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# **BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS**

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#### **ROBERT L. HAIG**

*Editor-in-Chief*

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## Chapter 6

# Congressional Investigations

*by Mark Filip, Asheesh Goel, Reginald J. Brown, Brian Benczkowski, W. Neil Eggleston, Jeremy Dresner and Matt Owen\**

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**I. INTRODUCTION****§ 6:1 Scope note**

Including a chapter on congressional investigations in a publication regarding business and commercial litigation may seem unusual, because Congress is a fundamentally different entity than the courts.<sup>1</sup> Like litigation in the courts, though, congressional inquiries are intense, adversarial proceedings that can be fertile ground for nuanced legal questions. They are also often time- and resource-consuming. And the factual stakes can be high, in terms of live testimony that sometimes can become a matter of public record and consequence.

Congress' role as policymaker extends well beyond its responsibility for drafting, debating, and enacting laws. Through a multitude of other means, Congress also exercises vast oversight powers that enable it to track progress and compliance with the laws it implements and identify new areas for legislative action. Lawmakers on Capitol Hill often scrutinize the decisions flowing from the White House, executive branch departments and agencies, and other government actors. The focus of this chapter, however, is on the implications that congressional oversight has for private parties.

With broad investigative authority,<sup>2</sup> including subpoena power,<sup>3</sup> Congress can dive deep into a company's or an individual's affairs, and its investigations can carry significant reputational consequences and substantial litigation risks. They frequently lead to or impact collateral proceedings involving federal and state regulators.<sup>4</sup> They can garner substantial media attention

**[Section 6:1]**

<sup>1</sup>For discussion of investigations by executive branch regulators, see Chapter 91, "Regulatory Litigation" (§§ 91:1 et seq.).

<sup>2</sup>See §§ 6:2 to 6:4.

<sup>3</sup>See § 6:8.

<sup>4</sup>See, e.g., Chapter 91, "Regulatory Litigation" (§§ 91:1 et seq.); Chapter 92, "Regulatory Litigation with the SEC" (§§ 92:1 et seq.).

and pose a threat to a company's stock price and market value.<sup>5</sup> And they can lead to legislative action that has lasting impacts on companies and the industries in which they operate.

Companies or individuals facing congressional scrutiny should recognize that congressional investigations are not the same as civil litigation or even other government investigations. Congressional investigations are governed by a distinct body of written and unwritten rules, practices, and precedents, and are animated by political and institutional concerns unique to the legislative branch. The appropriate approach and strategy for a matter is likely to vary significantly from case to case, and success can depend on strong relationships with the investigating committee and its members. As a result, it is generally advisable to consult with counsel experienced in these matters to determine the best approach and navigate the process.

This chapter explores the distinct forum that is the United States Congress and the scrutiny federal lawmakers apply to companies and their business activities. It discusses the breadth<sup>6</sup> and limits<sup>7</sup> of Congress' investigative authority, the common phases of a congressional inquiry,<sup>8</sup> the tools congressional investigators have at their disposal,<sup>9</sup> the rights of private companies and individuals that find their way into Congress' crosshairs,<sup>10</sup> and related case law. Finally, the chapter provides tables of House<sup>11</sup> and Senate<sup>12</sup> Committee Rules on investigative powers.

## II. CONGRESS' INVESTIGATIVE AUTHORITY AND PRELIMINARY CONSIDERATIONS

### § 6:2 Purpose and oversight powers

Congress has exercised oversight for centuries.<sup>1</sup> As early as 1791, the House of Representatives during the 2nd Congress convened a special committee to investigate the defeat of Major

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<sup>5</sup>See Chapter 73, "Crisis Management" (§§ 73:1 et seq.).

<sup>6</sup>See §§ 6:2 to 6:4.

<sup>7</sup>See §§ 6:11 to 6:21.

<sup>8</sup>See §§ 6:5 to 6:6.

<sup>9</sup>See §§ 6:7 to 6:10.

<sup>10</sup>See §§ 6:11 to 6:21.

<sup>11</sup>See § 6:29.

<sup>12</sup>See § 6:30.

#### [Section 6:2]

<sup>1</sup>See Morton Rosenberg, *The Constitution Project, When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry* (2017).

