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**WITNESSES****Congressional Investigations: Witnesses Do Have Rights**

BY JAMES HAMILTON AND RAECHEL KUMMER

**W**atching a televised Congressional hearing, you might well think that it is Washington's version of the Wild West—a proceeding where no rules protect witnesses and that, at least from the members' standpoint, anything goes. Indeed, years ago the chairman of the (blessedly now-defunct) House Un-American Activities Committee told a hapless witness:

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The rights you have are the rights given you by this Committee. We will determine what rights you have and what rights you have not got before the Committee.

But, in fact, there are a collection of rules—some more significant than others—that protect witnesses called before Congress. These basic rules provide witnesses at least a modicum of defense when testifying on the Hill.

Let's start with the doctrine of valid legislative purpose.

While Congress' investigatory powers are broad, it must act with a valid legislative purpose, such as gathering information relevant to legislation or the exercise of its oversight responsibilities as to the Executive Branch. Congress cannot expose private affairs solely for the sake of exposure or for sadistic or voyeuristic reasons. Members cannot investigate for their own self-aggrandizement. Congress cannot act as a law-enforcement agency or conduct legislative trials to punish persons under investigation.

However, the protection provided by this doctrine is limited. Courts generally presume that Congress acts with a valid legislative purpose, and it is well-established that Congress may investigate criminal activity.

Other constitutional protections may also provide relief.

**Constitutional Protections**

The First Amendment right of association may provide a witness some assistance, where information about the witness' colleagues is sought. But First Amendment rights are subject to a balancing process. Congress will prevail when it can demonstrate an overriding and compelling need for the information sought. Significantly, the Supreme Court never has ruled that a witness' associational rights outweigh Congress' informational needs, although it has found for a witness in a state legislative context.

The Fourth Amendment, which protects against unreasonable search and seizure, may be somewhat helpful to those subpoenaed to produce documents. How-

ever, if a committee acts with a valid legislative purpose, a subpoena seeking information in furtherance of that purpose likely will be upheld. But there are several cases when an egregiously broad committee subpoena was found unenforceable.

More importantly, witnesses may invoke the Fifth Amendment privilege against compelled self-incrimination. As in a criminal trial, witnesses may only take the Fifth to avoid testifying about their own wrongdoing; they must still answer questions about the conduct of others. Taking the Fifth does not prevent Congress from subpoenaing a witness' incriminating books or records. And Congress has statutory authority to obtain a grant of immunity from a federal court in order to gain the testimony of a witness who invokes the privilege.

Recently, Martin Shkreli, the former chief executive officer of Turing Pharmaceuticals who reportedly hiked the price of a life-saving drug from \$13.50 to \$750, was forced to take the Fifth repeatedly during a House Oversight and Government Reform Committee hearing (which he did while smirking). One might argue that making an endangered witness take the Fifth Amendment multiple times at a public hearing serves no valid legislative purpose. Sen. Sam Ervin (D-N.C.), during the Senate Watergate Committee hearings, allowed all Fifth-taking to be done in closed executive sessions, recognizing that no valid purpose was served by public humiliation. That said, the practice continues, sometimes with dramatic effect.

Witnesses may waive their Fifth Amendment privilege by declining to invoke it before testifying. Lois Lerner, a former Internal Revenue Service official, appeared before a House committee and testified that she had not done anything wrong or broken the law, before refusing to answer any further questions on Fifth Amendment grounds. The House voted to hold Lerner in contempt, asserting that she waived the privilege. However, the U.S. Attorney for the District of Columbia declined to file criminal contempt charges, concluding that Lerner had not waived privilege by her "general denials of wrongdoing."

Congressional investigations also are cabined by Congress' own rules and procedures. The Senate and House of Representatives each have detailed procedural rules, and individual committees must follow

those rules and committee-level rules as well. In the loyalty investigations era, several convictions were reversed by the U.S. Supreme Court because a committee did not follow its own rules affecting the witness' rights.

Congress also may only seek information or documents pertinent to the matter under investigation. Due process requires that, to determine whether a question is pertinent to the subject matter under inquiry, that subject matter must be made known in some way with undisputable clarity.

## **Attorney-Client Privilege**

Finally, in our strong view, witnesses are protected by the attorney-client privilege. It would be strange to contend that a witness, or his lawyer, can be compelled by Congress to discuss conversations between them.

Yet in the past, some House committees have declared that they have discretion to determine whether to recognize the privilege. Among the arguments raised are that Congress' Constitutional power to investigate trumps a common-law privilege, and that, in any event, the privilege doesn't apply in a non-adversarial investigative setting.

Those arguments are spurious. Grand juries have Constitutional powers and their proceedings are investigatory, but the privilege certainly applies in that context. The privilege also is so well enshrined that it may be a substantive right, not merely a procedural rule, the rejection of which would implicate Constitutional due process considerations. Moreover, if an investigatory committee could break the privilege, full and frank conversations between clients and their lawyers, a basic goal of the privilege, would be discouraged. Fortunately, many properly-run committees, including the Senate Watergate Committee, have recognized legitimate assertions of the privilege.

## **Conclusion**

The above rules, presented in abbreviated fashion, are the basic ones that govern congressional hearings and investigations. But there are others to consider, as well as the political dimensions that pervade and affect any congressional hearing. If you are to be a witness, it helps to understand the legal and political landscape.