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Why The Congressional Investigation Is A Unique Beast

The Editor interviews Daniel F. Donovan III and Zackary J. Harmon, Partners in King & Spalding's Government Advocacy & Public Policy Practice Group.

Editor: Would each of you tell our readers about your backgrounds involving congressional, Justice Department and other governmental investigations?

Donovan: I started my career in congressional investigations while in law school back in 1997. I spent the summer and fall working for Senator Fred Thompson on a special investigation authorized by the Senate into the 1996 federal election campaign. We were investigating allegations regarding illegal foreign influence and campaign financing. Once bitten by the political bug, I decided to continue as an investigator after law school and joined the Small Business Committee. Our investigations there focused on consumer fraud and protection issues, as well as nursing home quality of care and Medicare fraud. My background in healthcare fraud and nursing homes opened up an opportunity for me; I spent almost four years investigating drug and device safety issues, drug pricing, and fraud, waste and abuse in Medicare and Medicaid and other federal government programs. Most recently, I joined Ted Hester and Eleanor Hill in King & Spalding's congressional investigations practice and have been practicing there for the past three years.

Harmon: I joined King & Spalding in the mid-1990s and worked on the team that focuses on government investigations, principally Department of Justice and SEC investigations, but also congressional investigations. I left the firm in the late 1990s and went to the Justice Department as a prosecutor, holding a number of different positions – with the U.S. Attorney's Office in Washington and the Tax Division of the Jus-



**Daniel F.
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**Zackary J.
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Department, on a presidential commission (the Webster Commission) that investigated Robert Hansen, the FBI agent who was caught spying for the former Soviet Union. This investigation resulted in a number of congressional hearings. Thereafter, I spent over a year as a prosecutor on the Enron taskforce. The work of this taskforce overlapped a number of different enforcement agencies as well as Congress. My last position in the Department of Justice was as counsel to the then Deputy Attorney General Larry Thompson. In that role I had responsibility for a variety of criminal investigations and enforcement actions, including working with terrorist financing and terrorism issues. After returning to King & Spalding in 2003 my practice has been largely focused on Department of Justice and SEC investigations, although several of those have involved congressional investigations. One of the investigations that had a heavy congressional component involved my representation of one of the Native American tribes victimized by Jack Abramoff.

Editor: How would you distinguish congressional investigations from other types of investigations?

Harmon: First, the rules are very different – and in important ways – when comparing congressional investigations and investigations brought by other enforcement arms of

the U.S. government. Obviously when you're dealing with investigations by the Department of Justice and the SEC, the attorney-client communication and attorney work product privileges provide significant protections to a witness, target or defendant. By contrast, it's not at all clear that a witness or target is going to enjoy those rights in the context of a congressional investigation. Moreover, as a practical matter, another big difference is that investigations conducted by the Department of Justice and the SEC and some of the other investigative agencies are considerably more predictable in their scope and their focus than are congressional investigations. When someone is asked to provide evidence or testimony in a Department of Justice or SEC investigation, it is usually very clear what misconduct is being investigated. Or, perhaps better put, the experienced attorney will insist on clearly understanding the focus and scope of the investigation before his or her client provides any testimony or evidence, and as a result the attorney can predict with some confidence what kinds of issues and questions are going to arise. By contrast, it is often more difficult to anticipate what sorts of questions and issues might arise in a congressional investigation.

Editor: Dan, what strategies do you advocate in responding to congressional requests for information?

Donovan: First and foremost my focus is always on establishing a level of credibility for my client with the committee staff. The staff who are leading the investigation need to know that your client understands the process and takes it seriously. Once you have established that, it makes the process much easier and it is truly a unique process. As an investigator on the Hill I regularly encountered litigators who right out of the gate were confrontational and adversarial

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towards the committee's inquiry, which immediately placed their clients at a disadvantage. Anytime you sit down with a congressional investigator, there's no doubt it is an adversarial situation. But it is also an important opportunity to show some respect for the process, to understand what motivations are at play and to appreciate the personalities you're dealing with in the investigation. So the first contact with committee staff is really important. You want to establish your credibility, to gain intelligence about whatever they're inquiring into, to begin negotiating on behalf of your client and educating them about the facts supporting your client, and to hopefully narrow the focus of the committee to certain discrete issues. In most cases there is no way to extricate your client completely from the investigation, but it's necessary to cooperate with the committee to the extent it's in the best interest of your client.

Editor: Zack, how does preparing a witness for an investigation by another governmental body differ from preparing a witness for an appearance before a congressional body?

