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Congress

A divided Congress may mean gridlock when it comes to legislation, but it has not slowed the pace of congressional investigations, say authors Steven R. Ross, Raphael A. Prober and Megan L. Greer of Akin Gump Strauss Hauer & Feld. Rather, minority lawmakers are increasingly launching their own investigations—and they have developed many ways of compensating for the lack of control of a committee. The authors explain exactly why companies need to give such inquiries very serious attention.

Minority Rules: Why Companies Should Take Seriously the Increasing Trend of Minority Party-Led Congressional Investigations

BY STEVEN R. ROSS, RAPHAEL A. PROBER
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With the 113th Congress mired in an atmosphere of partisan rancor over taxes and spending, Americans wonder whether—and how—House Republicans and Senate Democrats will work together to make meaningful legislative progress. Although governing in a divided Congress hinges on bipartisan compromise, in at least one aspect of congressional life, majoritarian politics does not necessarily rule the day. Both Democrats and Republicans in Congress believe in robust congressional oversight, and even though the parties periodically cycle in and out of power, recent events have proven that neither party is ever truly powerless in the world of congressional investigations.

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Under the Constitution, Congress has broad oversight powers to investigate businesses, governmental agencies, and even private citizens. Generally, this power is wielded by the majority party's committee chairmen. Working with committee members, the chairman will set the committee's investigatory agenda and will issue document requests or other demands to the investigation's subjects. In addition to these voluntary requests for information, the chairman can generally also issue compulsory subpoenas requiring the production of documents and testimony.

Minority-led probes can present companies with legal, regulatory, reputational, business, and investor relations risks.

Beyond such traditional congressional investigations, however, minority party committee members are increasingly launching their own investigations. Even without the threat of a subpoena, minority-led investigations can pose similar risks to a company as traditional congressional investigations do—including legal, regulatory, reputational, business, and investor relations threats. A look back at the investigative tactics used by the minority in the 112th Congress—led by Democrats in the House of Representatives and by Re-

publicans in the Senate—shows that even without subpoena power, the minority party can and will assert its own investigative agenda.

In such minority-led investigations, members and their staff may enlist the support of other congressmen who do hold subpoena power—either the committee chairmen or other majority party members of their own chamber, or even their fellow party colleagues with control of the other chamber (for instance, Democrats in the minority in the House may seek assistance from in-power Senate Democrats). Or, minority party investigators may simply conduct investigations on their own by issuing investigative demand letters, empaneling minority hearings, and issuing investigatory reports.

As such, and given the very real threats that such minority-led investigations can pose, companies should be well prepared for significant minority-led investigations in the 113th Congress, investigations that cannot simply be ignored. By understanding the tactics employed and the potential consequences of minority-led investigations, individuals and businesses facing congressional scrutiny may more confidently and prudently navigate the investigatory process.

Case Study: One Senator's Unilateral and Bipartisan Investigations

In the Senate, many important and extensively researched investigations are conducted by Sen. Carl Levin's (D-Mich.) Permanent Subcommittee on Investigations. This Subcommittee in particular has a long-standing practice of conducting inquiries on a bipartisan basis, even allowing the ranking member to initiate investigations.

In addition to such committee-led investigations, one senator, Charles Grassley (R-Iowa), is known for his long history of investigative work. Sen. Grassley serves as the ranking member of the Judiciary Committee, is active on a handful of other committees—including the Finance Committee and the Agriculture, Nutrition, and Forestry Committee—and maintains a full-time investigative staff. In the past Congress alone, Grassley single-handedly launched the congressional investigation into the Federal Communications Commission's handling of LightSquared, inquired about a hospital's use of a federal discount drug program, and sent a scathing three-page letter request to the National Highway Traffic Safety Administration regarding Toyota's unintended-acceleration crisis.

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While Sen. Grassley conducts certain investigations unilaterally, he has frequently teamed with Senate Finance Committee Chairman Max Baucus (D-Mont.) for a host of other inquiries. For instance, in the 112th Congress, the two senators investigated conflicts of interest in medical device manufacturing and the pharmaceutical industry's support of pain management research. Noted for his prolific oversight activities even without

an official committee mantle, Grassley has found a bipartisan partner in Chairman Baucus, who often possesses similar oversight objectives and the official prerogative to most effectively pursue them. A dogged investigator, irrespective of whether his party is in control of the Senate, Grassley should be expected to continue his rigorous investigative agenda in the new Congress.

The House: Where Minority Investigations and Politics Go Hand-in-Hand

In the House, investigations often take on a more nakedly partisan tone, irrespective of the party leading the charge. In the House Committee on Oversight and Government Reform, ranking members have a strong track record of conducting significant investigations. In 2009, current Oversight Committee Chairman Darrell Issa (R-Calif.) capped his particularly active tenure as Ranking Member by issuing his own minority staff report on the Countrywide VIP loan program and successfully—and very publicly—pressuring the committee's chairman to issue a subpoena. Following Rep. Issa's lead, current Oversight Committee Ranking Member Elijah Cummings (D-Md.) has pursued an active minority investigations agenda as well. During the 112th Congress, Rep. Cummings and his Democratic colleagues empanelled unofficial, minority-only hearings to address topics they felt were neglected by the Republican majority, including an expansive inquiry into bank foreclosure practices. A very public minority-led hearing was also held by the House Democratic Steering and Policy Committee on reproductive rights, an issue House Democrats felt was not being adequately or appropriately addressed by House Republicans.

Ranking Democrats Cummings and Waxman at times join forces to advance their investigative agendas.

