

Responding to Congressional Investigations

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Current Congress has initiated investigations of non-profits

- In June, the chairmen of the House Natural Resources Committee and its Subcommittee on Oversight and Investigations wrote to several nonprofits accusing them of acting as foreign agents due to their “adversarial approach” to the Trump Administration’s policies, reflecting anti-US and pro-Chinese bias.
- The House letter said they had been acting a foreign agent if they were acting at China’s direction or with its support.
- The letters demanded that the nonprofits provide Congress with “all documents and communications with the Department of Justice” referring or relating to their registration under the Foreign Agent Registration Act (“FARA”) and any “transaction” involving the non-profits with any individual associated with “any Chinese official, Chinese national, or Chinese business interest.”

Congressional investigative authority is very broad

The House of Representatives ... form the grand inquest of the state. They will diligently inquire into grievances, arising both from men and things.

Supreme Court Associate Justice James Wilson

Quite as important as legislation is vigilant oversight of administration. It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. The informing function of Congress should be preferred even to its legislative function.

President Woodrow Wilson (when President of Princeton)

Congress has right to investigate any subject on which legislation could be had or would be materially aided by the information which the investigation was calculated to elicit.

McGrain v. Daugherty, 273 U.S. 135, 177, 181-182 (1927)

In principle, investigative authority is almost unlimited

- Ensure Executive Compliance with Legislative Intent
- Improve Effectiveness of Government
- Investigate Allegations of Abuse, Waste, Dishonesty, and Fraud
- Assess Agency or Officials' Ability to Manage and Carry Out Program Objectives
- Determine Federal Financial Priorities
- Ensure Executive Policies Reflect the Public Interest
- Protect Individual Rights and Liberties
- Review Agency Implementation of Regulations
- Monitor Government Contracts and Consultants
- Acquire Information Useful for Future Policymaking
- Investigate Constituent Complaints and Media Critiques

There is disturbing precedent for Congress investigating non-profits.

- In 1952, Select Committee investigated tax exempt foundations to determine if they were using resources as intended or “for un-American and subversive activities” or other purposes not in US interests."
 - All foundations with assets of \$10 million or more received a questionnaire covering virtually every aspect of their operations & all cooperated.
 - Committee initially found them all “loyal” and no diversions. But new Chair of committee, unhappy with outcome, began new two-year investigation.
 - Committee concluded in 1954 that Ford, Rockefeller & Carnegie were funding projects at elite schools to enable “oligarchical collectivism” and supporting “subversion” through attacking US system and financing promotion of socialism.
 - They recommended:
 - limiting non-profits lives to 10–25 years
 - denying tax exemption to any foundation holding more than 5%-10% of any business,
 - banning use of foundation funds to support socialism or other views at variance with “American principles.”
 - None of these proposals became law.

Two major dimensions to the problem

Legal

- Contempt of Congress
- Civil or criminal referrals to the Justice Department
- Upgrading document requests to intrusive subpoenas creating legal \$\$
- Potential third party parallel civil litigation

Reputational

- Negative media affecting image of non-profit
- Impact on mission, domestically, internationally
- Impact on donors
- Legitimizing further ideological attacks
- Operational consequences

Key objectives

- Align legal strategy and communications strategy so that they reinforce one another.
- Meet legal requirements to respond to Congressional action to avoid escalatory steps by Congress, while protecting and defending the core values of NPO and its mission.
- Identify key audiences and ensure that what you do helps you with each of those audiences:
 - Congressional antagonists
 - Allies (identify other stakeholders)
 - Press and public, domestic and global
 - Donors
 - Others in your sector
 - Your own employees

Areas of potential concern under new Congress

- House and Senate priorities differ, given the split in party control.
- House investigations now much more likely to focus on Trump Administration, not on NGOs
 - But - possible investigations of political activities of 501(c)(4)s by Ways & Means or Government Oversight.
- On Senate side, potential areas of investigation include:
 - Alleged abuse of non-profit status by 501(c)(3)s to engage in political activity (Judiciary Committee)
 - Alleged inappropriate expenditures by ideological targets, likely in conjunction with conservative activist group criticisms based on sector:
 - » Committee on Environment & Public Works (Environmental Groups)
 - » HELP Committee (Education Groups)
 - » Finance Committee (everyone – likely driven by headlines)

In practice, how does investigative process work?

- Chairman of committee/subcommittee makes doc request including document preservation, including emails & all forms of documents with a deadline.
- Counsel for target negotiates response with committee over scope, deadlines, asserts defenses, objections:
 - » Beyond the scope of committee's jurisdiction
 - » Overly broad, intrusive, burdensome,
 - » Vague
 - » In violation of constitutional rights (1st, 4th, 5th Amendments)
- Staffs review docs, take depositions, ahead of committee hearings.
 - » May have multiple bites of the apple on document requests.
 - » Provide some documents, defer/delay on others
- Typically, committee goes onto other things when document requests become too difficult – but can move to contempt.

How does contempt process work?

- When impasse has been reached over voluntary production, depending on rules of House of Congress and Committee at that time (they change), chairman or full committee votes on subpoena, creating legal obligation to respond backed by threat of contempt of Congress.
- Failure to respond to subpoena even in part can lead to Committee vote to enforce contempt, which must then go to full House or Senate.
- Vote to enforce contempt goes to Justice Department, which has duty to enforce but in practice may refuse to take further action, as happened with House contempt vote against AG Eric Holder.
- Through different mechanisms both Senate and House have right to enforce contempt authority with civil enforcement actions, backed by federal courts.
 - » For Senate, this can include fines to force compliance.