General Arthur St. Clair and his troops by a group of American Indians in the Northwest Territory. Since that time, Congress continued to assert its authority to conduct oversight of high-profile issues and events of the day, from the sinking of the Titanic, the Watergate scandal, and the Iran-Contra Affair to the terrorist attacks of September 11th, Hurricane Katrina, the 2008 economic recession, and the January 6, 2021 attack on the Capitol. Congress also regularly extends its oversight powers to investigate a wide range of conduct by private businesses, including drug pricing,<sup>2</sup> financial reform, antitrust,<sup>3</sup> energy issues,<sup>4</sup> and more.

Congress' authority to conduct investigations is not enumerated in the Constitution. However, courts and the political branches have long recognized that such authority exists as an implied, essential function of Congress' mandate. In particular, the power to investigate is viewed as a corollary of Congress' Article I legislative power: to exercise its power to legislate, Congress needs broad power to collect information. Various statutes also recognize and enhance Congress' oversight authority.<sup>5</sup>

In *McGrain v. Daugherty*,<sup>6</sup> which arose out of the Teapot Dome scandal of the 1920s, the Supreme Court held that each chamber of Congress has the power to “secure needed information” in order to legislate.<sup>7</sup> As the Court reasoned, this “power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function,” and without it, Congress “cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.”<sup>8</sup> More recently, the Supreme Court explained in

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<sup>2</sup>See § 6:6.

<sup>3</sup>See generally Chapter 87, “Antitrust” (§§ 87:1 et seq.).

<sup>4</sup>See generally Chapter 176, “Energy” (§§ 176:1 et seq.).

<sup>5</sup>See, e.g., 18 U.S.C.A. § 1505 (Obstruction of Congress); Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 (1970); GAO Access and Oversight Act of 2017, Pub. L. No. 115-3, 131 Stat. 7 (2017).

<sup>6</sup>*McGrain v. Daugherty*, 273 U.S. 135, 137, 47 S. Ct. 319, 71 L. Ed. 580, 50 A.L.R. 1 (1927).

<sup>7</sup>*McGrain v. Daugherty*, 273 U.S. 135, 161, 47 S. Ct. 319, 71 L. Ed. 580, 50 A.L.R. 1 (1927); see also Letter of Opinion for the Counsel to the President, Dep't of Justice Office Of Legal Counsel (May 1, 2017), <https://www.justice.gov/olc/file/966326/download> (“The Supreme Court has recognized that one of those legislative powers is the implicit authority of each house of Congress to gather information in aid of its legislative function.”).

<sup>8</sup>*McGrain v. Daugherty*, 273 U.S. 135, 174, 175, 47 S. Ct. 319, 71 L. Ed. 580, 50 A.L.R. 1 (1927).

*Trump v. Mazars USA, LLP*:<sup>9</sup> “The congressional power to obtain information is ‘broad’ and ‘indispensable.’ It encompasses inquiries into the administration of existing laws, studies of proposed laws, and ‘surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.’ ”<sup>10</sup>

As discussed herein, this power is not unlimited,<sup>11</sup> but it is expansive in scope. As courts have held, Congress’ “power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”<sup>12</sup> It “encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.”<sup>13</sup> And “[t]o be a valid legislative inquiry, there need be no predictable end result.”<sup>14</sup>

Congressional investigations can serve many different purposes—and understanding those purposes is critical for the target of an investigation to develop an effective response strategy. As a general matter, investigations are mechanisms that assist legislators in assessing public policy, developing legislation, and keeping attuned to the priorities of their constituents. But they can also be a means to other ends as well, including calling attention to particular issues, gathering information, prompting action on matters of importance to a lawmaker’s constituents, or even reviewing alleged instances of corporate or individual wrongdoing. Indeed, a single investigation may be animated by multiple purposes: the majority, the minority, individual members, and committee staff may all have substantially different interests in initiating and carrying out the investigation.

Increasingly, these investigations have expanded beyond the federal executive branch to cover private corporations and their executives across a range of industries and issue areas. As Congress looks to map out its legislative agenda, companies can

<sup>9</sup>*Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2022, 207 L. Ed. 2d 951, 126 A.F.T.R.2d 2020-5106 (2020).

