



Handling Investigations of Members of Congress and Congressional Staff

A How-To Guide for Chiefs of Staff

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January 19, 2021

White Collar Defense and Investigations / Election and Political Law

Approximately 50 Members of Congress found themselves under investigation during the 116th Congress. As some investigations are not made public until resolved, the true number is almost certainly higher. In the highly politicized world of investigations involving Members of Congress and congressional staff, taking the right steps in the first hours and days can mean the difference between a swift resolution and a years-long crisis. A Member's Chief of Staff often directs the office's initial response to an investigation and has the potential to make a meaningful impact, potentially resolving it in the early stages or perhaps inadvertently prolonging it. Below we provide an overview of how these investigations work and outline "best practices" to help Chiefs navigate their way through the opening stage of an investigation.

The First 24 Hours and Beyond

There is no shortage of authorities empowered to launch investigations of Members of Congress and staff. Enforcers include the Public Integrity Section of the U.S. Department of Justice ("DOJ"), the 94 United States Attorney's Offices, the Office of Congressional Ethics, the House Ethics Committee, the Senate Select Committee on Ethics, the Federal Election Commission, and the Securities and Exchange Commission, among others.

Regardless of the enforcer, Chiefs of Staff must act quickly upon learning of a potential investigation, taking specific steps to ensure that initial actions (or inaction) do not jeopardize a successful resolution down the road.

Finding the Facts and Retaining Counsel

When a Chief of Staff learns of an investigation, it is important to move quickly, but carefully, to understand the facts. To help ensure that this fact-finding exercise will be privileged, counsel should take the lead whenever possible. If the staff conducts a slapdash internal review without the meaningful involvement of counsel, the staff's findings and communications may well be discoverable. "Discovery" is the process by which investigative authorities marshal their facts by obtaining and reviewing documents, conducting interviews, and taking testimony. Documents that are reviewed by investigators during discovery typically include emails, texts, calendars, financial records, voicemails, social media, and hard copy notes and materials—whether housed in the office, at home, on personal devices, or in the cloud.

Many things can—and do—go wrong when initial fact gathering is done by staff in a panic, often in an effort to anticipate and respond to press inquiries. Dozens or hundreds of emails and text messages may be generated that are not protected by the attorney-client privilege and that contain rumors or inartful language that could later be misconstrued. Witnesses' recollections may become muddled. Worse still, the fact-gathering exercise itself could later be viewed by an investigator, fairly or not, as an illegal effort to coerce witnesses or to “get their stories straight.”

Ideally, early fact gathering would be conducted by counsel with the protections of the attorney-client privilege and the attorney work product doctrine. While the privilege may attach to some work conducted by staff who serve as “counsel” to the Member, or to work done by Counsel to the House or Senate, investigative agencies, including the Ethics Committees, may resist recognizing the privilege for staff lawyers. The privilege is on much stronger ground when the Member or staffer under investigation retains personal outside counsel who is not an employee of the House or Senate. In fact, some courts have held that an attorney-client privilege cannot be validly asserted in response to a criminal investigation where the attorney works on a public official's staff.

If outside counsel eventually will be retained, it is far better to retain them at the outset of the investigation. It is common, however, for Members to delay retaining counsel until the last possible moment. They worry that they will have to report attorneys' fees on their FEC reports, drawing media attention. They worry, too, that hiring a lawyer will be viewed as evidence of guilt. But the downside of delay is significant because of the implications for the attorney-client privilege, and because actions taken in the initial days of an investigation may shape its future course and ultimate outcome.

Chiefs should keep in mind that a lawyer hired to represent the Member is *the Member's* lawyer, and not the lawyer for individual staffers or for the office as a whole. When the interests of staff members diverge from those of the Member, or of other staff, certain staff may require their own personal counsel. Counsel fees can sometimes be paid using campaign funds when legal representation relates to campaign or official duties, after consultation with the Ethics Committees and the FEC.

