



CAPLIN & DRYSDALE

Congressional Investigations 101

Sara Marshman, Senior Assistant General Counsel, The Humane Society of the United States

Bryson Morgan, Member, Caplin & Drysdale

Amanda Reed, Associate, Caplin & Drysdale

July 17, 2024

We See the Headlines

Chairman Jordan Subpoenas As You Sow and GFANZ in ESG Investigation

Republicans accelerate investigation into foreign influence of US climate groups, environmental policy

GOP leaders expressed concern the eco group's relationship with foreign nationals may impact its lobbying related to US energy independence

E&C Launches Bipartisan Oversight Inquiry into Organ Transplant Contractor and Implementation of Bipartisan Reforms



GOVERNMENT AND REGULATION

The House GOP Wants to Probe Nonprofits. Both Left and Right Have Pushed Back

The Ways and Means Committee wants to know whether the nonprofit tax code is rife with abuse, allowing nonprofits to be key players in political races, rather than serving charitable causes.

By *Alex Daniels* | SEPTEMBER 20, 2023

Congressman Calls For Investigation Of Conservative Think Tank

Veteran Democrat Lipinski joins critics of the Illinois Policy Institute with a letter to the IRS.

Lawmakers Probe Nonprofit Hospitals, Challenge Tax-Exempt Status

- Grassley, Warren ask IRS, Treasury to investigate charity care
- Senators say they're concerned about abuse of tax exemption

INVESTIGATIONS

Lawmakers call for IRS scrutiny of Trump-backed nonprofit that aids Jan. 6 rioters

JANUARY 17, 2024 · 12:43 PM ET

Roadmap

- **Congressional Investigations Overview**

- Legal authority
- Limitations
- Purposes
- Actors
- Tools

- **Real Life Scenario**

- Day 1
- Developing a Response Strategy
- The Response

- **Lessons From the Other Side**

- **Q&A**

Congressional Investigations: Legal Authority

- **Congress has broad authority to conduct investigations**

- Congress's power to investigate is *implied* in the Constitution's grant of legislative powers to Congress in Article I of the Constitution, and rooted in historical practice
- *Watkins v. United States*, 354 U.S. 178 (1957): "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad."
- *Trump v. Mazars USA*, 591 U.S. 848 (2020) (internal citations and quotations omitted): "Each House of Congress has the power to secure needed information in order to legislate. This power is indispensable because, without information, Congress would be unable to legislate wisely or effectively."

Congressional Investigations: Limitations on Investigative Power

- Congressional investigative power is not unlimited
- It must be exercised in aid of a legislative function or a legislative purpose
 - Interpreted quite broadly (any topic upon which legislation could be passed or Congress could exercise authority)
 - Investigations into private affairs of individuals who do not hold public office are, in theory, supposed to be out of bounds
- Investigations are governed by House and Senate rules and by committee and subcommittee rules

Congressional Investigations: Purposes

- In practice, congressional investigations are used to:
 - Ensure efficiency and effectiveness of government laws and operations
 - Develop and advance legislation
 - Expose wrongdoing, abuses, areas for needed reforms
 - Hold organizations and individuals accountable, including regulatory agencies and the White House
 - Advance policy or political agendas
 - Generate media coverage
- The mix of legal and political considerations make navigating a congressional investigation difficult

Congressional Investigations: Actors

- Most congressional investigations are conducted at the committee or subcommittee level. Sometimes multiple committees/subcommittees can be involved in the same investigation. Cooperation between House and Senate investigators is possible, but not as common.
- Individual Members and Senators have the ability to pursue investigations through their individual congressional office, but individual Members and Senators lack compulsory process (e.g., subpoena power).
- Day-to-day interaction is likely to be with committee/subcommittee legal counsel.

Congressional Investigations: Tools

- **Letters**

- Vast majority of congressional investigations begin with a letter requesting information and perhaps documents

- **Subpoenas**

- Standing committees and subcommittees are empowered to issue subpoenas
- Rules vary by chamber and by committee
 - House: A committee chair usually has the power to unilaterally issue a subpoena (usually after giving notice to the ranking member)
 - Senate: Consent of the ranking member usually required

- **Interviews and Depositions**

- **Hearings**

- **Prosecution for false statements, obstruction, destruction of evidence**

Real Life Scenario: Day 1

- *You're GC of a nonprofit organization that just received a letter signed by a Chair of a House committee asking various questions and requesting documents by the **end of next week**. Your Communications Director just pinged you asking what to do about the press release issued by the House committee accusing your organization of violating federal law and publicly posting the letter online. **The comms team wants to respond**. Your Development Director wants to know what to tell funders about the press release that is now going viral on social media. And your Executive Director wants to assure the staff.*
- What are the first things you should do?

