) whom they want to interview; (3) whether they intend to take depositions under oath; (4) whether they will provide any questions in advance of the interview or deposition; and (5) whether they want a witness to testify at a public hearing. By engaging committee staff, you increase the possibility that various issues can be negotiated to a mutually satisfactory resolution, thereby avoiding potential confrontations and surprises.

## The Congressional Subpoena

Once served with a Congressional subpoena, either to produce documents and/or testify, a number of unappealing choices face an individual or corporation that seeks to challenge it. Your client may opt to refuse to comply with the subpoena for strategic reasons or on the basis of a privilege. If your client refuses to comply, either the Senate or the House can vote to enforce its subpoena and certify the refusal to comply to the Department of Justice (DOJ) for prosecution under a criminal contempt of Congress statute.<sup>8</sup> Additionally, the Senate can refer the refusal to comply with the subpoena to a Court for enforcement of the subpoena under a civil contempt statute.<sup>9</sup> The party refusing to comply then would have the opportunity to raise any arguments with regard to the subpoena as defenses in a criminal or civil contempt proceeding. In reality, a contempt proceeding can be more damaging than complying with the subpoena. Committee members and staffers are keenly aware of this fact and are willing to use it as leverage to "force" subpoena compliance. However, if good communication has been established with the committee's staff, there is often a compromise that can be worked out where valid objections are recognized by the committee and a resolution agreeable to both sides can be negotiated.

## Testimonial Privileges and the Executive Privilege

Although Congress's investigatory powers are broad, a witness before a congressional committee retains certain constitutional protections and common-law privileges. The Fifth Amendment privilege against self-incrimination is one such right that is applicable to congressional hearings.<sup>10</sup> While a witness cannot be

compelled to give evidence against himself, he may be required to assert the Fifth Amendment privilege in response to each question posed by a committee member that would be self-incriminating.<sup>11</sup> Thus, the invocation of the privilege can have potential adverse consequences, because various committees require individuals who intend to assert a privilege to do so in a public hearing, which can be a source of both embarrassment and adverse publicity.

Once a witness has invoked the privilege, Congress can compel a witness's testimony by requesting a federal court to grant the witness "use immunity," if the request has been approved by a majority vote of either house of Congress, or a two-thirds vote of the members of a full committee. This situation occurred most recently in connection with the investigation of the firing of eight United States Attorneys by the Attorney General. A recently-resigned DOJ official was subpoenaed to testify. Her counsel advised the Committee that she would assert her Fifth Amendment privilege and decline to testify. The Committee subsequently sought and obtained court-authorized immunity and compelled her to testify at the hearing. During the late 1980s, Lieutenant Colonel Oliver North and Vice Admiral John Poindexter were compelled to testify in the Iran-Contra Hearings pursuant to grants of immunity. Subsequently, both men were criminally charged and convicted in separate trials. Their convictions were eventually overturned when the District of Columbia Court of Appeals concluded that certain evidence presented during their trials was tainted in that it was based solely on their immunized congressional testimony.<sup>12</sup>

Despite the dearth of definitive judicial or statutory law on the applicability of common-law privileges, such as the attorney-client privilege, to congressional investigations, in actuality, Congress has very rarely refused to recognize established common-law privileges.<sup>13</sup> In light of the strong constitutional underpinnings of Congress's investigatory power, a congressional committee's recognition of the common-law attorney-client privilege, which has no constitutional foundation, likely will rest within the sound discretion of the respective committee. In determining whether information sought should be protected by the attorney-client privilege, congressional committees weigh considerations of legislative need, public policy, and the likelihood that the claim of privilege would be recognized by a court of law against any possible injury to the witness.

In 1995, the attorney-client privilege was asserted by then-President Clinton's personal counsel, David Kendall, in response to a Senate Whitewater Committee subpoena for notes taken during a meeting at the law offices of Williams & Connolly. Kendall resisted the subpoena on the ground that the meeting notes were privileged because they pertained to confidential legal advice for President Clinton. The Committee began enforcement proceedings against Kendall under the Senate civil contempt statute. The subpoena, however, was not judicially enforced because the notes were eventually turned over under an agreement that the disclosure would not be construed as a waiver of the attorney-client privilege with respect to other matters.<sup>14</sup> Thus, the issue of the applicability of the attorney-client privilege to congressional investigations was left unresolved

judicially. In practice, assertions of the attorney-client privilege often will be resolved through counsel's negotiations with committee staff.