Preserving Documents

The obligation to preserve documents is triggered when there is awareness of a reasonably likely complaint or investigation. Papers, computer files, emails, texts—almost anything stored physically or electronically—must be preserved if they are relevant to the investigation. This obligation could extend to office, campaign, and PAC documents, as well as anything else—including on personal devices—in the Member's or staffer's possession, custody, or control.

A “document hold memo” should be circulated promptly to instruct staff to retain relevant documents. Both the distribution list and the wording of the hold memo should be considered carefully. The memo should be distributed broadly enough to be effective, but the more widely it is circulated, the less likely it is that news of the investigation will remain confidential. Technical issues to be mindful of include ensuring that automatic deletion protocols on email accounts, texting apps, and calendars are turned off, backup system files are retained, and documents on home computers and personal devices are preserved. It is important to keep in mind that relevant data (including emails, texts, and voicemails) may exist in personal email accounts, on personal phones and tablets, and in other personal electronic media. Such data, if relevant to the investigation, must also be preserved. One area of concern is the use of ephemeral messaging apps that do not retain messages. Using Signal or similar apps during the course of

an investigation could raise serious compliance issues and may need to be suspended, depending in part on the settings for those apps.

In some cases, to ensure adequate preservation of data on House and Senate servers, it may be necessary to consult with the House or Senate Sergeant at Arms, Counsel to the House or Senate, or other administrative offices. Such consultations themselves, however, may be sensitive if the investigation is not yet public.

Communicating Inside and Outside the Office

It is important to be aware of privilege and discovery issues during the course of an investigation, as well as when an investigation may not have been formally initiated but can reasonably be anticipated. Communications within the office that do not include counsel may not be privileged, and participants could be asked to testify about those conversations later. Communications with other offices, even leadership, likely will be discoverable in any investigation or legal proceeding. Staff should not consult about the investigation outside the office unless absolutely necessary.

Communicating with the Press and Social Media

There will be great pressure to give an immediate statement to the press once the investigation becomes public. But any early statements to the press or social media that later are determined to be inaccurate could be extremely damaging, both legally and politically. The best statements often say as little as possible. Outright or blanket denials can be dangerous, especially before all the facts are known. Keep in mind that drafts of press statements and talking points may be discoverable by investigative authorities, and they certainly will be discoverable if they are not prepared in consultation with counsel. If drafts are obtained during an investigation, any differences between drafts and the final version will draw attention.

Avoid Giving Investigators New Reasons to Investigate

Unfortunately, even in cases where there may be no basis for the original investigation, Members and staff sometimes dig themselves deeper into the hole by taking actions that investigators later perceive to have obstructed the investigation. Obstruction of justice, false statements to investigators, and perjury allegations can be more damaging than the original allegation of wrongdoing. This is an old Washington adage: The cover-up may be worse than the (alleged) crime. Make sure everyone on the staff understands the importance of not interfering with, or appearing to interfere with, the investigation. Pay particular attention to junior staff who may not have experience dealing with the scrutiny that comes with an investigation.

Handling Department of Justice Investigations

In addition to the best practices described above, successfully navigating an investigation requires familiarity with the procedures and tactics that the relevant investigative agency employs. Of all the enforcers, investigations conducted by the DOJ can be the most daunting because they involve potential violations of criminal laws *and* because the DOJ can use the powers of the grand jury and court orders—such as search warrants and witness immunity orders—to compel the production of information or documents.

Department of Justice Enforcers

The DOJ tasks two enforcers with handling investigations involving public corruption allegations: (i) DOJ's Public Integrity Section ("PIN") and (ii) local United States Attorney's Offices.

