



Ep. 6: Congressional Investigations and the Midterm Elections

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Jose Garriga:

Hello and welcome to *OnAir With Akin Gump*, I'm your host, Jose Garriga.

For many years, congressional investigations have been both a regular feature and a standout example of the work done on Capitol Hill. The Kefauver Committee, the Army-McCarthy hearings, the Watergate Committee and the Iran-Contra hearings are just a few of the investigations that have become landmarks of the U.S.'s legislative history.

More recently, congressional investigations have consumed news cycles, as both candidate Hillary Clinton and President Donald Trump became the object of Hill inquiries.

We have with us today the co-heads of Akin Gump's congressional investigations practice. Rafi Prober, before taking on his current role, served as an Associate Deputy Attorney General at the Justice Department, where he handled all facets of the DOJ's responses to congressional oversight and investigations. Steve Ross, for 10 years, served as a U.S. House of Representatives General Counsel, working on, among other responsibilities, counseling the leadership and relevant committees on numerous congressional investigations.

We'll be discussing the current state of investigations on the Hill and where the midterm elections might lead the investigative function of Congress, as well as some things everyone should know about facing congressional investigations.

Welcome to the podcast.

Rafi, Steve, thank you for appearing on the show today. Investigations of one sort or another have been on everyone's lips, and radar, for months on end, so, Steve, let's kick this off. You've been representing clients in congressional investigations for many years. Just to set the stage, what are the two or three things that clients want to know at the outset about this unique legal challenge?

Steve Ross:

Thank you, Jose. Well, invariably when we begin a representation of a client, and quite often it happens when the client has received a subpoena or a letter from one of the committees of the Senate or the House that are known for conducting investigation. And

at the outset, the client is unaware of the unique nature of Congress' authority and the process that's deployed in conducting these investigations. So, very often, the first questions we'll get over the years are "Under what law does Congress have the authority to demand that we produce hundreds of thousands of pages of documents? Or to demand that we show up for a deposition or an interview or for a hearing?" And so, one of the things that we very often see is at the initiation of a matter, we'll have a discussion in which we go through the history of how Congress has this authority.

And it's actually a very interesting history that predates the U.S. Constitution because Parliament in England really was the precursor to these congressional investigations. But it carried over to the very first days of our republic, and, indeed, the very first Congress started conducting committee investigations. And the authority has been viewed by the Supreme Court and by the Congress itself as really to be integral to the legislative authority that Congress possesses. And so you can think of there being two broad areas in which Congress has authority to conduct investigations.

The first is in aid of its legislative authority in which, as the court has said, Congress has the ability to conduct inquiries into any subject on which legislation might be had. Given the broad federal role, that pretty much encompasses anything. But then the second area that Congress has authority to conduct investigations is a bit more specific, and it's investigations that are oversight of the executive branch—how the executive branch is implementing already enacted laws or how the executive branch is conducting itself in general. And, so, you have some investigations and hearings that the goal of which is to produce information that allows Congress to legislate in a more educated fashion, and then you have other investigations the goal of which is to have Congress provide the necessary oversight as to how an agency of the executive branch or other parts of the executive branch are implementing already-enacted laws.

That's sort of a very broad statement of it. The second question that we then often get is "Okay, well, I understand Congress has this power, but why are they picking on us? Why are they doing this investigation with regard to my company or with regard to me as an individual?"

And what we usually try to go through with clients at that point is that there's really a spectrum of motivations for why a specific investigation may be undertaken. It can be because Congress legitimately wants to learn about an area so that it can enact a law based on reality and best designed to address the problem that Congress is trying to address. And that, as I said, probably ties most directly to the historic purpose.

But over the years, Congress has also realized that they can use the investigations to achieve other goals, and, so, there may be other motivations. Those motivations can include trying to pressure and influence the executive branch and how it implements law. So, Congress passes a law, would like it to be implemented in a certain way, they don't believe the executive branch is implementing the law in the way Congress intended, and, so, they'll conduct an investigation and a hearing in which they try to impress upon the executive branch the importance of doing it the way Congress wants it to be done.

