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What To Do If Your Client Is Under Congressional Investigation

By **Michael Atkinson, Aaron C. Cummings and Jeff Severson** (November 7, 2023, 1:38 PM EST)

Congressional investigations have recently been at the top of news headlines because of the criminal contempt proceedings and convictions against Steve Bannon and Peter Navarro, two former White House advisers during the Trump administration.


Michael Atkinson

This increased coverage has raised questions about the scope of congressional investigations and their potential risks for organizations and individuals.

Congressional investigations have some similarities to other law enforcement and regulatory investigations, but are distinct in many respects.

This article will provide guidance about the unique nature of congressional investigations, and how to respond if your client is the target of one.


Aaron C. Cummings

What types of information can Congress request as part of an investigation?

The U.S. Congress has the power to request documents, interviews and testimony, and these requests can be voluntary or compelled.

Congress tends to seek voluntary compliance before it uses a compulsory process, but congressional committees routinely issue subpoenas for testimony and document production in the course of their investigations.


Jeff Severson

Why would my client voluntarily respond to a congressional request?

There are clear benefits to responding to congressional requests voluntarily, and many areas for compromise, effective negotiation and strategic framing of responses.

Resisting or refusing to cooperate with congressional investigations can lead to heightened scrutiny, subpoenas, broader scopes of investigation and, in worst cases, criminal referrals for contempt of Congress.

Many congressional investigations generate significant press attention, so an investigation that is not handled well or that is ignored can do great harm to the brand and reputation of organizations and individuals who find themselves in the crosshairs of Congress.

With any response to Congress, it's important to keep in mind that knowingly providing a false statement to Congress is a crime, regardless of whether you are under oath.

Document requests can be negotiated.

A party can negotiate the scope and time frame of the request, the sequence of its response in a rolling production, and deadlines for the response. Congress generally has extremely broad latitude in deciding what information it can make public, so these negotiations are critical.

It is possible to request and obtain a nondisclosure agreement for confidential or trade secret information voluntarily provided, but in practice this is difficult to obtain.

Interview requests can be negotiated.

Parties can also negotiate how they respond to voluntary interview requests. This includes, but is not limited to, who will testify, in the case of organizations; the scope of the testimony; and if the testimony remains private.

This last point is particularly important for organizations concerned about reputational risk where privacy is a top priority.

Of course, there are also potential downsides for voluntarily appearing or producing documents. Careful analysis, and weighing of risks and benefits, are often necessary when deciding how best to respond, especially if one goal is to minimize public attention to the matter.

If our client doesn't cooperate voluntarily, then what?

Both standing committees and subcommittees have the authority to issue subpoenas for documents and testimony.

There are circumstances where requiring a subpoena for documents or testimony will make more strategic sense than voluntary cooperation, but there are also risks for noncompliance.

For example, refusing to comply with such a subpoena risks the party being held in contempt of Congress, which could result in fines and imprisonment if the U.S. Department of Justice chooses to prosecute.

Additionally, even if a party appears before Congress, Title 2 of the U.S. Code, Section 192, makes it a misdemeanor to refuse to answer questions when a witness has been summoned and is being questioned by either house of Congress.

What is the process for a standing committee or subcommittee to issue a subpoena?

The process is set by the rules of the applicable standing committee or subcommittee.

The rules may require bipartisan approval, chair approval or approval by a majority of the members of the committee or subcommittee.

Why would our client voluntarily cooperate with the nonmajority side if a subpoena requires

bipartisan approval, chair approval or a majority of the members of the standing committee or subcommittee?

First, the nonmajority side can become the majority in a future election cycle.

Second, the nonmajority side in one house of Congress, such as the U.S. House of Representatives, could work with the majority in another house of Congress, such as the U.S. Senate, to try to obtain the same evidence through a compulsory process.

Third, and despite multiple viewpoints on standing committees and subcommittees, some evidentiary requests will garner bipartisan support — for example, requests related to China.

If our client receives a subpoena for documents or testimony, can we contest the subpoena?

Yes. First, you can argue that the subpoena is outside of the standing committee or subcommittee's jurisdiction or scope of the investigation.

A committee or subcommittee can issue a subpoena about anything that could affect legislation that it would work on — broad authority, but not unlimited.

Second, a subpoena could be contested if it is outside the scope of the committee's own and Congress' standing rules for investigations.

Third, one could also argue that the standing committee or subcommittee did not follow proper procedure — e.g., it did not have sufficient votes, notice to members on voting or a quorum to issue the subpoena.

However, the chances of success with any of these approaches would be low.