Harmon: On one point, preparing a witness to provide testimony or evidence is the same regardless of the venue: you must spend whatever time is required for the witness to be comfortable and ready to address any issue that may arise. As to process and "atmospherics," however, the witness must be prepared for some important differences. Beginning with a DOJ interview, typically such meetings are not recorded. Rather, an FBI or other government agent takes handwritten notes which are later memorialized in an internal document. Accordingly, while a witness's word choice in a DOJ interview is very important, many experienced attorneys will try to minimize interjecting during the interview in order to reinforce the impression that the witness is providing full cooperation. This is obviously a delicate balance. Grand jury appearances are different because defense counsel is not allowed into the grand jury room. So, the witness must be prepared to exercise his or her right to leave the room and confer with counsel if questions or issues arise for which the witness is unprepared. Like grand jury proceedings, SEC interviews are usually recorded and transcribed. Since these depositions may be used against the witness later in a contested proceeding, there is a significant premium on the witness's exact words. Accordingly, most attorneys will play an active role at SEC interviews, interjecting where necessary and appropriate to protect the record on their client's behalf.

Congressional hearings are yet again different in several ways. Importantly, and as we discussed earlier, it is often much more difficult to predict what questions and issues may arise at a congressional hearing. So, while preparation is equally important, it is also harder. Most experienced defense counsel will enjoy some success in working with DOJ and SEC attorneys to define the focus and scope of an inquiry – and the issues are in any event more predictable when there is clarity concerning the misconduct at issue. By contrast, congressional staff are sometimes reluctant to define the inquiry, which may not relate to any particular statute or regulation, and their principals are often inclined to depart from the defined scope in any event. If congressional staff are unwilling to discuss the topics to be covered at an upcoming hearing, then defense counsel should prepare their clients for a difficult day on Capitol Hill. And, as we discussed earlier, witnesses in congressional hearings must be prepared for questions that DOJ and SEC attorneys would be unlikely to ask – for example, questions about conversations with their attorneys.

Donovan: It is worth the effort to try and set parameters around the scope of questioning and agree to some ground rules. If an interview starts to exceed the scope of those parameters, counsel may interject at that point and say: this is not what we agreed to, we're really not prepared to speak to those issues today or this is not the best person to be talking to about that subject, and, if necessary, suggest a follow-up response.

Editor: Dan, what regulatory or legislative initiatives affecting healthcare companies were the result of congressional investigations which you were involved with?

Donovan: In 2004 I was the senior staffer leading the investigation of the worldwide withdrawal of Vioxx from the market. At the close of the Vioxx hearing in November, Senator Grassley announced that he would introduce legislation to reform FDA, and he subsequently did introduce bills in the 109th and 110th Congress. Finally, after I had departed the committee, Congress enacted the FDA Amendments Act of 2007. A number of key provisions from the initial Grassley legislation were either incorporated into or strongly influenced the enacted legislation. Senator Grassley's oversight during these years led to enhanced FDA post-market surveillance and notably expanded public access to information about clinical trials through a clinical trial database. Also, the FDA itself launched many new regulatory initiatives which in my view were fairly

responsive to the increased oversight from Congress.

Editor: Why are your backgrounds so helpful to a potential witness in so far as you are both familiar with the rules regarding congressional hearings as well as those of other governmental agencies?

Harmon: Increasingly, enforcement actions have DOJ, SEC and congressional components. So, there's a reason why people turn to lawyers who have experience in each of these areas. A witness absolutely must have a strategy that recognizes that he may face different, often competing and sometimes even irreconcilable rules, procedures and practices. The witness must understand his or her rights at every stage, and must know how best to respond to initial inquiries in a manner that protects his or her rights at a later stage, in a different venue. Should the witness request immunity? What kind? Must a letter be filed within a certain period of time in order to assert certain rights that could attach later? Within just one of the agencies we have discussed, DOJ, there are marked differences in practice among the various U.S. Attorneys' offices. The more an attorney is tuned in to these meaningful differences, the less time and capital will be lost fighting battles that cannot be won. The last point is that a witness is much better off with an attorney who has credibility with the authorities. It can streamline any of these processes considerably if the authorities do not have to test every assertion made by counsel, and both sides are more likely to focus on those things to which they are clearly entitled.

Donovan: During my time in the Senate I benefited from the opportunity to spend a significant amount of time with Senate Legal Counsel, the office that acts essentially as in-house counsel for Senate committees and committee staff. Having years of investigative experience and having confronted these issues and sought the advice of Senate Legal Counsel, I am well equipped to counsel our clients and even at times help educate the investigative staff on some important precedents. It's always said that congressional investigations are unique beasts, and they truly are. You have to counsel your client to know what they're going to encounter when they get in a room with an investigator or in a hearing with committee members who will be asking tough questions under the glare of the Klieg lights. Completely understanding the lay of the land and our experience gives our congressional investigations team at King & Spalding a unique advantage.