<sup>10</sup>*Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031, 207 L. Ed. 2d 951, 126 A.F.T.R.2d 2020-5106 (2020) (quoting *Watkins v. U.S.*, 354 U.S. 178, 187, 215, 77 S. Ct. 1173, 1 L. Ed. 2d 1273, 76 Ohio L. Abs. 225 (1957)).

<sup>11</sup>See, e.g., *Watkins v. U.S.*, 354 U.S. 178, 187, 77 S. Ct. 1173, 1 L. Ed. 2d 1273, 76 Ohio L. Abs. 225 (1957) (noting that congressional inquiries “must be related to, and in furtherance of, a legitimate task of the Congress.”).

<sup>12</sup>*Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 504 n.15, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975).

<sup>13</sup>*Watkins v. U.S.*, 354 U.S. 178, 187, 77 S. Ct. 1173, 1 L. Ed. 2d 1273, 76 Ohio L. Abs. 225 (1957).

<sup>14</sup>*Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 509, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975). See §§ 6:11 to 6:21.

receive voluminous requests for documents and information,<sup>15</sup> and CEOs and other senior employees can easily find themselves testifying before congressional committees.<sup>16</sup>

Companies or individuals contacted by Congress should understand that each investigation is unique and that developing an appropriate response to an inquiry requires a careful assessment of several dynamics. For example, some inquiries may include a one-time request for testimony or information,<sup>17</sup> while others may involve a months- or years-long investigation requiring document productions,<sup>18</sup> depositions,<sup>19</sup> briefings,<sup>20</sup> and more. Additionally, the nature and scope of congressional inquiries can vary depending on who is investigating. Requests from an individual lawmaker, for instance, may warrant a different type of response than those from a committee or group of legislators. Similarly, inquiries with the backing of a majority party that holds committee gavels and can more easily obtain subpoenas<sup>21</sup> may merit distinct treatment from those initiated solely by minority members.<sup>22</sup> Investigations can also be shaped by other factors, including the committees or member offices in which they originate, how much of a priority they are for individual members or staff, and the amount of resources dedicated to them.

Upon receiving a request from Congress, a party therefore should carefully evaluate a variety of factors in crafting an appropriate response strategy, including understanding who is making the request and for what purpose; is compliance voluntary or compulsory; what are the broader political and policy concerns motivating it; what are the mostly likely end-goals of the investigation; and are you the exclusive target or one of many receiving the request.<sup>23</sup>

### § 6:3 Congressional committees and their jurisdiction

Congress conducts the bulk of its oversight through its committee structure. Each chamber, through slightly different rules, has

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<sup>15</sup>See § 6:10.

<sup>16</sup>See § 6:7.

<sup>17</sup>See § 6:5.

<sup>18</sup>See § 6:5.

<sup>19</sup>See § 6:9.

<sup>20</sup>See § 6:5.

<sup>21</sup>See § 6:8.

<sup>22</sup>It is important to remember, however, that the balance of power in a given chamber can shift quickly, particularly in the House, all members of which stand for reelection every two years.

<sup>23</sup>See § 6:27 (providing a practice checklist detailing these and other consideration).

delegated responsibility for carrying out its investigative role to certain jurisdictional committees.<sup>1</sup> Given how different committees can be—not only in their formal rules and authorities but also in their informal practices and priorities—it is important for a private party receiving a congressional inquiry to understand the nature of the requesting committee.

The House and Senate maintain three types of committees, standing, select or special, and joint committees:

- Standing Committees are permanent committees established under the rules of the Senate or House which focus on particular subject matters. In the 117th Congress, the Senate has 16 standing committees and the House has 20. Standing committees can also create subcommittees or informal task forces to assist with oversight in particular areas.
- Special or Select Committees are typically established for a limited time period to perform a particular study or investigation. Some, like the Senate Select Committee on Presidential Campaign Activities (the Watergate Committee) or the House Select Committee on Benghazi, are of limited scope and duration and are established for a singular investigation. Others, like the Select Committee on Aging, have existed for years and have proposed legislation. Select Subcommittees are often created and tasked with important investigatory roles of public concern. In response to the pandemic, for example, the House passed H.Res. 938 in April 2020, creating the Select Subcommittee on the Coronavirus Crisis of the House Committee on Oversight and Reform. This subcommittee was directed to “conduct a full and complete investigation and study” on a number of specific issues related to the impact of the COVID-19 pandemic and the federal government’s response. Additionally, some Select Committees, such as the original Ways and Means Committee, have been transitioned into full Standing Committees.
- Joint Committees include membership from both chambers of Congress and are often set up to handle routine duties, such as supervising the Library of Congress. Joint committees typically have narrow jurisdictions and generally do not investigate or draft legislation.

