

The Danger of Congressional Oversight

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“Quite as important as lawmaking is vigilant oversight of administration.”

Woodrow Wilson, Congressional Government (1885)

The scene on television is all too familiar. Corporate executives from a company in the headlines are dragged before a Congressional committee, they are placed under oath, and they are asked a series of questions by Senators or Congressmen/women, to which they each respond by asserting their Fifth Amendment privilege. For Congress, this I considered a victory. They get to grandstand before the public and launch their attacks on behalf of the public against the latest corporate villain.

Congressional oversight poses significant risks to businesses and individuals. Congressional investigations involve a unique blend of politics, procedure, publicity and “fact-finding.” Multi-disciplinary approaches – political and legal tactics—must be combined to help clients navigate such investigations in order to protect a company and/or individuals.

Oversight is broadly defined as the review, monitoring and supervision of the implementation of public policy of the executive branch. Congressional power to conduct oversight is rarely circumscribed by the courts.

The only rule is that there are no rules. The rules of evidence do not apply, common law privileges usually do not apply (except if a Committee recognizes such a privilege), and enforcement proceedings can result in contempt of Congress.

The risks to business and individuals are well established. Criminal referrals for perjury, false statements (e.g. Roger Clemens), follow on criminal prosecutions using statements elicited during Congressional testimony (e.g. Watergate, Iran Contra), civil proceedings which run parallel to Congressional investigations, and what I call the “whipsaw effect” – Congressional prodding to government regulators or prosecutors to cajole them into launching criminal and/or regulatory enforcement proceedings. In addition to the clear legal implications, businesses face significant risks of political and reputational harm, all of which can result in significant economic harm.

When caught in the cross-hairs, business need to act and move quickly. The company’s strategy has to be nimble and quickly crafted. A series of questions need to be examined: (1) What is Committee’s goal and message? (2) What is the scope and purpose of the investigation?; (3) What information is likely to be disclosed?; (4) Are there pending criminal, civil or regulatory proceedings?; (5) What is your company’s exposure?

Once you answer these questions, the company has to determine whether it has a story to tell, meaning a counter-anecdotal set of stories which it can present through witnesses. At bottom, the company needs to assess the public relations and political risks, along with the legal risks.

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The Congressional oversight proceeding is run by Senators and or Member of Congress. There is no judge or single source of decision-making, so companies need to find Committee or political allies to help – this requires companies to energize economic and political interests which may be sympathetic to its positions.

In the end, there are not many alternatives against an aggressive oversight investigation. Depending on the facts and the political environment, companies can duck and cover to try and minimize the possible harms, they can aggressively defend themselves when appropriate, or they can comply and issue apologies and fight the political and public relations fall out.

There are ready example of all of these strategies. For attorneys who work in this area, it requires nimble feet, adept political radar and important relationships in the political world.

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