Realities of contempt process

- Senate authority last used in 1995 and six times in its history.
- House can only seek injunctive relief from courts. Its contempt power is almost never enforced in practice, as Holder case illustrated.
- However: the Constitution makes Congressional power to issue and enforce contempt rulings essentially unlimited in theory, except by other provisions of Constitution such as 1st, 4th and 5th amendments.
- These issues remain under-litigated, as both targets of Congress and Congressional committees typically work to break impasses with deals, due to Congress having limited time, and targets having limited appetite for confrontation:
 - » Case Study: BCCI/Kissinger subpoena (1992)
 - » Case Study: House Government Oversight/Bank Subpoenas Fusion GPS (2018)
- In practice, any defense to Congressional investigation must be principled, based on fundamental values, and win some public support and support from some in at least one political party.

Other Risks: Perjury, false statements, protecting privileged material

- Congress can recommend cases to the Department of Justice for prosecution. DoJ applies same standard to such requests as it would a referral from any other source. Political cases are routinely not acted upon. But cases with solid documentation can and do lead to prosecutions for both underlying offenses and offenses relating to conduct before Congress:
 - » Perjury 18 U.S.C. Section 1621
 - » False Statements 18 U.S.C. Section 1001
- Perjury limited to cases in which false statements have been made under oath. False statement prosecutions (\$250,000 fine, up to five years imprisonment) can include knowing & materially misleading Congress even in unsworn staff interviews.
- Congress has not accepted principle attorney-client communications are privileged & can be withheld from Congress.
 - » In practice, it's only recourse would be a contempt citation, which to date has never been enforced for the purpose of acquiring attorney-client information.

Other differences from civil litigation

- Just as it does not formally accept attorney-client privilege as a basis for limiting its power to compel the production of information, Congress does not per se accept attorney work product privilege, marital privilege, or other common law defenses against discovery.
- A subject of a Congressional investigation has no right to cross-examine other witnesses, to demand information from the Committee, or to have a “fair hearing” as opposed to whatever the Congress chooses to do in light of the needs and decisions of the Committee.
 - » Example Kavanaugh hearing – Chairman Grassley decided on deadlines, witnesses, scope of questioning, times allotted to questions, and made unilateral decisions on objections, denying all of those of the opposing political party.
 - » Unlike situation in civil litigation, there is no legal appeal from any Congressional decision within Congressional setting, other than to public opinion.

How likely are Congressional investigations of NGOs in 2019-2020?

- The Democratic controlled House of Representatives will very likely carry out multiple, simultaneous investigations of the Trump Administration, including both the White House and many agencies, among them Agriculture, Commerce, DHS, Education, Energy, EPA, HHS, HUD, Interior, IRS, Justice, Treasury, and the Veteran's Administration.
- The Republican-controlled Senate may investigate private sector, non-profit, and governmental bodies seen as hostile to the Trump Administration's policies, such as environmental groups, family planning organizations, groups involved with immigrants or refugees, gun control, promoting voter registration, diversity, or other causes counter to the goals of Republican funders or other constituencies.
- Investigations are often headline driven. When James O'Keefe undertakes a "sting" video, it is with future Congressional investigations in mind, such as Planned Parenthood, ACORN, NPR, Open Society Institute.

What do you do when Congress calls?

Internal

- Keep your powder dry, minimize public response.
- Assemble a core team incorporating government relations, public relations, and legal
 - Each of three elements should have specific tasks to explore
- Appoint someone to be in charge.

External

- Find trusted legal counsel and crisis communications counsel.
- Assess whether you need additional help with Congress.
- Prepare holding statement for media inquiries, and related ones for staff, donors, and general public.

Early Checklist (communications)

- Undertake scenario planning – assess risks to the organization and options for countering them.
- Stakeholder mapping internal
 - » Who do we have to think about? (Employees, donors, others in sector, those we provide services to – everyone we interact with in our business)
 - » How will they be affected? What will be their concerns?
- Stakeholder mapping external
 - » Who can affect what happens? On the Hill (antagonists, friends, neutrals)? Relevant executive branch agencies? State government agencies? Actors in other countries? Traditional print media? Broadcast? Online? Social media? Others in sector? Think-tanks? Activists?
- Develop initial action plan
 - » Media monitoring, social media monitoring, influencer mapping and analysis (who is driving the dialogue? Who could drive dialogue?)
- Controlling message: Define spokesperson and methods to communicate

Early Checklist (legal)

- Issue and implement document preservation across organization.
- Exercise extreme care in electronic communications (emails, IMs)
- Limit circle of communication on legal issues to those essential to communications with counsel to preserve privilege to maximum extent.
- Establish process for reviewing communications before they are issued with counsel, to align communications and legal strategy.
- Review categories of requested documents with counsel to scope potential issues for negotiations.
- Working with counsel, develop process for retrieving documents that may be responsive to each category of request.
- Discuss with counsel any consultations you may wish to consider with other organizations that could be subject to similar requests.
- Discuss in privileged setting with counsel areas of concern/vulnerability specific to the NPO, such as failures of best practice creating particular risks.

Countering risk and neutralizing attacks

■ TACTICAL

- » Counsel or outside spokespersons can both be used to deflect attacks from the organization and its own officers.
- » Any message should be values-based, and repeated, so that people hear it.
- » Engagement can be undertaken on social media to amplify messages.
- » Friends and supporters of the organization can be activated to counter the attack.
- » The facts may help you – so build the factual response quickly and prepare to provide a narrow but strong response when the investigation is premised on false, distorted, or unfair premises.
- » Avoid multiple voices, conflicting message, & avoidable mistakes like issuing info out that turns out not quite accurate: work closely with legal counsel.

■ STRATEGIC

- » Build an internal and external team who can work together seamlessly until the crisis is resolved.
- » Assess all options – judge each situation on the facts, risks & environment before deciding on what to do. Goal is for Congress to move on, but getting there requires tailored solutions to the actual case.

Questions and Comments

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