PIN, which was formed after the Watergate scandal, primarily prosecutes bribery, illegal gratuities, criminal conflicts of interest, post-government employment lobbying ban violations, and criminal campaign finance law violations. In recent years, high-profile PIN cases have included the prosecutions of Senator Robert Menendez, Virginia Governor Bob McDonnell, Jack Abramoff and his associates, former Congressman Stephen Stockman, and former Congressman Michael “Ozzie” Myers, among numerous others. In addition to the Washington-based PIN, all 94 United States Attorney’s Offices across the country have prosecutors who focus on public corruption work, and some also have formal public corruption units. Recent public corruption prosecutions pursued by United States Attorney’s Offices, often by specialized task forces, include those of former Congressman Duncan Hunter, former Congressman Aaron Schock, former adviser to President Trump Stephen Bannon, former lawyer to President Trump Michael Cohen, and former Illinois Governor Rod Blagojevich. Some of these investigations are conducted solely by the United States Attorney’s Offices, although PIN typically is apprised of these investigations pursuant to DOJ policy to the extent the conduct of a Member is under scrutiny or the investigation involves campaign finance law violations. Other investigations are conducted jointly with PIN.

Both PIN and the United States Attorney’s Offices rely on FBI field offices to do the actual investigating. Like U.S. Attorney’s Offices, many FBI field offices around the country have one or more specialized public corruption squads. Since 2002, the FBI reportedly has more than doubled the number of special agents assigned to public corruption matters, and public corruption has been identified as a top enforcement priority within the FBI’s criminal division.

Working with DOJ and the U.S. Attorney’s Office

At the outset of any DOJ investigation, it is important to clarify the legal status of the Member or staffer who is under investigation. Depending on the circumstances, it may make sense for counsel to contact DOJ. Counsel might ask whether the Member or staffer is a “target,” “subject,” or “witness” in the investigation.

The Justice Manual defines a “target” as a “person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.” A “subject” is “a person whose conduct is within the scope of a grand jury’s investigation.” “Witnesses” are individuals with potential knowledge of the facts. If you are under investigation, you want to be a witness. You do not want to be a target or subject. The subject designation, however, is a very broad category and quite common. One might be a subject bordering on being a target, or a subject bordering on being a witness. These nuances matter a great deal.

Understanding whether the Member or staffer is a target, subject, or witness can inform how the Member or staffer responds to interview and document requests and subpoenas. A person who is merely a witness might, for example, be willing to sit for an interview while a target or subject might seek to avoid an interview, seek formal or informal immunity from DOJ, or even invoke the protections of the Fifth Amendment. These are sensitive judgment calls that very much depend on context, but a critical first step is to determine the Member or staffer’s formal status.

Regardless of an individual’s status, it is not prudent for Members or staffers to be interviewed by the FBI or a prosecutor without counsel present. Making sure that those interviewed are prepared and represented by able counsel is essential to ensuring that the rights of all parties are protected. Because the FBI will sometimes approach individuals whom they wish to interview on the street or at their homes to catch them off guard, it may be important to advise staff of this possibility. This must be done carefully to avoid anything that might obstruct the

government's investigation. Most critically, while it is perfectly appropriate to advise staff that they are not required to speak to the FBI, and on the advantages of obtaining counsel before doing so, any suggestion that staff are not permitted to speak to the FBI if they so choose may be viewed as obstruction.

In responding to subpoenas or informal requests for interviews or documents from DOJ, it is also important to keep in mind the Speech or Debate Clause protections that may apply to a Member. In every public corruption investigation involving Congress or its Members, decisions about whether to assert the protections that might be afforded to a Member under the Speech or Debate Clause are critically important. In some instances, it will make sense to assert those protections right away as to particular documents or areas of inquiry. In other circumstances, it may be more helpful to reach an accommodation with DOJ and make particular documents available, even if they may be protected from use by DOJ under the Speech or Debate Clause. In any event, it is critically important for a Member to be aware of the protections that might apply, including whether the Member should assert the Speech or Debate Clause protections in connection with certain questions that may be posed by DOJ or the FBI not just to the Member, but also to the Member's staff.

Handling OCE and Ethics Committee Investigations

Sometimes it is not the FBI that comes knocking, but an enforcer within the federal legislative branch. These enforcers include the Office of Congressional Ethics ("OCE"), the House Ethics Committee, and the Senate Select Committee on Ethics. Below we describe each enforcement body and provide tips and best practices for resolving these legislative enforcement matters.