Recent media attention surrounding the invocation of the executive privilege in response to congressional investigation inquiries warrants a discussion of the privilege. The executive privilege is a reserve power claimed by the President and other members of the executive branch to resist certain subpoenas and other interventions by the legislative and judicial branches of government. The "presumptive privilege" is not specifically mentioned in the Constitution, but it is grounded in the separation of powers doctrine and derived from the supremacy of the executive branch in exercising its Article II duties and responsibilities under the Constitution.<sup>15</sup>

The United States Supreme Court has recognized three broad categories of the executive privilege:

(1) the state secrets privilege, which protects military and state secrets, so as not to compel the dissemination of sensitive or classified information;<sup>16</sup>

(2) the presidential communications privilege, which protects the confidentiality of conversations and communications between the President and his senior advisors to ensure full and frank discussions in the Presidential decision-making process;<sup>17</sup> and

(3) the deliberative process privilege, which narrowly protects intra-governmental pre-decisional documents that address matters antecedent to the adoption of agency policy and reflect deliberations comprising the consultative process by which governmental decisions are formulated.<sup>18</sup>

The deliberative process privilege must be formally lodged by the head of the governmental depart-

ment or agency after personal consideration of the congressional request.<sup>19</sup> An agency head must directly notify White House Counsel of his determination that executive privilege issues have been raised by a congressional request so that Counsel may consult the Attorney General to determine whether to recommend invocation of the privilege to the President, who then personally must assert the claim.<sup>20</sup>

Although presidential communications privilege claims to preserve the confidentiality of information and documents in the face of legislative demands have figured prominently, though intermittently, in executive-congressional relations throughout history, the overwhelming majority of these disputes have been resolved short of litigation through political negotiation and accommodation.<sup>21</sup> However, during the infamous 1970s Watergate scandal, Congress sought judicial enforcement of subpoenas served on President Nixon for tape recordings of his conversations with a presidential aide. The District of Columbia Court of Appeals recognized the presidential communications privilege as a presumptive privilege which can only be overcome by an appropriate showing of a particularized public need by the committee seeking access to the communications. The appeals court refused to enforce the congressional subpoenas because the Watergate Committee had not met its burden of showing that the subpoenaed evidence was "demonstrably critical to the responsible fulfillment of the Committee's functions."<sup>22</sup> Subsequently, the Supreme Court enforced the special prosecutor's grand jury subpoena of the same tape recordings because it found that President Nixon's generalized interest in confidentiality



could not prevail against the special prosecutor's demonstrated, specific need for the recordings. However, the Court was careful to limit the scope of its decision, stating, "we are not here concerned with the balance between the President's generalized interest in confidentiality . . . and congressional demands for information."<sup>23</sup> Thus, it is clear that the scope of the presidential communications privilege in the congressional-executive context will be examined under different standards because the President's ability to withhold information from Congress implicates different constitutional considerations.<sup>24</sup>

### The Congressional Hearing

The hearing itself is nothing like a formal legal proceeding. A well-prepared hearing is a tightly scripted event, aimed at making a few key points, which are determined by the committee chairman and the staff. The opening statement of the committee chairman and questions to be asked at the hearing are usually prepared in advance by committee staffers.

Many times the press will be briefed and materials provided to them the day before the hearing, so it should come as no surprise that there will be advance press reports describing what is to be brought out at the hearing. Additionally, at the hearing itself, committee members will be looking to make statements or comments which can be used as "sound bites" or quotes in subsequent press accounts.

If your client is called to testify at a congressional hearing, your main objective should be to get him or her on and off as quickly as possible, without anything bad happening. Your client almost certainly will be placed under oath; hence he or she risks the possibility of a perjury

prosecution if he or she were to testify untruthfully. Therefore, careful preparation prior to testifying at a hostile hearing is essential. To avoid any unnecessary public embarrassment of your client, it is also prudent to raise any potential privilege issues with the committee beforehand and negotiate any accommodations.

It is a misconception to think that at the hearing your client will be given an opportunity to adequately state his position. The best way to ensure that your client's position is captured as part of the hearing record is to submit a detailed written statement to the committee, which, upon request, will be made part of the record. Although a witness almost always will be given an opportunity to make an opening statement, he normally will not be allowed to read the written statement submitted to the committee. Therefore, it is advisable to have a short oral statement prepared, which conveys the most critical points you want your client to make at the hearing.

Prior to the hearing, it is also prudent to determine whether there are any committee members who are supportive of your client's position, and, if so, whether they would be willing to make favorable comments in their opening statements and/or ask a helpful question during the hearing, which would allow for an explanation of your client's position.