And that can be a very effective tool for Congress to make sure that its laws are being implemented the way it sees fit. They then also learn that, well, sometimes we don't have to influence the executive branch—we can leapfrog that step and influence the private sector. So, you see a lot of hearings in which Congress will call in various leaders

of an industry or a particular company and, by using the moral suasion and, indeed, sometimes the political pressure and public pressure that can be brought about by a high-profile congressional investigation and hearing to try to persuade without the benefit of a legal binding passage of a law the private sector to act in a certain way.

See that all the times with different industries, and Congress has learned that that is an extremely effective way to get various elements of the private sector to act or to stop acting in certain ways. There are also other motivations that can inform why Congress is doing a particular investigation and hearing. So, sometimes, it is to tee up an issue for the next election, and that can be broadly stated, so, the Republicans may be trying to tee up certain issues for the next election on a broadly stated partisan basis. You know, we've seen both parties become more and more adept at doing that, whether it's with regard to health care, conduct by contractors to the military and any number of other issues.

But it's really each investigation, each hearing then becomes a tile in an overall mosaic that the party controlling the Congress or the house of Congress is trying to create in the leadup to the next election. And that is certainly something I would anticipate seeing a great deal of in the next two years heading into the 2020 presidential election. Or it can even be much more of a micro-political action, in which a committee is trying to do a hearing to help a particular member, most often the chairman, not surprisingly, but, at times, other members who are in a tough reelection race, and this is a way to demonstrate to their constituents, i.e., their voters, that they are trying to act in their best interests and trying to protect them.

And then, finally, particularly in this age of gridlock, where it can be so difficult to understand the problem, come up with a solution, create the consensus necessary to enact that solution and get the executive branch to implement it in a way that Congress wants, members of Congress now will conduct an investigation as a way to demonstrate to their constituents that they are on their side. It's really if you think of it as members of Congress as consumer advocates or industry advocates, we see a lot of that.

And, frankly, for members who are going to be running for election either for reelection to their same seat or for higher office, it can be a great way to attract favorable publicity, and, so, we see politically motivated use of the power. Now those are often, "Why is Congress doing this to me, and how do they have the power to compel me to do these things?" Those are the questions that clients most often ask.

Interestingly, perhaps the most important discussion that we have at the outset is the question clients oftentimes fail to ask, which is "What are the dangers that these investigations and hearings pose? What is the threat?" And as I describe that spectrum of motivations that the Congress might have, there's sort of a parallel spectrum of risk for the company or the individual. That can range from the underlying conduct that's being investigated might subject the individual or the company to criminal prosecution; it could subject them to enforcement actions by executive branch agencies; it could subject them or worsen their position with regard to civil litigation—and one of the things that we are certainly seeing a lot of is congressional investigations that are working hand in glove with the plaintiffs bar to create the proper groundwork to support a large civil, consumer action litigation. It can pose a threat in the marketplace; in other words, particularly for a consumer-facing company, being roughed up at one of these hearings or in a bad report can affect your market position of being able to sell your product.

It can affect people in Wall Street. There are any number of times when you'll see a company that is being subjected and the target of one of these hearings and investigations, in which it's more difficult for them on Wall Street. Either they'll suffer a drop in their stock price, or they have more difficulty raising money from the market. There's also more direct reputational risk for leaders, and not a month goes by or usually in which you don't see a hearing in which the CEO or the leader of a corporation is not being subjected to rough treatment on the Hill, and very often, within days, that CEO may be removed from their position.

So, there's individual reputational risk as well. And so we always stress that it's important to understand what's motivating the investigation? What is Congress trying to accomplish? What is the committee trying to accomplish? But also what are the risks to me as an individual or us as a company, and once you understand that you're in a much better position to create and develop a strategy to properly deal with the threats that are posed and to try to get through this unique legal challenge as best as one can.