Office of Congressional Ethics

OCE was established in March 2008 as an independent, non-partisan body that investigates allegations of misconduct involving Members, officers, and staff of the House. It does not investigate allegations of misconduct against Senators or Senate staffers. OCE is governed by an eight-person Board of Directors, all of whom are private citizens. Based on its review of allegations of misconduct, OCE can refer potential violations to the House Ethics Committee.

Since its creation, OCE has been very active. According to the most recent data, OCE began a preliminary review of at least 18 matters in 2020—including, most recently, a matter involving potential misuse of campaign and Member funds. A significant portion of its preliminary reviews have involved campaign activities. Other subjects include travel, outside income and employment, gifts, official allowances, conflicts of interest, sharing material nonpublic information in connection with the purchase and sale of stock, and financial disclosures. Since 2009, OCE has referred at least 135 matters to the House Ethics Committee for review.

OCE lacks subpoena authority, but it makes up for that by using very aggressive investigative tactics. (A House effort in early 2017 to curtail OCE's powers and introduce due process protections was quickly scrapped after a media firestorm.) OCE's investigators, who appear to have an ample travel budget, have in the past flown across the country to conduct interviews with witnesses, including campaign donors, constituents, lobbyists, and others. Because OCE cannot compel staff to testify, it often threatens to embarrass witnesses by declaring them to be uncooperative in public documents and drawing an "adverse inference" from their unwillingness to submit. Members face pressure to lean on witnesses to testify because OCE sometimes unfairly draws an adverse inference against the Member when a third-party witness declines to testify.

Further, OCE investigations are fast-paced. OCE may launch its own investigation, or it may act on a complaint. Sometimes an investigation is triggered by nothing more than a news article. Once a complaint is filed, OCE does an initial review and launches an investigation if it finds a “reasonable basis” for the allegation, which appears to be a very low threshold. A two-stage process follows.

First, staff conducts a 30-day preliminary review. If the Board finds probable cause, the investigation continues. *Second*, during a 45-day second-phase review (with a possible 14-day extension), the Board determines whether there is “substantial reason to believe” that a violation occurred. If it concludes that there is, OCE refers the matter to the House Ethics Committee.

During these review periods, OCE often demands that Members produce large volumes of emails and other documents, and that the Member and his or her staff submit to transcribed interviews. These can be very burdensome, time-consuming, and expensive exercises. OCE also often demands production of emails and other documents by private parties, including corporations, lobbyists, and campaign volunteers or donors. This can generate media attention concerning the investigation.

Referrals by OCE to the House Ethics Committee are accompanied by a lengthy report and often numerous deposition transcripts. The reports frequently make sensational allegations. When a matter is referred to House Ethics for further review, OCE’s report generally becomes public within 90 days, unless the Ethics Committee empanels its own investigative subcommittee to pursue the matter. The OCE report, which usually reads like an indictment, can be very damaging to a Member’s reputation once it is released, even though OCE (unlike the House Ethics Committee) has no legal authority to adjudicate guilt or innocence.

The House Ethics Committee

In addition to its authority to investigate a matter referred by OCE, the House Ethics Committee—consisting of five Members from each party—can launch an investigation on its own initiative or when a Member makes a complaint. When it concludes that a violation occurred, the Committee can refer the matter to federal and state authorities and recommend sanctions to the House, including expulsion, censure, dismissal, reprimand, or fines.

Unlike OCE, the House Ethics Committee does have subpoena authority and uses it. During the 116th Congress, the Committee conducted fact-gathering in 50 separate investigative matters; authorized 11 subpoenas; conducted 110 voluntary witness interviews; publicly addressed 16 matters; filed five reports with the House representing over 3,300 pages; and reviewed over 420,000 pages of documents. Throughout the 116th Congress, the Committee received 13 referrals from OCE and impaneled investigative subcommittees for investigations of six Members.

