Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Committee Discretion in Obtaining Witness Testimony

Todd Garvey
Legislative Attorney

December 22, 2023

Early in December 2023, Hunter Biden, son of President Biden, refused to comply with a subpoena issued by the House Committees on Oversight and Accountability and the Judiciary (the Committees) seeking Mr. Biden's testimony in a deposition. Appearing at a press conference shortly before the subpoena deadline, Mr. Biden stated that he was willing to appear and testify in a public hearing but would not appear for a closed-door deposition out of concern that the Committees would selectively leak portions of his testimony. The Committees have rejected his offer for public testimony at this time and are now considering contempt of Congress proceedings.

This Sidebar addresses congressional depositions generally and whether any existing legal constraints govern the Committees' decision to obtain witness testimony through a private deposition rather than a public hearing. Ultimately, neither the Constitution nor House or committee rules appear to constrain the Committees' significant discretion to choose among authorized mechanisms for obtaining testimony from a witness. It also does not appear that Mr. Biden's concern about the Committees' potential future use of his testimony would lead a court to invalidate the subpoena. As a result, while Mr. Biden may request that the committee hear his testimony in a public hearing rather than a deposition, it is unlikely that either that request, or its rejection by the Committees, will excuse him from his legal obligations.

Committee Deposition Authority

A deposition is a method of gathering sworn testimony through the direct questioning of a witness in a non-public setting. In the congressional context, the deposition has developed as a way for committees to obtain witness testimony in an efficient and confidential matter. This mechanism allows committees to avoid expending the substantial resources necessary to hold a formal hearing, though depositions are often used to prepare a committee for a formal public hearing held later in time.

Congressional Research Service
7-5700
www.crs.gov
LSB11093

The routine use of depositions to collect information is a relatively new but significant tool in Congress's investigative tool box. Beginning in the latter part of the 20th century, the House periodically authorized committees to take depositions in impeachment investigations and other major oversight investigations, including, for example, Iran–Contra and, more recently, the Benghazi and January 6th investigations. It was not until 2007 that the House first provided the Oversight Committee standing deposition authority, and only in 2015 did the House begin to extend that authority to other committees as part of each year's rules package. Today, the chair of each standing House committee (except the Committee on Rules) possesses the authority to obtain deposition testimony and to do so pursuant to a subpoena.

Regulations promulgated by the House Committee on Rules govern the taking of depositions. These rules require that depositions be (1) transcribed, (2) taken under oath, and (3) conducted by a Member or designated committee counsel. Witnesses are to be allowed the assistance of "nongovernmental" counsel "to advise them of their rights." The rules also require that the majority and minority be given equal time to question the witness and that all depositions occur behind closed doors, with only authorized persons in attendance. Following a deposition, the rules require the chair and ranking member to "consult" on the release of deposition transcripts, and in the case of a disagreement, direct that any release be decided by the committee as a whole. As such, the committee chair (and in a disagreement, the committee) controls whether deposition transcripts are disclosed to the public.

The willful failure to comply with a committee deposition subpoena may subject a witness to criminal prosecution for contempt of Congress under 2 U.S.C. § 192. Although examples are somewhat limited, the Select Committee to Investigate the January 6th Attack on the United States Capitol held four witnesses in criminal contempt of Congress for their failure to comply with deposition subpoenas—two of whom have been tried and convicted.

Committee Control over the Conduct of an Investigation

The current conflict with Mr. Biden raises the question of what constraints, if any, the law places on an investigating committee's decision to gather witness testimony through depositions as opposed to public hearings.

As a general matter, congressional committees have significant discretion in how they approach an investigation. The methods used can vary by committee and by investigation, and can be influenced by various factors. Some committees tend to rely on voluntary cooperation from witnesses, while others more frequently utilize the compulsory authority of subpoenas. Similarly, some investigations are conducted primarily through public hearings, while others gather information from witnesses through the privacy and control of depositions. When it comes to these types of investigative choices, it is generally the case that so long as a committee complies with its own rules (detailed below), neither the courts nor witnesses may dictate the manner in which a committee chooses to proceed.

Federal courts have repeatedly affirmed this general principle—including in cases challenging how a committee chooses to obtain testimony from a witness. This judicial deference to congressional choices is due largely to the separation of powers and the fact that the Constitution empowers each House of Congress to "determine the Rules of its Proceedings." In *Eisler v U.S.*, for example, a witness refused to be sworn unless he was first given time to "make a few remarks." In upholding the witness's conviction for contempt of Congress, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held that "having been summoned by lawful authority," the witness was "bound to conform to the procedure of the Committee" and "could not impose his own condition upon the manner of inquiry."

Similarly, in *U.S. v Hintz,* a federal district court upheld the sufficiency of a contempt indictment against a witness who refused to answer questions in a committee hearing on account of excessive media presence within the hearing room. *Hintz* reasoned that "the courts have no right to dictate either the procedures for Congress to follow in performing its functions" or "how congressional hearings shall be conducted." The

witness, the court continued "has no greater right than the courts to prescribe the conditions under which he may be interrogated by Congress," as whether a hearing is public or private is a question "committed to the Congress by the very basic constitutional separation of powers principle." Other courts have similarly concluded that "a witness has no right to set his own conditions for testifying" and that "the law is that a witness does not have the legal right to dictate the conditions under which he will or will not testify."

Exercise of this committee discretion is subject to two possible constraints: the Constitution and chamber rules.