Jose Garriga:

Steve, thank you, that's a terrific backdrop, I think, for people to understand some of what's been going on and what we'll be discussing in this interview as well. So, with all that in mind, we know where Congress has the authority, we know why Congress does these things, we know some of the risks.

All that said, could you, Rafi, please, could you sketch out where we are then from an investigative standpoint as the 115th Congress concludes?

Rafi Prober:

I'd be happy to and thanks again for having us on today. As folks who have read any news over the last couple of years are well aware, the conversation has been very much related to Russia, and Russia has taken a lot of the oxygen out of the room from an investigative standpoint. But there have been a number of other areas that have been interesting with a Republican-led House and a Republican-led Senate that have been focused on, and it hasn't been just Russia.

So, a few of those areas worth talking about, and we'll talk a little bit, I hope, later about what to expect going forward, a number of these areas will continue to be focused on. One is the health care sector broadly, Obamacare, Affordable Care Act, that continues to be a hot political topic, and there's a lot of inquiry on both sides of the aisle still related to health care issues, particularly drug pricing. Drug pricing really has been a fairly bipartisan issue, it's something top of mind for many legislators and for their constituents back home. We have seen a lot of activity in the drug pricing space on the Hill over the last couple of years and expect that to continue.

A subset of that is opioid issues, which, obviously, the opioid epidemic has really ravaged the country and gotten, in a very meaningful way, the attention of Congress. It's one of the top legislative items that Congress is looking at and figuring out how they can address, and that has also resulted in opioid-related investigations. We saw recently there was a CEO panel of a number of the distributors, the manufacturers had been called upon, so there's been a lot of focus, and, certainly, I expect that to continue.

The other really big hot area over the last couple of years that our clients have been focusing on and that we've been focusing on is technology, social media, big data-related topics. And you can look at the Facebook hearing and any number of hearings that have recently been held where Congress is looking to understand more how these

platforms work, what is happening with folks' data, what's happening from a consumer protection privacy perspective, from a civil liberties perspective, and there really is a recognition that the technology has outpaced, to a large extent, the understanding, on the Hill and just among the general population, of what is being done with our data? where is it going? are malicious actors impacting social media? how do you control what shows up in a news feed?

And these are going to continue to be really tough issues to wrestle with, and I think Congress in their pursuit of ultimately very likely enacting legislation and, to some extent, continuing to move forward with consideration of regulation in these areas, they will certainly continue to hold hearings and conduct investigations.

In a lot of ways, this feels, to me, like it did around the time of the financial crisis, where there was a recognition that the technology and the financial products on the market were so complex and beyond at that point the knowledge of many on the Hill and many in the population as to what a credit default swap was. Or a CDL or a CDO, and it feels a lot like it did back then in terms of the learning curve and also trying to get ahead of things from an investigative perspective.

So, you know, that's been where we've spent a fair amount of our time over the last couple of years. There has been some Russia-related investigations—obviously the Hill has been quite active in the House and Senate intelligence committees—but there's been lots going on. I expect lots certainly to continue.

And one other item to mention is minority-led requests. Very often, in congressional investigations, the focus is on who the chair of the committee is, and that's largely because the chair is typically in the position of deciding whether to launch an investigation and has the ability to issue subpoenas, in some cases unilaterally. The minority party, in this case, the Democrats in the House and the Senate have done a pretty effective job at running investigations on their own on issues they care about even without subpoena authority. And we've certainly had a number of clients who have been on the receiving end of letters and inquiries, and Congress has, and ranking members in the minority party have, realized how effective they can still be and relevant from an investigative perspective.

So, we have seen a number of those in more-traditional areas that Democrats have focused on, whether that's labor issues, whether that's consumer protection-type stuff, financial services inquiries. So, a lot of those more traditional-type investigations are still going on, but they are going on without subpoena authority and conducted by the minority party.

