Staff Depositions And The New Congress' Investigations

By **Jack Sharman and Logan Matthews** (January 24, 2019)

Jack Sharman

Logan Matthews

Michael Cohen, President Donald Trump's former lawyer, has withdrawn his offer to testify before Congress, citing what he believes to be safety concerns. Cohen may or may not ever testify — he is to report to federal prison in March. Either way, the dustup over Cohen may presage a season of congressional investigations of the executive branch (and of industry) such as we have not seen in recent years. Congressional investigations are peculiar creatures, both substantively and procedurally — part law, part political theater, part constitutional struggle. For persons and businesses who are the subject of a congressional investigation, and for the lawyers who advise them, a seemingly anodyne tool — staff depositions — has received new life under the new majority and could make congressional investigations faster, more penetrating and more dangerous.

The centerpiece of a congressional investigation is that of the public committee hearing. Witnesses are called before the assembled committee members in open session. The witnesses give a statement, normally written out and provided to the committee and the public in advance. Members of the committee make statements and ask the witnesses questions within their allotted time, questions usually designed to showcase the member rather than elicit substantive testimony from the witness. At the conclusion of such hearings, a congressional committee has a range of options: do nothing, produce a report, propose legislation and, in rare instances, take affirmative action against witnesses (such as contempt proceedings or criminal referrals). The arc of a committee hearing and its aftermath is public.

As with a trial or any proceeding that is both adversarial and fact-finding, however, most of the real work is done in private and before the event. One tool for getting that work done is the congressional staff deposition. Why is that important, and what has changed to make it potentially more important for witnesses, businesses and public officials?

As an initial matter, there is nothing novel about Congress's broad power to investigate, including the use of staff and compulsory subpoena power for oversight and investigation purposes.[1]

Staff depositions are nothing new. They have been used at least since 1980, in the investigation of the relationship between Libya and Billy Carter, the brother of President Jimmy Carter. Staff depositions were also taken in the various investigations into the Iran/Contra affair and President Ronald Reagan; the impeachment and Senate trial of President Bill Clinton; the Whitewater investigation involving President Clinton; the investigation of the Clinton White House travel office; and matters of discipline of members.[2]

Over time, with some exceptions, congressional rules have generally provided that depositions must be conducted by a member or, if conducted by staff (for example, by committee counsel), with at least a member present. In theory, because a deposition would be in aid of a committee hearing, or even as a substitute or placeholder for a committee hearing, it was only appropriate that a member actually be present, even if he or she did little to contribute to the examination of witnesses.

From a congressional investigator's point of view, this "member present" rule is

cumbersome and benefits witnesses, not the investigation. The best-defended deposition is one that never takes place, and scheduling a deposition around the schedules of members means that delay — perhaps beyond the end of the session — is likely, if not inevitable. Further, many members are not lawyers; fewer find it a profitable political investment to spend hours or days in preparation for a witness examination; and even fewer ask questions that are incisive, on point and difficult to evade. Finally, because there is virtually no political value for a member to sit in a conference room while a staffer asks questions for much of the day, it can be challenging for staff to timely find a member willing to serve in that role. Combined with normal scheduling difficulties among witness counsel, witnesses and staff counsel, depositions in the former member-present regime can be difficult to set and to complete in a time frame politically useful for the committee.

That landscape and time frame changes, if staff counsel is vested with authority to notice, set and conduct depositions free from the burden of a member's calendar.

Such authority is what we see in the new rules package for the 116th Congress, which notably abandons the requirement that members be present during depositions taken by staff in the course of a congressional investigation. The rules clarify that, at least for the Committee on Oversight and Reform, no member need be present at a deposition. The new rules also retain the previous provision that committee chairmen, who have been so delegated by their committee rules, may unilaterally issue subpoenas.

One of us was special counsel to the House Financial Services Committee for the Whitewater investigation of President Clinton and Hillary Clinton. As part of that investigation, committee staff used staff depositions to great advantage. In addition to the normal pressures that a looming deposition can place upon a witness, political and public relations pressure played a role as well. If a witness balked at submitting to the deposition and attempted to force us to bring the matter to the committee's attention (in a contempt citation hearing or otherwise), we told the witness (or his or her lawyer) that we would do no such thing — but that we would tell the Washington Post and New York Times that the witness was refusing to answer questions, and they would be perfectly free to discuss their recalcitrance with the media. There was much grumbling; ultimately, no witness whose deposition we noticed refused to submit.

Deposition transcripts are also useful in preparation for committee hearings and the hearings themselves. For the Whitewater hearings in August 1995, for example, we assigned to members a lead position on each witness. As part of their preparation to examine witnesses, we provided each member with excerpts of the testimony and deposition of his or her respective witnesses. Staff lawyers, of course, had readily at hand the full, indexed transcripts and could assist members in real time if witnesses' testimony at the hearing deviated from their sworn deposition testimony.

Congressional hearings are about the members, not the witnesses. Expanding the role of staff in pre-hearing testimony does not change that fundamental political fact. Nevertheless, staff depositions are a powerful, incisive instrument for congressional oversight investigators intent on bringing maximum pressure to bear on witnesses and their organizations. The use of that instrument bears watching closely in the upcoming months.

Jack Sharman is a partner at Lightfoot Franklin & White LLC. He served as special counsel to the House Financial Services Committee for the Whitewater investigation involving President Bill Clinton.

Logan Matthews is an associate at the firm.

[1] "A legislative body cannot legislative wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. ... [T]he constitutional provisions which commit the legislative function to the two house s are intended to include this attribute to the end that the function may be effectively exercised." McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

[2] See Jay R. Shampansky, Staff Depositions in Congressional Investigations, CRS Report for Congress (Dec. 3, 1999) at 1 n.2 ("In the congressional sphere, depositions are utilized not only in congressional investigations conducted in furtherance of Congress' legislative and oversight functions, but also in quasijudicial proceedings in which the Senate and House perform their constitutional responsibilities with regard to seating and disciplining Senators and Representatives and with regard to impeaching officials of the executive and judicial branches.")