

## ACC NCR Congressional Investigations

Learning Best Practices From Missteps

April 26, 2023



- Investigations are part of the law-making power of Congress as conferred by the Constitution
  - Fact-finding by investigation is part of the power to make laws
  - [McGrain v. Daugherty](#), 273 US 135, 173–74 (1927) (“the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function”)
  - [Eastland v. U.S. Servicemen’s Fund](#), 421 US 491, 504 (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”)
  - But there may be limits:
    - [Trump v. Mazars USA, LLP](#), 140 S.Ct. 2019, 2031– 32 (2020) (“a congressional subpoena is valid only if it is related to, and in furtherance of, a legitimate task of the Congress[,] ... serve[s] a valid legislative purpose, ... concern[s] a subject on which legislation could be had, ... [and is] not issue[d] for ... the purpose of law enforcement”) (citations omitted)



- House and Senate committees have wide latitude to conduct investigations
- Committees have the authority to demand documents and testimony by subpoena
- Each committee has its own rules governing these authorities
- House rules [\(Rule X: Organization of Committees\)](#) on jurisdiction can be very important



- Congress has the authority to enforce its subpoenas
  - Congress can ask the Department of Justice to prosecute criminal contempt violations to enforce its orders, e.g., [U.S. v. Bannon](#)
  - More commonly, Congress can seek enforcement through civil proceedings in US District Court, e.g. [Comm. on the Judiciary v. Harriet Miers](#), [Comm. on the Judiciary v. McGahn](#)
  - The process of seeking enforcement can take time and, in the Senate, requires a special vote, e.g., [S. Rept. 114-214](#)
  - Individuals and entities can file a request for an injunction or motion to quash, e.g., [Meadows v. Pelosi](#)
  - Congress also has an arrest power, which has not been used in this century, e.g., [McGrain v. Daugherty](#)
  - For further information on Congressional sources of authority, see [CRS Survey](#) of House and Senate Rules on Subpoenas
  - See also CRS's "[Congress's Contempt Power and the Enforcement of Congressional Subpoenas](#): Law, History, Practice, and Procedure, History, Practice, and Procedure" and Todd Garvey's [testimony](#) before the Committee on the Judiciary



There are some limits on the Congressional Investigatory Power:

- 5<sup>th</sup> Amendment, e.g., [Martin Shkreli](#)
- Attorney-Client Privilege, e.g., [Eastman v. Thompson](#)
- Scope of Subpoena, e.g., [Trump v. Mazars USA, LLP](#), [Bragg v. Jordan](#)



# Limits of Congressional Authority: 5th Amendment,





# Limits of Congressional Authority: 5th Amendment

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- The 5<sup>th</sup> amendment protections against self-incrimination remain in play during Congressional investigations, [5<sup>th</sup> Amendment](#)
- Strategic considerations come into play when considering whether to invoke the right, including:
  - Public and media perception
  - Degree of risk of incrimination



# Limits of Congressional Authority: Attorney-Client Privilege

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- Historically, Congress has viewed its investigative powers as not limited by common law privileges.
- However, recent Supreme Court dicta suggests it might be:
  - “[R]ecipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney client communications and governmental communications protected by executive privilege.” [Trump v. Mazars USA, LLP](#)
- The district court considering John Eastman’s challenge to the January 6 Committee subpoena agreed and upheld Eastman’s privilege claim as to certain documents. [Eastman v. Thompson](#)



# Limits of Congressional Authority: Scope of Subpoena

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- [Trump v. Mazars USA, LLP](#), set out several key limitations to the validity of a subpoena. A subpoena must:
  - Be related to, and in furtherance of, a legitimate task of the Congress
  - Serve a valid legislative purpose
  - Concern a subject on which legislation could be had
  - Not be issued for the purpose of law enforcement
- Current events are testing the role of the judiciary in overseeing the scope of subpoenas:
  - “It is not the role of the federal judiciary to dictate what legislation Congress may consider or how it should conduct its deliberations in that connection.” [Bragg v. Jordan](#)



# Case Study from Congressional Investigation of Government COVID Response

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# Why Does Congress Conduct Investigations?

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# Why Does Congress Conduct Investigations?

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- Developing facts to support a particular political or policy agenda
- Shaming or embarrassing a company or industry in an effort to change its behavior
- Assessing a federal agency's or officials' management of a program
- Establishing a record to support changes to a federal program
- Exposing criminal or civil wrongdoing
- Garnering public or media attention (usually in support of one of the above)



# Congressional Investigations Require Special Considerations

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- Investigation
  - No judge to oversee, limited rules of procedure; no guarantee of privileges or confidentiality
- Public Relations
  - Press release announcing launch of investigation; ongoing coordination with journalists and other interested committees or members, e.g., [Comer Launches Investigation](#)
- Policy/Political Considerations
  - Policy implications of the investigation? Are there opportunities to engage with supportive members?
- Legal Considerations
  - Committee coordination with plaintiffs, prosecutors, and investors
  - Litigation/enforcement arising from information made public by an investigation



- Request for a staff or member briefing
- Letter from member of congress acting in their own capacity (not tied to committee), e.g., [Warren Letter to Circle CEO](#)
- Letter from chairman and/or ranking member requesting information and/or documents, e.g., [Letter from Chairman Comer to FDA](#)
- Subpoena from chairman (or chairman and ranking member), e.g., [Chairman Jordan to Pomerantz](#) (letter accompanying subpoena)
  - less common as an initial step



# So You Get a Request for Information and Documents... What do you do?

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- Acknowledge inquiry quickly and respectfully
- Assemble response team with internal and external experts
- Develop a plan for responding to the inquiry
  - What are your goals?
  - What is the committee really after?
  - What are your options?
  - Can you work behind the scenes?
- Consider public relations from the start



# **What if You're Called to Testify?**

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## **You Don't Win Congressional Hearings**





## HOUSE COMMITTEE ON FINANCIAL SERVICES



**Game Stopped? Who Wins and Loses  
When Short Sellers, Social Media,  
and Retail Investors Collide**

**VLAD TENEV**  
CHIEF EXECUTIVE OFFICER,  
ROBINHOOD MARKETS, INC.





# What if You're Called to Testify?

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## Be Prepared









# **What if You're Called to Testify?**

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## **Know Your Audience**







**CHINESE OWNERSHIP OF TIKTOK**

**REP. FRANK PALLONE**  
D-New Jersey  
Energy & Commerce Committee Ranking Member





# **What if You're Called to Testify?**

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## **Anticipate the Tough Questions**









# **What if You're Called to Testify?**

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## **Be Respectful and Polite**













# **What if You're Called to Testify?**

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## **Interaction with Other Witnesses**





# **Is Sheltering in Place a Strategy? Can You Do Anything Now to Protect Your Client?**

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# Know Your Way Around

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