Day 1

- **Read letter carefully**
- **Ensure staff understand importance of maintaining privilege and communication hygiene from the outset**
 - Designate point of contact for staff questions, usually in-house counsel (provide a telephone number)
- **Identify/assemble core team to assist with response**
 - In-house and outside legal counsel (first call)
 - Multiple outside counsel may be advisable (congressional investigations expertise + subject matter expertise + experience/history with relevant committee or member)
 - Board member lead or committee of the board
 - Communications Director and crisis communications support (engaged under outside counsel where appropriate)
 - Government relations support

Day 1

- **Institute a litigation hold**

- Work with outside counsel to help define parameters of the hold and who should receive it
 - Arrange a meeting with outside counsel and staff to answer questions about the hold
- Work with IT staff to ensure records are not inadvertently lost and snapshots are preserved
- Review document retention policy and practices

- **Holding statement (if necessary)**

- Reviewed by counsel
- Version for funders/grantees

Real Life Scenario: Developing the Response Strategy

- *The litigation hold is in place and your team is assembled. You're finally getting a moment to catch your breath and your Board Chair calls. She wants to know what the plan is for responding to the letter. Are we really going to hand over everything, she asks?*
- What should you tell her?

Developing Response Strategy

- **Rule of Thumb: Make a touch back to Congress within the first few days**
 - Sometimes this phone call accomplishes nothing other than confirming receipt of the letter
 - Sometimes it is an opportunity to have a conversation about the response deadline and expectations
- **Response strategy varies widely, and should be driven by the facts and various considerations, including potential for parallel or subsequent investigations by other agencies**
 - It may take time to assemble the facts and assess risks
 - Oftentimes, an internal investigation (interviews with key staff) is conducted
 - Be open to adjusting response strategy
- **Scope of request and deadlines are often negotiable and fluid**
 - Congressional letters/subpoenas often have unusually short deadlines (e.g., one to two weeks)

Developing a Response Strategy

- **Political considerations**

- Who is driving this?
- What do they actually care about?
- What is their end game?
- How have similar investigations progressed?
- Is there alignment with broader congressional investigation priorities?

- **Congressional calendar can be important**

- **Levels of expertise of investigators varies**

Real Life Scenario: The Response

- *You have worked diligently over the last month to assess the facts and legal risk and identify the responsive documents. You are now drafting answers to the letter's questions and preparing to deliver the responsive documents.*
- What should you be thinking about?

The Response

- **Know what you are handing over**
- **Rolling productions are common**
- **Revisiting scope of request is common**
 - Document via email or letter so there is no confusion
- **Anticipate potential for leaks and press attention**
 - You can request/negotiate for confidentiality, but it is never a guarantee
 - Communications team needs to be prepared
- **There are various objections that can be made**

Congressional Investigations: Objections

- Proper legislative purpose
- First Amendment concerns
- Fourth Amendment protections against unreasonable searches
- Fifth Amendment privilege against self-incrimination
- Attorney-Client Privilege and Attorney Work Product
- Procedural Defects

Lessons From the Other Side

- Information Security
- Document Retention Policy
- A Prepared Board
- The Knowledge Loop

Information Security

- **Information Security**

- What is your IS response capability?

- *Subpoena/e-discovery response*

- What is your IS landscape?

- *Communication channels & practices*

- *Data and Information*

- **Communications hygiene is critical**

- Communications discipline internally and externally

Document Retention Policy

- **Know and follow your document retention policy**
 - Keeping and destroying data are both key parts of document management
 - “Document Days”
- **Understand any auto-delete schedules for e-mail, IM, and other programs**
- **Encourage staff not to create work-arounds to the policy and procedures**

A Prepared Board

- **Who should you call first and who will be the liaison going forward?**
- **Does the Board have a strong understanding of the organization, your activities, partners, and brand/reputation?**
 - Without that fundamental understanding, the Board's assistance may be unhelpful at best
- **Do the Board and management have a strong functional relationship?**
 - Establishing a strong, trust-based relationship with your Board now may alleviate problems later
 - What will be the cadence of keeping the Board informed during?
- **Does the Board have the right combination of experience and expertise?**
 - Diverse backgrounds, approaches, and skills enhance decision-making

The Knowledge Loop

- **Internal**

- Compliance reviews/risk assessments
- Fostering a culture of transparency and accountability
- Maintaining a unified message across all levels of the organization
- Preparing staff for external inquiries

- **External**

- How much to share, and when, with:
 - *Donors*
 - *Partner organizations*
 - *General public*

Questions?

Thank you!

Bryson Morgan, bmorgan@capdale.com

Amanda Reed, areed@capdale.com