CONGRESSIONAL OVERSIGHT AND INVESTIGATIONS 101

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Congress has extraordinary power to conduct oversight and investigations of both the Executive Branch and non-governmental entities. Clients and counsel can find themselves thrust into a most curious world, with little warning, few protections, and much danger. Simply put: congressional investigations are a unique mix of policy, politics, procedure, prosecution, and publicity.

This article serves as a modest introduction to this complex subject, providing brief answers to six questions. What can Congress investigate? How does Congress investigate? When and why is this power used? What happens because of these investigations? What does this power mean for the subject of an inquiry? What will 2008 bring – who's next?

What Can Congress Investigate?

Section One of the Constitution of the United States says that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[1] Section Eight sets forth the many powers entrusted to Congress, including taxation, regulation of commerce, and declaration of war. It also includes the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested in this Constitution in the Government of the United States, or in any Department or Officer thereof."[2] Section Five provides that "[e]ach House may determine the Rules of its Proceedings."[3]

In 1927, the Supreme Court said that "the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function."[4] This was echoed in several subsequent decisions.[5] How broad is this power? Here is how the Court put it in *Watkins v. United States*, a representative example consistent with other case law:

> "That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes a survey of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into Departments of the Federal Government to expose corruption, inefficiency or waste."[6]

Each chamber, under its rules, in turn delegates this broad power to its committees for use within their jurisdiction. The Rules of the United States House of Representatives provide that committees "shall have general oversight responsibilities" and that each committee shall review and study on a continuing basis –

(A) the application, administration, execution, and effectiveness of laws and programs addressing subjects within its jurisdiction;

(B) the organization and operation of Federal agencies and entities having responsibilities for the administration and execution of laws and programs addressing subjects within its jurisdiction;

(C) any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation addressing subjects within its jurisdiction (whether or not a bill or resolution has been introduced with respect thereto); and

(D) future research and forecasting on subjects within its jurisdiction.[7]

Senate Rule XXVI provides similarly broad authority for Senate committees, saying that a committee "may make investigations into any matter within its jurisdiction."[8]

How Does Congress Investigate?

The delegation of power from the House and Senate to their committees includes the power to subpoena documents and testimony.[9] Subpoena power has been recognized by the Supreme Court as a legitimate act of Congress:

> "Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed."[10]

What if the subpoena is overbroad or otherwise objectionable? Redress must be sought from the chairman of the committee, who of course issued the subpoena in the first place. Judicial review is rarely a realistic option, because courts are loathe to interfere in the workings of a co-equal branch.[11] Companies or individuals could refuse to comply, but then would suffer through contempt votes by the committee and by the relevant chamber. The matter then is referred to the United States Attorney for the District of Columbia for prosecution. By law, the Senate has the additional option of pursuing civil contempt in federal court.[12] (Congress also possesses an "inherent contempt" power, with the ability to summarily detain those in contempt, but this power has not been used in many decades.)

Against this backdrop of substantial power, committee inquiries most often start with letters seeking voluntary cooperation. These can vary from short and general, to lengthy and very

specific. They are often followed by informal staff requests for additional documents and interviews (some committees also have staff deposition authority).

Endpoints of investigations include hearings, reports, letters to agencies, and/or legislation. Hearings, which are almost always public, are conducted by the chairman who is bound only by the rules of the chamber and of the committee – but not by the Federal Rules of Civil Procedure, which address judicial proceedings under Article III of the Constitution. Reports, which can be lengthy and detailed, are prepared by staff and can be issued as a staff report by direction of the chairman, or voted on and issued as a committee report. Letters, which again may be lengthy and detailed, can be sent to cabinet departments or investigative agencies seeking further inquiry or specific action. And, of course, any or all of the above may contribute to the basis for legislative action.

When and Why Is This Power Used?

Use of this power by Congress, perhaps the ultimate political body, will be, by necessity, part of someone's political agenda. Understanding the political context will help answer why and how a particular committee is acting, and explain the timing.

The most benign and straightforward use of this power, at least from an agency's or a company's standpoint, is for oversight. Oversight tends to focus on policy issues and alternatives that legislators need to understand, or that legislators believe their constituents need to understand. And it can focus on often mundane, but important, administrative implementation issues arising from statutes that are occasionally less than perfectly clear.

