

Demystifying Congressional Investigations: A Conversation With Stephen Braga

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On this episode of the Bracewell Sidebar, we talk with [Stephen Braga](#) about the ins and outs of congressional investigations.

Steve chairs Bracewell's [government enforcement and investigations practice](#). Over the course of his career, he has been involved in many high-profile white-collar cases and investigations in Washington, DC, including defending public relations executive Michael Scanlon during the Jack Abramoff lobbying scandal.

At a high level, tell us what happens with the congressional investigations.

The hearings that you see on TV are the end piece of the investigatory process, like a trial would be the end piece of a charge in criminal court. This starts out with fact gathering by the legislative staff, and it usually starts out with a voluntary request. There are very few rules that govern this stuff. There are rules about deposition subpoenas and subpoena power in general, but more likely it's all informal. It can happen that a legislator or a staff committee member can send just a letter to one of our clients and say we'd like the following information, or we'd like you to show up for an interview. That's really where the representation gets started.

Are these almost always just part of partisan politics? Or do they actually involve some significant "down the middle of the road" potential problems?

If you look back historically, you had these grand hearings. You had the Watergate hearings with Senator Ervin and the Joint Committee. And then you had the Iran-Contra hearings with Oliver North. That paradigmatic

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Congressional hearing done right starts off with requests for information. It works through interviews and depositions. It leads up to a hearing that looks like a trial, although it's not really a trial. Another unique feature of congressional investigations is that the party that wants the information from you also happens to be the party who is going to judge whether you've complied with it. There's no neutral arbiter, in other words.

But back in the old days, those grand hearings were truly fact finding expeditions as part of Congress' oversight function to keep the public informed about the way the government was working and if it wasn't working to change things.

There's no upside to be gained by testifying before a hearing in Congress these days. In most investigations, because it's not about finding the facts, it's really not about directing the result. Most of these hearings tend to be about finding a sound bite for the legislator or the committee in question.

Can someone say “No I have rights, I’m not going to say anything. I don’t care if it’s a legitimate purpose or if it’s purely political. I’m not answering any questions.”

Although Congress says it doesn't respect privileges intent, what it really says is our legislative purpose behind an investigation is of primacy versus individual and corporate rights in responding. In other words, we as the legislature are a coordinate branch of government we're entitled to do what we need to do to fulfill our function regardless, regardless of privilege. It is true, of course, that the individual's Fifth Amendment rights are routinely claimed in Congress.

When I represented Mike Scanlon in the Jack Abramoff investigation, Mike, after Jack was called to testify before the Senate Indian Affairs Committee and both of them took the Fifth in response to every question because there was no upside to them answering any questions, it was a purely political inquiry and they had full fear of self-incrimination as subsequently was revealed when both of them pled guilty.

So, the Fifth Amendment is there. Congress says they don't have to recognize it, but they have never tested it in court, so Congress is never going to court and say we're not bound by privilege. They just say as part of their negotiation with clients and lawyers dealing with them that we don't have to be bound by privilege, and so we'd like this portion of your attorney-client, or we'd like that portion of your Fifth Amendment rights.

The courts do seem to recognize that individuals receiving congressional compulsory process still have privilege rights. Congress seems to recognize that they don't, and it's never really been battled out, and that's probably because Congress and the recipients tend to work it out, or it's so clear that Congress would lose if they went to court.

Are there huge differences between how the House of Representatives and the Senate conduct investigations?

There are differences in the process. Senators serve for six years, so they have a longer horizon than the House members who are up for reelection every two years. And so the House tends to, in my view, have more sort of scattershot investigations, more shorter-timed investigations. The Senate still today I think tends to look at more involved, more lengthy, more truly fact-finding investigations.

In general, I would say you'd be better off – a client would be better off – and it would be easier to work with an investigation arising out of the Senate than the House, which tend to be more unpredictable.

Want to learn more about Congressional investigations? Email [Stephen Braga](#) or [Matthew Nielson](#) with any questions regarding these topics.

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