Senate Select Committee on Ethics

Like House Ethics, the Senate Select Committee on Ethics—led by three Senators from each party—is empowered to initiate its own investigations. It is authorized to receive and investigate allegations of “improper conduct which may reflect upon the Senate, violations of law, violations of the Senate Code of Official Conduct and violations of rules and regulations of the Senate.” In 2019, the Committee reviewed 251 alleged violations of Senate rules, up from only 55 alleged violations in 2015. The Committee tends to dig deeply into the matters under review, and its investigations can sometimes be protracted.

Tips for OCE and Ethics Committee Investigations

Preparing for Interviews and Testimony

Preparation for interviews and testimony can be a daunting task for any witness and should be led by counsel. The in-person preparation with counsel can take a full day, sometimes more. It should include, among many other things, reviewing key documents produced to the investigators, practicing mock interview questions, and discussing tips for avoiding legal traps. When a Member will be interviewed, an extended block of uninterrupted time should be scheduled for the prep session, ideally outside the Member's office so that distractions can be avoided. This is critical.

Testifying

Testifying can be hard to avoid, for both current Members and staff. "Taking the Fifth" is possible when there is potential criminal exposure, but that often comes with consequences. Staff who assert their Fifth Amendment right against self-incrimination may be let go. Members, too, may find it difficult to remain in office once they have asserted their Fifth Amendment rights. The decision whether to assert the privilege is a delicate one, to be made after consultation with personal counsel.

Often the greatest risk a Member or staffer faces when interviewed by OCE or the Ethics Committees (or by the FBI or a prosecutor) is that they will be accused of making a false statement, which itself can be prosecuted as a crime. Even an informal interview, in which the witness is not sworn, can lead to a false statement prosecution because the federal False Statements Act, 18 U.S.C. § 1001, applies whether or not the witness is under oath. This is one reason why careful preparation is so important, and why it is critical for interviews to be conducted with counsel present.

In the case of OCE investigations, most Members and staff used to voluntarily submit to interviews, but over the last several years it has become increasingly common for them to decline OCE interviews based on a general perception that OCE investigations are lacking in due process protections. Members, in particular, are more willing than they used to be to hunker down during OCE investigations and wait to argue their cases before the House Ethics Committee.

Document Production

Document requests need to be taken very seriously. The response at this stage can have a major impact later in the investigation.

The best way to respond to a document request is a centralized, counsel-led production process that may require coordination with the Sergeant at Arms and other congressional offices to access and search all relevant documents. Allowing individuals to search their own documents, though permissible, can be risky. If the individual misses a key document (or, far worse, discards the document), the result could be an allegation of obstruction and even criminal prosecution.

A methodical and centrally managed document collection process is a way to protect the individuals involved. Letting individuals collect their own documents may have the opposite effect: it puts them at risk by making them personally responsible for any mistakes or oversights.

Counsel can help avoid common document production pitfalls. All relevant custodians should be searched, using carefully crafted and targeted electronic search terms. Forgetting a custodian or shared drive during the first go-round, or using unnecessarily broad search terms, can add significant time and cost burdens to responding to a document request. Chiefs should make sure to think about all the places that data may reside, such as on backup drives, thumb drives, mobile devices, and personal email accounts. Few things roil the investigation waters more than a key document that turns up for the first time six months or a year after it was supposed to have been produced. Failing to produce subpoenaed documents or otherwise comply with aspects of compulsory process in the context of a Committee-led ethics inquiry—even inadvertently—can also raise the specter of criminal prosecution under the federal obstruction of Congress statute, 18 U.S.C. § 1505.

During document production, you must also be careful about materials that may be protected by the attorney-client privilege, work product doctrine, Speech or Debate Clause, or other common law privileges. Counsel can ensure that these issues are carefully considered before a production is made to an enforcer.