Oversight can be as broad as Congress wants, or as narrow. A committee could examine the overall health of the American people, the post-Katrina healthcare crisis in New Orleans, or efforts to combat a rare disease. It could inquire into programs in whole or in part – for example, the future of Medicaid or Medicare, or past and present reimbursement decisions for a given product. Similarly, a committee could examine the administrative workings of an entire cabinet agency, such as the Department of Health and Human Services. Or it could look at particular administrative issues, such as how Medicare call centers are monitored by the Centers for Medicare and Medicaid Services ("CMS"), or how CMS collects data on hospitals' uncompensated care, both of which were examined in 2007 by House and Senate committees.

Investigations, on the other hand, focus primarily on problems and possible misbehavior. They can be triggered by several things, including routine oversight work, law enforcement activity, regulatory action, press inquiries, complaints from industry, litigants or constituents, concern by a particular member of Congress, inside information from whistleblowers, or the curiosity of enterprising congressional staff. Again, they can be very broad or very narrow, depending on the problems or allegations involved.

Most investigations examine problems in the Executive Branch, problems in a particular industry or company, or both. Examples of primarily government-focused inquiries include investigations into possible conflict of interest in Food and Drug Administration ("FDA") contracts, possible enforcement problems arising from FDA lab closings, and FDA treatment of its scientists who raise drug safety concerns. Others include management issues at the National Institute of Environmental Health Services, conflicts of interest at the National Institutes of Health ("NIH"), and biosurveillance efforts at the Department of Homeland Security. To the extent private companies are involved, either as contractors, grantees, or as subjects of regulation, they can be readily caught up in the probe.

Industry-focused investigations are common, as committees often seek to shed light, and trigger Executive Branch action, on practices of concern. Examples include biosafety labs, the safety of various prescription drugs and biologics, the safety of various medical devices, food safety (both imported and domestic), marketing of carbon monoxide-treated meat, nursing home quality, and health insurance company marketing practices. Notably, many of these soon turn into inquiries into why the FDA or other regulator had not taken more aggressive action to prevent or stop the industry or company practices.

What Happens as a Result of Oversight and Investigations?

Oversight by Congress tends to remind agencies or private entities that they are being watched, and the accompanying press coverage reinforces that point. Oversight and publicity also tend to make issues that Congress cares about receive priority attention from agencies or others. And, depending on the vigor and depth of the work, behavior or outcomes can be changed.

It is more common for an investigation to cause behavior modification, in part because that is usually its purpose, and in part because investigations are more intrusive. Agencies will strengthen policies (NIH conflict of interest safeguards), increase administrative attention to problems (FDA imported food inspections; CMS review of Medicare Advantage plans' marketing), or even change decisions (FDA halt to lab closings). Companies too have changed policies or practices, acquiesced in regulatory agency action, or exhibited more flexibility on legislation, when facing congressional scrutiny.

In some cases, major investigations will lead directly to changes in law. The Food and Drug Administration Amendments Act of 2007[13] contains several drug safety provisions spurred by concerns raised in Congress and in the press. More narrowly, the Generic Drug

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Enforcement Act of 1992[14] arose directly from the House Energy and Commerce Committee's investigation of the generic drug industry and from related criminal proceedings brought by the U.S. Attorney for the District of Maryland.[15]

What Does This Power Mean for the Subject of an Inquiry?

When Congress exercises its power to oversee and investigate, subjects of the inquiry have few legal protections. Of course, Constitutional privileges must be respected. For example, the right to invoke the Fifth Amendment in response to questions is maintained, although committees can, and often do, force witnesses to invoke that right in person and before cameras. Witnesses also have the right to counsel, although that counsel has no right to lodge objections to questions during a hearing.

Common-law privileges, such as the attorney-client privilege, are more problematic. In particular, recognition of the attorney-client privilege is viewed by some committee chairmen as a matter of their discretion, subject to their ability to muster a majority of colleagues in the committee and in the chamber to vote for contempt should the witness assert the privilege and decline to answer. Notably, most committees are reluctant to take on that fight; the matter has rarely come before a court, and it is not yet resolved.[16]

Committees are bound by their rules and those of the relevant chamber, of course, but those rules afford little protection to parties under examination. Fortunately, most chairmen are bound by something else – a desire to be fair, or at least to appear to be fair. The public nature of these inquiries reinforces this practical and political constraint.

A subject of an inquiry should recognize that if the probe is serious, documents will be turned over; the question is whether voluntarily or under subpoena. (But the scope of document requests is often narrowed through negotiation.) Witnesses will testify; the question once again is whether voluntarily or under subpoena. (But voluntary interviews can sometimes substitute for, or limit the scope of, formal testimony.) And not surprisingly, publicity is likely to accompany the entire proceeding, as was certainly the case in inquiries into Iran-Contra, Whitewater, and Enron.