Standing committees of Congress exercise oversight over government activities within their jurisdiction and may not

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**[Section 6:3]**

<sup>1</sup>See, e.g., House Rule X(2); House Rule XI(1)(b); House Rule XI(2)(m); Senate Rule XXV; Senate Rule XXVI(1).

exercise compulsory investigative powers for matters outside of their respective jurisdictions.<sup>2</sup> Courts, although traditionally wary to get involved in questions of jurisdiction in this realm, have held that committee jurisdiction is “restricted to the missions delegated to” it by the parent body, and that “[n]o witness can be compelled to make disclosures on matters outside that area.”<sup>3</sup> One committee’s jurisdiction is not mutually exclusive of another’s, and at times, the jurisdictional lines can be less than clear. As of 2021, the Senate’s website explains that “setting jurisdictional boundaries among committees has always proved troublesome. While some jurisdictions apply to oversight of specific executive agencies or precisely defined functions, others are not so obviously described. As a result, a half-dozen or more committees may claim jurisdiction in such broad policy areas as the national economy or environmental protection. While Senate Rule XXV also provides for select, special, and joint committees, it does not spell out their responsibilities. These are detailed in the Senate resolutions that established—or updated—the authority of these special panels.”<sup>4</sup>

While the two chambers’ committees often operate in pairs—with two committees exercising authority over a similar range of issues—there are not always perfect overlaps in jurisdiction, necessitating a careful reading of the relevant jurisdictional provisions for each committee:

<b>Committees of the 117th Congress</b>	
<b>HOUSE COMMITTEES</b>	<b>SENATE COMMITTEES</b>
Agriculture	Agriculture, Nutrition, and Forestry
Appropriations	Appropriations
Armed Services	Armed Services
Budget	Budget
Education and Labor	Health, Education, Labor, and Pensions
Energy and Commerce	Commerce, Science, and Transportation
Science, Space and Technology	
Transportation and Infrastructure	Environment and Public Works
Ethics	Select Committee on Ethics

<sup>2</sup>U.S. v. Rumely, 345 U.S. 41, 42, 44, 73 S. Ct. 543, 97 L. Ed. 770 (1953); H.R. Rule X; S. Rule XXV.

<sup>3</sup>Watkins v. U.S., 354 U.S. 178, 206, 77 S. Ct. 1173, 1 L. Ed. 2d 1273, 76 Ohio L. Abs. 225 (1957).

<sup>4</sup>S. Comms., <https://www.senate.gov/artandhistory/history/common/briefing/Committees.htm>.

<b>Committees of the 117th Congress</b>	
<b>HOUSE COMMITTEES</b>	<b>SENATE COMMITTEES</b>
Financial Services	Banking, Housing, and Urban Affairs Finance
Foreign Affairs	Foreign Relations
House Administration	Rules and Administration
Judiciary	Judiciary
Natural Resources	Energy and Natural Resources
Oversight and Reform	Homeland Security and Governmental Affairs
Rules	Rules and Administration
Small Business	Small Business and Entrepreneurship
Transportation and Infrastructure	
Veterans Affairs	Veterans Affairs
Ways and Means	
Permanent Select Committee on Intelligence	Select Committee on Intelligence
Select Committee on Coronavirus Crisis	
Select Committee on the January 6, 2021 Attack on the United States Capitol	
Select Committee on the Climate Crisis	
Select Committee on Economic Disparity and Fairness in Growth	
Select Committee on the Modernization of Congress	
	Permanent Select Committee on Indian Affairs
	Special Committee on Aging
<b>JOINT COMMITTEES</b>	
Joint Committee on Printing	Joint Economic Committee
Joint Committee on Taxation	Joint Select Committee on Solvency of Multiemployer Pension Plans
Joint Committee on the Library	