Obtaining Private or Public Witness Testimony: Limited Constitutional Considerations

When conducting an investigation, a committee must comply with applicable constitutional protections. With respect to Mr. Biden, it is difficult to articulate a constitutional justification for requiring a congressional committee to hear his testimony in public. Courts have held that the Sixth Amendment guarantee of a "public trial" has no application in a congressional investigation. Similarly, while witnesses have sometimes raised "fundamental fairness" concerns under the Due Process Clause of the Fifth Amendment, the courts have generally concluded that the Due Process Clause does not generally place substantial constraints on committees. In a limited number of cases, courts have suggested that the notions of fairness that animate due process might require a closed hearing when "unwarranted and unreasonable" conditions of public testimony, including extreme media and public distractions within the hearing room, would deprive the witness of "normal faculties to respond intelligently with clarity and accuracy" and therefore subject him to possible prosecution for perjury, false statements, or obstruction. These same concerns would not be implicated in a private deposition.

With respect to Mr. Biden's concerns over how a committee may subsequently use his deposition testimony, constitutional considerations may inhibit a court's evaluation of his argument. Under the Speech or Debate Clause, for example, courts have generally been reluctant to restrict what a congressional committee can do with information in its possession and unwilling to investigate a committee's "motive" in seeking information from a witness. The separation of powers has likewise led courts to suggest that they "cannot assume that Congress will act irresponsibly in regulating or disclosing" sensitive information, unless an unlawful release of information is both "imminent" and "evident." These principles contributed to a recent D.C. Circuit decision enforcing a committee demand for former President Trump's tax returns despite arguments from the former President that the committee was seeking the information solely for public disclosure.

Finally, a deposition subpoena is always subject to the basic constitutional requirement that it serve a valid legislative purpose and may be challenged on such grounds, but if an investigation does serve a valid purpose, this foundational principle does not appear to directly limit the choice between a private deposition and a public hearing.

Obtaining Witness Testimony in Private or Public: House and Committee Rules for Hearings and Depositions

The second, and more specific, constraint on the manner in which a committee conducts an investigation comes from chamber and committee rules.

It is well established that a committee must follow its own rules, as well as those of the House, throughout any investigation. This obligation, the Supreme Court has said, extends to decisions of whether to receive testimony in a private or public setting. In *Yellin v. United States*, for example, the Court reversed a contempt of Congress conviction on the ground that a House committee did not comply with its rules for

deciding whether to *close* a hearing. In that case, the rules of the House Un-American Activities Committee required that the committee consider whether the public questioning of a witness would "endanger national security or unjustly injure [the witness's] reputation." If a majority of the committee determined that such risks were present, the rules provided that "the Committee shall interrogate such witness" in a closed or executive session to determine the "advisability" of later questioning the witness in a public hearing.

In *Yellin*, the Court reasoned that, although the rules provided the committee with significant discretion over the ultimate decision to close a hearing, the contempt conviction must be reversed because the committee had not even considered the possible injury a public hearing would have on the witness's reputation. *Yellin* and similar cases stand for the principle that a committee's failure to comply with its own rules can provide a witness with a defense to prosecution for criminal contempt of Congress.

If Mr. Biden can point to a House or committee rule that requires the Committees to take his testimony in public, that requirement could be used to prevent the enforcement of the deposition subpoena. It appears, however, that no such rule exists.

Current House rules establish a default rule that committee hearings "shall be open to the public" except when the committee determines to close the hearing because the "matters to be considered would endanger national security, would compromise sensitive law enforcement information, or would violate a law or rule of the House." The rules of the Oversight and Judiciary Committees mirror the House rule, except that the Judiciary Committee rules also permit a hearing to be closed if the matters to be considered "would tend to defame, degrade or incriminate any person." As such, it appears that a committee's decision to take testimony in a closed hearing must be based on one of the authorized reasons for departing from the general requirement that hearings be public.

A deposition, however, is not a hearing. As discussed above, depositions are governed by their own House and committee rules, and those rules explicitly require that a deposition be conducted in a closed setting with attendance limited to the witness and their attorney, Members, designated staff, and an official reporter. If the committee chooses to obtain witness testimony pursuant to a deposition, it must, under House and committee rules, do so in private.

There is also no House or committee rule that regulates the committee's choice between obtaining testimony by deposition or in a hearing. To the contrary, rules on investigations, generally, and depositions, specifically, appear to accord House committees significant, and perhaps complete, discretion in choosing between the two. House rules authorize all standing committees to "conduct at any time such investigations and studies *as it considers necessary or appropriate*" (emphasis added) so long as the investigation is within the committee's jurisdiction. In conducting an investigation, a committee may "hold such hearings *as it considers necessary*" and "require, by subpoena [the] testimony of such witnesses … *as it considers necessary*" (emphasis added). The deposition provisions in the House rules package for the 118th Congress and committee rules similarly establish depositions as an optional tool ("the chair of a standing committee … may order the taking of depositions") and offer no standards to be applied in deciding to order a deposition.

H. Res. 918, the resolution recently adopted by the House authorizing the Judiciary, Oversight, and Ways and Means Committees to "continue their ongoing" impeachment investigations, reaffirms this discretion. That resolution states that the committee chairs "*may* designate an open hearing" and issue subpoenas for testimony at either hearings or depositions "*as deemed necessary* to the investigation" (emphasis added). A related resolution, H. Res. 917, "ratifies and affirms" subpoenas that were previously issued by all three committees as part of the impeachment inquiry. Whether the Hunter Biden deposition subpoena is governed by H. Res. 918, the existing rules on depositions, or a combination of both is an open question. However interpreted, the House and committee rules do not appear to include any clear limits on the

Committees' discretion to choose between gathering testimony via a private deposition or a public hearing.