So what can a subject of an inquiry do? There is no substitute for understanding the political context and goals of the inquiry. Also, understand the company context, including possible parallel proceedings, broader corporate objectives, and other legislative or regulatory goals. Remember that it is often hard for a subject to make things better, but very easy to make things worse. Finally, be as responsive and constructive as one can, and be careful.

What Will 2008 Bring – Who's Next?

The attached appendix of selected health-related oversight and investigations work in 2007 provides a useful listing of the healthcare matters of particular interest to congressional investigators. Topics are wide-ranging, reflecting the high level of political interest in healthcare. Constituents care deeply about it, substantial federal tax dollars underwrite much of it, many members are active and knowledgeable, and press attention is constant.

First, FDA and FDA-regulated companies will continue to receive close and sustained attention. Given the ongoing legislative interest in follow-on biologics and food safety, additional inquiries may be made to companies in those industries.

Second, Medicare is such a large, politically sensitive, and expensive program that providers and others will always be vulnerable to congressional review. Fraud, waste, and abuse are attractive targets for members who desire to take action against increasing healthcare cost burdens. Concerns about access and quality will also spur activity.

Third, other issues stemming from an aging population will only increase in importance. This means Medicaid long term care funding, nursing home quality, and long term care insurance will stay on the docket.

Fourth, federal public health agencies such as the Centers for Disease Control and Prevention and the National Institutes of Health, and the institutions and companies that work with them, will remain in the public eye.

Conclusion

Congress has a critical role to play in healthcare issues. Most think of its legislative work, which has created programs, policies, and agencies that are fundamental to the health of Americans. But to continue that work, Congress needs information – and it has been given wide powers to get it. Those who are "asked" to provide that information ignore the unique procedural, political and public context at their peril.

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From 1997-2007, Mr. Stuntz served as Minority Staff Director and Chief Counsel to John D. Dingell, then-ranking Democrat on the U.S. House Committee on Energy and Commerce. In that position, he directed staff work on all legislative, investigative, political, policy, and procedural matters. Previously, he was

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Mr. Stuntz earned his J.D. in 1977 from Harvard Law School, and his A.B., *magna cum laude*, from Princeton University in 1974. He may be reached at *rstuntz@hhlaw.com*.

APPENDIX

2007 SELECTED HEALTH-RELATED OVERSIGHT AND INVESTIGATIONS

Committee on Energy and Commerce, U.S. House of Representatives

- Safety and marketing of drugs and biologics (several)
- FDA contracting conflicts of interest, lab closures, salaries/bonuses
- Medical device enforcement by FDA
- Medicare (several)
- Healthcare crisis in post-Katrina New Orleans
- Conflicts of interest at NIH
- Medical errors
- Food safety (imported and domestic; pet and human)
- Long term care insurance
- Use of antibiotics in animals
- Risks in biosafety laboratories
- Medicaid

Committee on Oversight and Government Reform, U.S. House of Representatives

- Status of women's health offices and programs at HHS
- Safety and marketing of drugs and biologics (several)
- President's Global AIDS Program
- Food safety
- FDA regulation of dietary supplements
- Formaldehyde in FEMA trailers
- Medicaid (several)
- Surgeon General independence
- Medicare Part D drug benefit pricing
- HIV testing
- National Institute of Environmental Health Services
- Tobacco

Endnotes

1 U.S. Const. art. I, § 1.

2 U.S. Const., art. 1, § 8.

3 U.S. Const., art. 1, § 5.

4 *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

5 *See, e.g., Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959).

6 354 U.S. at 187.

7 Rules of the House of Representatives, 110th Cong., Rule X cl. 2(b)(1).

8 Standing Rules of the Senate, Rule XXVI cl. 1.

9 H. Rules, Rule XI cl. 2(m)(1)(B); S. Rules, Rule XXVI cl. 1.

10 *McGrain*, 273 U.S. at 175.

11 *See, e.g., Eastland v. United States Serviceman's Fund*, 421 U.S. 491 (1975).

12 *See* 2 U.S.C. §§ 288 a-d and 28 U.S.C. § 1365.

13 Pub. L. No. 110-85.

14 Pub. L. No. 102-282.

15 The author was the lead staffer on the bill. The floor debate can be viewed in the Congressional Record for April 28, 1992 (102d Congress, 2d Session;pages H-2684-2689).

16 See Morton Rosenberg, Cong. Research Serv., Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry, No. 95-464, at 43-56 (1995).

*/ Compiled from committee websites. This list is designed to be illustrative, not exhaustive, and does not include other committees with jurisdiction and activity. Tomas Kolodziej, Legislative Specialist, Hogan & Hartson, assisted in this compilation.