### Likelihood of Separate Investigations

A harsh reality of a congressional investigation is that it frequently spawns separate, independent investigations and/or lawsuits, which need to be dealt with at the same time, or shortly after, your client is dealing with the congressional investigation. The recent Jack Abramoff lobbying scandal started with hear-

ings before the Senate Indian Affairs Committee and the House Oversight and Government Reform Committee, and the matter was soon being investigated by the Criminal Division of the Department of Justice. The firing of eight United States Attorneys by the Attorney General also was examined in hearings before the Senate and House Judiciary Committees and was soon thereafter under investigation by the Department of Justice's Inspector General and Office of Professional Responsibility.

### Conclusion

For a corporation or an individual that becomes the subject of a congressional investigation, the decisions that must be made are often difficult. In selecting the most prudent course of action, it is important to understand how the congressional investigation process works, so your client can take advantage of the options available to him or her and to ensure that your client does not fall into any of the potential traps that await. Although challenging, representing clients in congressional investigations and hearings provides counsel with an opportunity to wear many hats in order to best serve the interests of your client. ■

*To learn more about  
the issues discussed in this  
article please contact  
Harold Damelin at  
Damelin@BlankRome.com  
202.772.5820  
or  
Jennifer Peru Gary at  
Gary@BlankRome.com  
202.772.5863*

1. Henry Waxman, Quote of the Day, The Hotline: National Journal's Daily Briefing on Politics, Aug. 22, 2007.
2. U.S. CONST. art. 1, §8, cl. 18; *McGrain v. Daugherty*, 273 U.S. 135, 172-74 (1927) ("power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function").
3. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503-506 (1975) ("[t]he scope of [Congress's] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution") (quoting *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959)); *McGrain*, 273 U.S. at 172-74. However, Congress does not have the authority to investigate merely for the sake of personal aggrandizement or punishment. *Watkins v. United States*, 354 U.S. 178, 187 (1957).
4. See House of Representatives Rule XI(2)(m) and Senate Rule XXVI(1). In 1995, a special committee was established by Senate Resolution 120 to investigate the Whitewater Development Corporation and related matters. In 1987, the Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition was established to conduct an investigation into alleged covert sales of military equipment to Iran and the diversion of proceeds to aid Nicaraguan Contras.
5. Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers, Report for Congress, Government Accountability Office, GAO-06-929 (Sept. 2006).
6. Stop Unfair Practices in Credit Cards Act of 2007, S. 1395 (May 2007).
7. Because the rules of procedure can vary significantly from committee to committee, it is important to become familiar with the rules and practices of the particular committee with which you are dealing.
8. 2 U.S.C. §§ 192, 194 (2000).
9. 2 U.S.C. §§ 288b(b), 288d and 28 U.S.C. § 1364 (2000). This procedure cannot be used against an officer or employee of the Federal Government acting within his official capacity. See 28 U.S.C. § 1364(a).
10. *Watkins*, 354 U.S. at 188; *United States v. Fort*, 443 F.2d 670, 678 (D.C. Cir. 1970).
11. *Rogers v. United States*, 340 U.S. 367, 371 (1951).
12. *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990); *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991).
13. To date, there has been no Supreme Court ruling on the applicability of the attorney-client privilege to congressional investigative inquiries. Congressional Oversight Manual, Report for Congress, Congressional Research Service, at CRS-46-47 (May 1, 2007).
14. See Glenn A. Beard, Note, Congress v. The Attorney-Client Privilege: A "Full and Frank" Discussion, 35 AM. CRIM. L. REV. 119, 119-120 (1997).
15. *United States v. Nixon*, 418 U.S. 683, 708 (1974).
16. *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953).
17. *Cheney v. United States Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 369-71 (2004).
18. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); see also *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) (deliberative process privilege disappears altogether when there is any reason to believe government misconduct occurred, but there must be a focused demonstration of need to overcome the presidential communication privilege, even when there are allegations of misconduct by high-level officials).
19. *Reynolds*, 345 U.S. at 7-8.
20. Congressional Oversight Manual at CRS-44, *supra* note 13.
21. *Id.* at CRS-39.
22. *Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974).
23. *Nixon*, 418 U.S. at 712 n.19.
24. See *In re Sealed Case*, 121 F.3d at 753. In 1997, the deliberative process and presidential communications privileges were invoked in response to a grand jury subpoena served on White House Counsel during an Independent Counsel's investigation of former Secretary of Agriculture Michael Espy. The District of Columbia Court of Appeals distinguished the parameters of the two executive privileges and clearly stated that the presidential privilege affords greater protection against disclosure of documents and communications. *Id.* at 745-46. The court held that the privilege should not extend to staff outside the White House in executive branch agencies and "should apply only to communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *Id.* at 752; see also *Judicial Watch, Inc. v. Dept. of Justice*, 365 F.3d 1108 (D.C. Cir. 2004).