

The Trump Row Aside, Here's How Subpoena Recipients Can Respond Effectively

The U.S. Court of Appeals for the Second Circuit on Aug. 23 asked if the president and the U.S. House could negotiate. When facing a subpoena, compromise can be an effective tool.

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President Donald Trump's challenges to subpoenas served on Deutsche Bank, Capital One and Mazars have thus far failed to persuade the courts. If the president cannot successfully resist congressional subpoenas, then neither can the other individuals and entities that typically receive them. But the difficulty of outright resistance does not mean that subpoena recipients cannot mount an effective response.

During oral argument before the U.S. Court of Appeals for the Second Circuit on Aug. 23, the court asked both sides whether negotiation could resolve the issues Trump had raised. Negotiation is typically the first option subpoena recipients pursue, but the president is in a different position than most recipients, and his tactics reflect that.

The zero-sum political battle between the president and the House incentivizes a drag-out fight in the courts. Most recipients, however, will be able to find common ground with Congress, especially if they act quickly, consider the goals of the particular committee issuing the subpoena and strike the right balance between satisfying the committee and protecting their interests.

Congressional subpoenas often coincide with criminal investigations, private civil litigation and other public relations challenges. They also frequently culminate in highly publicized



(Photo: Yuri Gripas/Bloomberg)

President Donald Trump

hearings. Navigating a subpoena thus requires a recipient to devise a strategy that responds not only to Congress but also to a range of collateral consequences. Depending on the circumstances, the strategies described below can help your client or company respond to crises on multiple fronts, both inside and outside the hearing room.

Shaping How Congress Understands a Problem

When a congressional committee serves a subpoena, it wants to understand an issue. Subpoena recipients often deal closely with that very issue. That experience can give recipients the opportunity to help Congress understand the issue from their perspective.

A subpoena recipient who quickly engages and conveys its experience with an issue can reap enormous benefits. Congressional investigations move fast, and shaping a committee's early view can determine what information it seeks, what actions it considers in response, and how it communicates about the issue with the media and public. The opposite is also true. Early recalcitrance can give Congress the impression that a recipient has something to hide, intensifying scrutiny and potentially causing negative publicity.

The inquiry into the 2008 financial crisis by the Senate's Permanent Subcommittee on Investigations provides an example of the importance of Congress' early views on an issue. After several months of preliminary investigation, the Subcommittee identified four key areas of interest and four individual "case studies" that shed light on them. Although many financial institutions played a role in the financial crisis, only those selected as case studies had to present their executives to testify at public hearings.

Discerning an Investigation's Purpose

If a committee already has a fixed view of the issue reflected in a subpoena, then the recipient needs to understand that view and how the subpoena relates to it. Congress generally

seeks information in advance of some public action such as a hearing, new legislation or both.

Usually, the committee— or certain members of the committee—have a particular point to make and make publicly. Subpoena recipients who understand the committee's purpose can sometimes accommodate that purpose while protecting their own interests. For example, they can seek to offer information early through an informal presentation or a closed-door interview, rather than publicly testifying at a hearing. Once a subpoena recipient has a better idea of how it may or may not fit into a particular investigation, it can determine how to promote its own interests through its response.

Negotiating the Scope

Oftentimes, a committee has difficulty identifying precisely what it wants and resorts to broad categories in the hope of not missing anything. However, by engaging with the committee and figuring out exactly what it seeks, a recipient can significantly limit the burden associated with producing documents.

Targeted productions reduce the workload for both the committee and subpoena recipient, so the two parties can usually reach agreement on a narrower scope.

Through negotiation with a committee, subpoena recipients

can also obtain important concessions on other issues. Although the Supreme Court has not definitively ruled on the issue, Congress likely does not have to recognize common-law privileges that would apply in court proceedings, such as the attorney-client privilege. Nor does it have to protect information, such as trade secrets, that a recipient will want to treat confidentially. But Congress often makes concessions on these issues in order to encourage cooperation.

Subpoena recipients can thus negotiate to exclude privileged documents and other sensitive topics from the scope of the subpoena. Such agreements can be invaluable, as Congress has discretion to publicize any documents a subpoena recipient provides.

Congressional investigations often play out in public, for high stakes. For Trump, that may make compromise impossible, despite the long odds he faces in a court battle. But other subpoena recipients who understand the process can effectively manage the risks associated with a congressional investigation, thereby protecting their interests, brand, and public image.

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