If our client can't contest the subpoena, is there anything else we can do?

Yes — you should consider whether there are any privileges or defenses that apply. These can include the following.

Executive privilege applies.

The executive is imbued with the power of withholding documents from the other two branches of government.

However, recent cases have shown that this privilege is difficult to successfully invoke, especially if the witness elects not to appear before a congressional committee.

On Aug. 30, the U.S. District Court for the District of Columbia ruled that Navarro failed to prove that former President Donald Trump invoked executive privilege to prevent Navarro from testifying in front of the U.S. House Select Committee to Investigate the Jan. 6 Attack on the U.S. Capitol.[1]

There was no clear evidence, according to the court, that Trump instructed Navarro not to testify.

A jury found Navarro guilty of contempt of Congress on Sept. 7, and on Oct. 6, he filed a motion for a

new trial.

Bannon also unsuccessfully tried to invoke executive privilege, and the oral argument for the appeal of his criminal contempt conviction is set before the U.S. Court of Appeals for the District of Columbia Circuit on Nov. 9.[2]

There are clear takeaways from these two prominent cases. Bannon's lawyers claimed that they attempted to negotiate the terms of the subpoena seeking his testimony, but the fact is that Bannon ultimately did not show up.

The immediate lesson is that there are serious consequences for anyone who defies a congressional subpoena for documents and testimony by failing to appear before the congressional committee, as it greatly increases the odds of a referral and prosecution for criminal contempt of Congress.

Whether defying a congressional subpoena in such a manner can ever be a viable legal strategy will be determined by the D.C. Circuit.

In the case of Navarro, the lack of clear evidence that the executive at issue — Trump — asserted the privilege significantly hampered his defense, as did his failure to appear before the committee.

The lesson is that if your client is going to assert executive privilege, they need to have clear, compelling evidence that the executive meant to assert the privilege, and they may also need to appear before the committee to assert such a privilege.

Fifth Amendment privilege against self-incrimination applies.

In 2014, former IRS official Lois Lerner was held in contempt of Congress for refusing to testify pursuant to a subpoena issued by a House committee, asserting her Fifth Amendment right against self-incrimination as part of her opening statement.

Despite a vote by the House to hold Lerner in contempt, the DOJ declined to seek criminal contempt charges against her, deciding that she did not waive her Fifth Amendment privilege by making general claims of innocence in her opening statement.

However, this right can be waived if a party makes statements about the matter that go beyond such general claims of innocence before invoking the privilege.

Fifth Amendment act of production immunity applies.

Act of production immunity under the Fifth Amendment allows individuals and sole proprietorships to avoid the production of documents when the very fact of the production would be incriminating. This avoids fishing expeditions that can result from broad and speculative subpoenas.

However, this immunity does not apply to corporations.

Attorney-client privilege does not apply.

Although some committees follow traditional rules about privilege, historically Congress has taken the approach that its power to investigate is not bound by common law rules of privilege. So unlike in a

court of law, the attorney-client privilege and work-product doctrine do not apply in congressional investigations.

However, committees can exercise discretion to recognize a claim of privilege on a case-by-case basis.

What if our client simply ignores the subpoena?

Like in the Lerner, Navarro and Bannon cases discussed above, Congress can refer cases to the DOJ to prosecute for contempt of Congress.

The DOJ does not keep statistics, but the department tends to pursue few of those referrals. In part, this is due to the often-politicized nature of congressional investigations.

The DOJ also does not provide published guidance about what criteria it uses to decide which cases to pursue.

Note that there is a distinction between appearing for a congressional proceeding and invoking a privilege or defense, as was the case for Lerner, and failing to appear, as was the case for Navarro and Bannon.

The DOJ is more likely to prosecute contempt in the context of failing to appear because it is easier to obtain a conviction, and the prosecution arguably appears less partisan.

What are the key takeaways for advising clients?

First, it's worth negotiating the scope of your client's obligations. There is no guarantee that your client will come away with their desired result, but there is little downside and substantial upside to engagement.

Second, as the Bannon and Navarro cases illustrate, there are real consequences to outright obstinance by deciding not to appear, and the context surrounding the request — whether alleged politicization or otherwise — may not aid a defense to criminal contempt of Congress under those circumstances.

In short, attorneys should work with their clients to formulate a clear-eyed and realistic assessment of their goals. Concerted, thoughtful advocacy focused on those goals can lead to successful outcomes.

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[1] United States v. Navarro, No. 1:22-cr-00200 (D.D.C.).

[2] United States v. Bannon, No. 22-3086 (D.C. Cir.).