Jose Garriga:

Thank you, Rafi. Now, a reminder, listeners, that we're here today with Rafi Prober and Steve Ross, co-heads of Akin Gump's congressional investigations practice, talking about Hill investigations, their history and their future. And let's talk about the future now a little bit.

Three weeks from now, we're going to have probably some of the most hotly contested and eagerly anticipated midterm elections in quite some time. So, let's look at some of the foreseeable impacts on congressional investigations of, basically, the two outcomes from the upcoming elections. So, to start, if the Republicans hold the House, what do

you see as their areas of interest for investigation? Steve, would you like to take a crack at this one?

Steve Ross:

Sure, and I think the first thing for people to realize is the Republican Party in 2019, after these elections, is very different than the perception that people might have of the Republican Party going back over recent decades. Between not just the effect of Donald Trump assuming the leadership of the Republican Party, but even before that, if you look at what was happening with the Tea Party and others, you have a much stronger populist strain within the Republican Party at this point. And I think that will likely affect their investigative agenda, particularly as some of those more recently elected Republicans that were elected either on Donald Trump's coattails or in the Tea Party wave rise in seniority and take over the leadership of committees and subcommittees that are empowered to conduct investigations.

I think you'll have one bucket of investigations that Republicans will lead which will really be in aid of legislation that they want to pass. There are some industries and industry practices that Republicans don't like, and that they may try to enact legislation, and it is a great precursor to enacting legislation, to create the atmosphere that drives the buildup of support for that legislation, to conduct investigations and hearings that highlight what they'll describe as inappropriate or improper or unhelpful practices within particular industry sectors.

Second is, I frankly would not expect the Republicans, if they control the House and the Senate, to conduct a large number of investigations and hearings designed to embarrass President Trump in 2019 and 2020. I think, politically, that calculus doesn't work for them. But there are many parts of the federal government that, not only the Congress but that the President himself don't like the way they're acting. One example that's highly public as we sit here today is the way the Fed is fulfilling their role in managing the economy.

But there are any number of other agencies in which the agency has not gone far enough in pursuing what the Republicans would think of as their agenda or continues to go too far in implementing what they think of as the Democrats' agenda. And, so, you may see hearings trying to influence or pull back an agency in that regard.

And then, finally, regardless of which party is in control, what we always see is what Rafi and I might call episodic-driven investigations and hearings. When something blows up, injuring a large number of people; when there is a consumer scandal of a tainted product or something of that nature; or other things in which there are headlines being generated by something that happened, Congress will very often move in quickly to do an investigation and hearing, whether it's with regard to an oil spill or a problem with a consumer product or something that happened in the stock market or anything of that nature. And those investigations really do not bear any partisan label. When something happens that is perceived as creating damage and a threat to the American public, both parties often try to use this tool as a way to find out what happened, to figure out if there is somebody who can be blamed and to take action along those lines.

And, so, I think if the Republicans retain control, you'll see a continuation, indeed, an uptick of that activity, and, then again, I would go back to something that Rafi pointed out, which is the ever-increasing use of the powers of the minority to conduct minority-led investigations, even without the formal authority and ability to issue a subpoena. And

those can be very effective, and I think you would see a very significant increase in that activity in the next Congress by the Democrats if the Democrats fail to obtain control of either the Senate or the House. I think the populist movement within the Democratic Party will push an increase of activism along those lines.

Jose Garriga:

Well, let's talk about that, then: What would be happening, then, in terms of investigations and targets of investigation, were the Democrats to flip the House. Rafi, what do you think in that regard?