The House Committee on Oversight and Reform and the Senate Committee on Homeland Security and Governmental Affairs are Congress’ predominant investigative bodies and are granted broad oversight jurisdiction over the federal government. The latter also houses the Permanent Subcommittee on Investigations,

## VI. PRACTICE AIDS

### § 6:27 Practice checklist

As an initial step, a private party receiving a congressional request for information should seek to understand the nature of the investigation. Congressional investigations can develop in many different ways, and what works in one situation may be problematic in another situation. Among other things, investigative subjects should consider the following questions:

- What is the purpose of the investigation (e.g., response to current events, policy change)? What is the current political landscape?<sup>1</sup>
- What is the jurisdiction of the investigating committee? What issues will the committee focus on?<sup>2</sup>
- What rules, procedures, and practices will govern the investigation? What powers does the committee have? How does this committee typically approach investigations?<sup>3</sup>
- How is the investigation likely to develop (e.g., one-off informal request vs. multi-month investigation with a report and hearing)?<sup>4</sup>
- Is it an informal request, or compulsory process?<sup>5</sup>
- Who is making the request? Is it an individual member, the minority, a committee chair, or the committee itself?<sup>6</sup>

Given the broad powers and tools—both formal and informal—that Congress can bring to bear in an investigation, cooperation is often the best approach for an investigative target. Nevertheless, when an investigative target decides to resist a congressional request, the target may have certain defenses available. Note that even in a cooperative posture, an investigative target may be able to use these defenses as leverage in negotiations

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141 S. Ct. 1390, 209 L. Ed. 2d 130 (2021) (“Section 1505’s specific reference to ‘either House,’ ‘any committee,’ and ‘any joint committee’ implies that Congress meant to exclude other bodies within the Legislative Branch. Indeed, the statute’s failure to include other congressional ‘offices’ is especially strong evidence of meaning here because other statutes do. For instance, the False Statements Act applies to ‘any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress.’ Congress knows how to refer to legislative offices when it chooses, and we must give effect to the statute’s tailored language.”) (citations omitted).

#### [Section 6:27]

<sup>1</sup>See § 6:2.

<sup>2</sup>See § 6:3.

<sup>3</sup>See § 6:4.

<sup>4</sup>See §§ 6:5 and 6:6.

<sup>5</sup>See §§ 6:7 to 6:10.

<sup>6</sup>See § 6:7.

over the scope and timing of the response. In evaluating possible defenses, investigative subjects should consider the following questions:

- Does the requester have the authority to compel a response?<sup>7</sup>
- Has the committee met—or is it likely to be able to meet—the procedural requirements for compelling documents or testimony?<sup>8</sup>
- Does the committee have jurisdiction over the topic?<sup>9</sup>
- Is there a valid legislative purpose for the investigation?<sup>10</sup>
- Is the specific request pertinent to the subject matter under inquiry?<sup>11</sup>
- Has the committee defined what the subject matter under inquiry is?<sup>12</sup>
- Would responding interfere with the investigative subject's freedom of expression or freedom of association?<sup>13</sup>
- Is the request for documents so overbroad that it constitutes an unreasonable search and seizure?<sup>14</sup>
- Would the testimony requested tend to incriminate the witness?<sup>15</sup>
- Has the committee requested information subject to the attorney-client privilege or work product doctrine? Is the committee likely to seek to override those privileges?<sup>16</sup>
- Will the committee agree to a narrow scope, redactions, in camera review, or briefings to avoid disclosure of business confidential or personally identifying information?<sup>17</sup>
- Has the committee met—or is it likely to be able to meet—the procedural requirements for holding the subject in contempt?<sup>18</sup>

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<sup>7</sup>See §§ 6:8 to 6:10.

<sup>8</sup>See §§ 6:8 to 6:10.

<sup>9</sup>See § 6:3.

<sup>10</sup>See § 6:11.

<sup>11</sup>See § 6:12.

<sup>12</sup>See § 6:12.

<sup>13</sup>See § 6:14.

<sup>14</sup>See § 6:15.

<sup>15</sup>See § 6:16.

<sup>16</sup>See §§ 6:18 to 6:19.

<sup>17</sup>See § 6:20.

<sup>18</sup>See §§ 6:23 to 6:25.