Ranking members on the Committee on Energy and Commerce also have a proven history of conducting minority-led investigations. Notably, in the 112th Congress, several privacy-related investigations directly targeted a sizeable number of private sector businesses. In 2012, Ranking Member Henry Waxman (D-Calif.) launched an investigation regarding consumer privacy practices. He launched the investigation with a letter to Apple Inc. but then expanded the inquiry by sending letter requests to 34 social "app" companies. With his fellow Democratic committee members, Rep. Waxman also sent investigative demand letters to 19 cell phone companies and related businesses concerning privacy practices and the tracking of cell phone theft.

Also in the 112th Congress, as the ranking members of two of the House's most powerful investigatory bodies—the Committee on Energy and Commerce and the Committee on Oversight and Government Reform—Waxman and Cummings at times joined forces to advance their investigative agendas. It should be expected that this trend of inter-committee, minority-led cooperation will continue in the 113th Congress.

Bicameral Partnerships and Executive Branch Delegation

When minority investigators want the imprimatur of a majority-led investigation but are unable or unwilling to secure the assistance of their majority party committee colleagues, they may look for allies across Capitol Hill. Since Republicans gained control of the House in 2011, House Democrats have increasingly partnered with fellow Democrats in the Senate.

Committee on Oversight and Government Reform Ranking Member Cummings has proven to be one of the leading proponents of this bicameral oversight approach. After unilaterally investigating foreclosure practices for months, Rep. Cummings turned to Senate Commerce Committee Chairman John D. Rockefeller IV (D-W.Va.) when he was unable to secure his own House committee's support to subpoena loan servicing companies. Sen. Rockefeller then participated in the investigation's minority hearings and his staff collaborated with the House staff in preparing the Democratic staff report on the topic. Later, Cummings collaborated with Chairman Rockefeller and Sen. Tom Harkin (D-Iowa), Chairman of the Senate Committee on Health, Education, Labor and Pensions, to investigate the practices of so-called "gray-market" drug companies.

On the other side of the aisle, Republicans have also conducted joint House and Senate investigations. In December of 2012, Sen. Grassley launched a joint investigation into health care reform implementation with then-Chairman of the House Committee on Energy and Commerce Fred Upton (R-Mich.). Also during the 112th Congress, Grassley spearheaded a group effort, along with Chairman Upton and Sen. Orrin Hatch (R-Utah), to investigate the Health and Human Services Department's 340B drug discount program. Grassley also collaborated with House Committee on Oversight and Government Reform Chairman Issa to investigate the Justice Department's Operation Fast and Furious, and their staffs prepared a three-part investigative report.

Determined lawmakers will turn to the GAO or agency investigators to press for answers.

In other investigations, minority party investigators have looked outside of Congress for the muscle to push their inquiries. One common tactic is to engage the Government Accountability Office (GAO), an independent investigatory entity at Congress's bipartisan disposal. This watchdog office is commonly used by members of Congress to investigate a particular subject matter without launching a full committee inquiry. Depending on the GAO's findings, the minority member may then use the report to push for a broader, full committee investigation.

For other inquiries, minority members may enlist the investigatory resources of a friendly executive branch agency. For example, House Democrats have petitioned the Justice Department to investigate whether a Florida election law will limit ballot access in the state. Similarly, Sen. Grassley petitioned a Justice Department Inspector General to investigate gun trafficking activities in connection with the Fast & Furious inquiry.

The Road Ahead: Responding to Minority-Led Investigations in the 113th Congress

The success of these recent bicameral and cross-branch investigations means the private sector should expect frequent minority-led inquiries in the new Congress. While a minority party member may not be able to compel cooperation from a private company without the support of his or her majority party colleagues, a company must nonetheless approach minority-led investigations carefully. Any recipient of a minority-led investigative request should consult with congressional investigations counsel, and should weigh the important considerations and potential consequences that may stem from a decision not to cooperate with the investigation.

Compliance or noncompliance with a congressional request may result in substantial public scrutiny and media coverage, likely at the minority investigator's behest.

Consider, for example, that even if a minority-led investigation lacks the specter of a subpoena threat, a private party's refusal to comply with a congressional request may nonetheless result in substantial public scrutiny and media coverage, likely at the minority investigator's behest. In the event a private party is invited to testify before an unofficial minority hearing, the threat of public scrutiny only increases, as an empty chair in a hearing room provides minority members with both a powerful narrative and a visual depiction of the company's failure to cooperate.

Just as minority-led investigations must not be outright neglected, cooperation requires careful strategic assessments—as would a company response to a similar full congressional committee inquiry. Specifically, companies that choose to comply with minority-led investigative requests must not lose sight of the potential legal, regulatory, reputational, and business ramifications of this stance. For instance, businesses should be concerned that documents and other sensitive information provided to a minority party member could later be disclosed publicly, provided to other lawmakers or to government regulators, or ordered discoverable in private litigation. Thus, companies should always be mindful that materials provided to Congress—whether to majority or minority members—may impact parallel criminal, civil, and regulatory proceedings down the road. In other instances, a company that chooses to testify at a minority hearing may face media scrutiny and reputational harm for its testimony. All of these concerns—in addition to the unpredictable nature of politics that may heighten an investigation's profile unexpectedly—should incline an investigation's target to seek the counsel of seasoned congressional experts.

Conclusion

A political party's control of Congress is certain to change over time. But it is important to understand that

both parties, regardless of majority or minority status, always maintain the inherent ability to conduct oversight. Even as political dynamics shift, the congressional minority continues to enjoy powerful—albeit more limited—resources to conduct investigations. Corpora-

tions or individuals facing a minority-led investigation should understand that while such inquiries may lack the official trappings of a full committee investigation, they must not be ignored and should be given all due and proper consideration.