Rafi Prober:

Yeah, so, it's a great question. There is a ton of pent-up investigative energy that I think we will certainly see if the Democrats do take the House, which obviously no one will know until the results are in, but it's looking increasingly likely from what the pollsters are saying. So, the areas that will likely be subject to the most scrutiny right out of the gate: There's no question that anything in the orbit of President Trump, be that in his personal life and business side or from an executive branch government perspective—and, there, I mean for the most part government contractors and those doing business with the executive branch—those folks are going to be right in the middle of the target zone for congressional investigations. And there's a long and well-established history of Congress, when you have a different party controlling at least one house of Congress and the White House, where Congress will ask questions of the executive branch or the White House, fail to get answers or fail to get adequate answers and then go to the private sector.

So, you think about government contractors who are operating in politically sensitive areas, whether that be anything related to Department of Homeland Security and immigration-related policies or other issues, those folks are going to be right on the front line as far as some of the more hot political-motivated investigations.

There's also going to be the perennial oversight targets. I think the financial services sector is going to heat up, and that will certainly be a focus in light of a lot of the sort of deregulation post-Dodd-Frank. I think we'll see the Democrats really try to dig back in on the financial services sector. I mentioned earlier health care and drug pricing and opioid-related issues—there's no question that's going to continue to be a topic of inquiry. We also expect to see an uptick in what I mentioned briefly before, the technology, social media and big data-related investigations.

And, finally, the large topic that I think we will see, from a political perspective, is investigations into the tax legislation and the impact that that is having. There have already been a number of minority-led requests asking companies, you know, what the tax break has done for them, how they've spent the money, where is it going. I think, from a policy perspective, certainly heading into the 2020 presidential election cycle, that's going to be an area that the Democrats are really interested in looking into.

And one of the big questions—and there's a lot that is just simply unknown on this—is the question of impeachment. And there has been a lot written and a lot of folks speculating on what will the Democrats do, will the Democrats seek to impeach President Trump depending what comes out of an ultimate report and what the facts are. I think, from a congressional investigations perspective, there are going to be many folks, on the Democratic side, who view it as more expedient and a better use of time and resources to launch hard-hitting investigations both of the administration and of the

private sector, to really stick to the bread and butter and also to demonstrate to their constituencies that they're hard at work in Washington fighting for them.

Jose Garriga: So, speaking, then, of 2020, Rafi, in a recent conversation, an interview that I conducted with two of your colleagues from the firm's public law and policy practice, they brought up the fact that the Kavanaugh confirmation hearings ended up having an energizing effect on the Republican base. With that in mind, is there a downside for the Democrats in being too aggressive in whatever investigative posture they might assume were they to flip the House, particularly as the two parties pivot to 2020?

Rafi Prober: Yeah, so, that's also a really good question. I think putting to the side for the moment the question of impeachment, I think that there, as we've been talking about, there's likely to be a lot of investigations even if the Republicans hold both Houses, certainly if the Democrats take the House and/or the Senate.

The interesting political dynamic that we've seen unfold over the last few years is the Republican Party with really a very populist message. So, there have been more consumer-focused investigations and sort of populist-based investigations than you would typically expect with Republicans controlling both the House and the Senate, and there really has been more of an appetite for that. So, I do not see a political downside conducting robust investigations and to, really, members rolling up their sleeves and doing the hard work. And if you look politically over the years at the people who have really done the hard work from the investigations standpoint, that has actually vaulted people into national prominence in their own political careers, probably the most famous being Truman, and his work on what became the Permanent Subcommittee on Investigations really vaulted him to the national stage.

I think, politically, there's a significant upside for people who take this seriously, enjoy doing it and want to do a good job. Obviously, if an investigation is being run inappropriately or purely for baldly evident political motives and is not being done properly, that's something that could backfire. But, properly run, in-depth, serious investigations tend to only be productive for members and committees and not the opposite.

Jose Garriga: Thank you. Steve, what's your take on this?