Handling FEC Investigations

The Federal Election Commission (“FEC”) conducts investigations involving alleged civil violations of the federal campaign finance laws. Potential violations could include anything from routine reporting mistakes to major violations, such as personal use of campaign funds. The FEC is a six-member Commission. It has only very recently been restored to full strength, with a quorum enabling it to resume its full range of activities. In August 2020, the Commission reported a backlog of more than three hundred outstanding cases, which will take the Commissioners quite a while to work through.

In recent years, the FEC has been a very quiet enforcement agency, due in large part to partisan and ideological gridlock. However, even in quiet periods, the FEC does aggressively investigate and pursue some matters, such as “straw donor” contribution reimbursement schemes and cases involving contributions from foreign nationals. The statute of limitations on FEC matters is five years. Even if no action is taken, FEC complaints can be costly to handle. Anyone can file a complaint. The candidate or other respondent submits a response explaining why the FEC should find no “reason to believe” that a violation occurred. If at least four Commissioners find “reason to believe,” the agency proceeds either to settlement efforts or a full investigation. During this stage, the FEC can subpoena documents and witnesses. Based on the results of the investigation, the Commissioners then vote on whether there is “probable cause to believe” a violation occurred. If at least four Commissioners find probable cause, the FEC must negotiate concerning settlement before filing a civil action. However, very few cases go to court. The vast majority are settled at some point along the way, and many cases are dismissed by the FEC without demanding a settlement.

In responding to an FEC complaint, the critical first step is to get on top of the relevant facts and to file a persuasive motion to dismiss. A strong response to the complaint can result in dismissal and no further action, avoiding years of enforcement proceedings, legal fees, and political damage. Occasionally, it may make sense for an officeholder or candidate to take advantage of the FEC’s voluntary disclosure policy and to disclose a violation prior to the filing of a complaint. This can lead to an expedited resolution, but for obvious reasons, this is a step that should be taken only after careful consideration of the costs and benefits.

SEC Investigations

A relatively recent concern for Members and staff is the possibility of an investigation by the Securities and Exchange Commission (“SEC”) concerning insider trading. The Stop Trading On Congressional Knowledge Act (“STOCK Act”), enacted in 2012, was intended to subject Members, staff, and others to civil and criminal enforcement of insider trading laws, in instances in which material nonpublic information obtained through Congress or other federal branches of government is used for securities trading purposes.

The SEC is known to have actively pursued STOCK Act investigations involving congressional employees, and we expect this to continue to be an area in which congressional offices must provide up-to-date training and be prepared to react promptly to any contacts from the SEC. The DOJ may also pursue alleged STOCK Act violations.

Parallel Investigations

Parallel investigations into the same conduct by DOJ, SEC, the OCE or Ethics Committees, and the FEC sometimes proceed simultaneously. In some cases, DOJ may ask the other agencies to stand down while the criminal investigation proceeds. For example, OCE referred its investigation of former Congressman Chris Collins to the House Ethics Committee. However, House Ethics was asked by DOJ to defer its investigation, which it did. The DOJ and SEC investigations led to parallel charges against Collins by the SEC and U.S. Attorney’s Office for the Southern District of New York. Collins pled guilty and resigned from Congress on September 30, 2019, at which point House Ethics dismissed its investigation.

In rare cases, though, the Ethics Committees may effectively force DOJ to stand down by seeking to immunize the target of the parallel investigations. These parallel investigations are complex, presenting many legal and political risks. Discovery taken by one investigative body may be shared with another. The Member’s overall strategy will have to take into account how actions in one investigation may influence another.

Conclusion

In fast-paced, high-stakes, and potentially politicized investigations of Members of Congress or their staff, Chiefs of Staff must make smart decisions, very early in the process, based on limited information. The consequences of even a small mistake at the outset can be very significant and long-lasting. Chiefs would be wise to spend a little bit of time now thinking about how they would react to an investigation in the first critical hours and beyond.

Covington has substantial experience representing Members and their staff in investigations. If you have any questions, or would like specific advice concerning an investigation matter, please contact the following Covington lawyers, all of whom have extensive government investigations experience:

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