Steve Ross: Well, I guess having been involved in congressional matters now since the 1970s, I would qualify as an old hand at this. I would say that, if the Democrats do win the control of the House and/or the Senate, it's going to be important for them to keep in mind that the issues that may dominate the lives of people in Washington, the inside-baseball kind of things, is not what matters most all the time to the American people. And they're going to have to keep their eye on what their constituents' lives are being affected by. And the good thing for the Congress, in this regard, is there are hundreds of congressional committees and subcommittees. And they can do widely varied matters, so that a focus on things involving President Trump does not preclude them from, at the same time, devoting considerable time and resources and energy to what I would think of as more consumer-oriented investigations and hearings.

And I think it's going to be important for the Democrats, if they do gain control, to keep their eye on who they're there to serve, which is the American people and to focus on issues that matter on a day-to-day, sort of bread-and-butter issues for their constituents.

And I expect that they will do that because that is certainly something the Democrats have done in the past.

Jose Garriga:

Just to wind up and maybe pull back a bit here, both of you have conducted seminars, provided thought leadership along the lines of "You've received a letter from Congress, what happens now?"

Steve, you spoke to this in your response to my first question, but just to hear from both of you, what are some high-level tips you can provide listeners on how to cope with a congressional investigation? Rafi, would you like to lead off?

Rafi Prober:

Yeah, and I think that's sort of the question that's top of mind for any executive or in-house lawyer who receives a letter from Congress. It's typically not a welcome development, so, once they've exhaled and regained their composure, very often they will try to figure out how to get their arms around it.

There is a bar of folk in D.C. who handle these matters and are experienced. The most sophisticated companies and the people who really navigate these the best turn to specialized lawyers who have been practicing in this field and really understand the nuances and get that it is not litigation—although it involves a lot of litigation-based aspects, including discovery and depositions and preparation of witnesses and things of that nature—and it's also not lobbying—even though it involves a lot of lobbying-type activities, or it can involve, also, a lot of political and policy questions.

It really is a hybrid that requires a deep understanding that can only be gained having done these. Every committee runs investigations differently; often subcommittees run them differently. So, really understanding those dynamics is incredibly important. The other overarching thing that is critical is to take it seriously. It's an official government investigation; if you've received a subpoena, that is something with force of compulsion behind it. You have to comply, or you have to find a valid reason not to. But when you're dealing with Congress, the only way, really, to challenge a subpoena is to be held in contempt, to get yourself in a courtroom to fight about it.

So, that, for most clients, as you'd imagine, is less than an ideal scenario. And congressional investigations have significant attendant risk factors that accompany them. You are under oath very often in a hearing. Even if you're just doing an interview with committee staff or doing a briefing for a committee staff, there's always one-thousand-and-one false statement penalties that can apply when you're speaking with government investigators. So, there are real legal pitfalls, and, more often than not, the things that trip people up ultimately in these investigations tend to happen during the conduct of the investigation itself and not necessarily related to the underlying activity. So, it's really critical that people take it seriously and are very thoughtful and deliberate.

And the final point I would make on this is that it's rare, if ever, that Congress is investigating something in a complete vacuum that no other regulator or agency is looking at. So, very often, in any of these matters, there's parallel regulatory issues, civil lawsuits, potential criminal investigations, all sorts of things going on. And it really is a very complex chessboard—three-dimensional in many senses. And even though the most high-profile thing at the moment may be the testimony before Congress, what ultimately is going to matter most to the company is their potential exposure and how they conduct themselves because that will inform the civil lawsuit resolution, any criminal

issues, the regulatory issues, what legislation comes down the road. So, even though the game is played in a hearing room, in a very real way, the score is kept outside, and it's critical that people understand that when you're going into one of these exercises.

Jose Garriga: Steve, do you have anything to add regarding this?

Steve Ross: I could not have said it better myself. *[laughter]*

Jose Garriga: Well, thank you. Thank you both for a terrific presentation and great information shared today. Listeners, you've been listening to Akin Gump congressional investigations practice co-heads Rafi Prober and Steve Ross. Thank you both for joining us today and sharing your thoughts on a topic that could not be more timely or significant.

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Until next time.

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