On the WLF Legal Pulse

Timely commentary from WLF's blog

October 8, 2024

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

After Being Found in Contempt, Former CEO Sues Senate Committee and Members

by Gregory A. Brower, William E. Moschella, and David D. Ransom

The United States Senate recently did something it hadn't done since 1971. It adopted a resolution finding a witness in contempt of Congress for having failed to comply with a subpoena commanding his appearance at a committee hearing. In response, the witness did something even more unusual—he sued the Committee alleging the subpoena is invalid and unenforceable. While this dispute's procedural posture is somewhat unusual, it presents a familiar set of issues concerning Congress's oversight powers and the seriousness with which those on the receiving end of congressional requests must treat them.

As summarized in our previous post about this matter, Dr. Ralph de la Torre, the former CEO of Steward Health Care, LLC ("Steward") was subpoenaed to appear before the U.S. Senate Committee on Health, Education, Labor & Pensions ("the Committee") as part of the Committee's bipartisan oversight investigation into Steward's financial troubles. The Senate record indicates that counsel for de la Torre accepted service of the subpoena and agreed to his appearance on the date noticed. Then, a few days prior to the scheduled hearing date, counsel apparently reversed course and informed the Committee that his client had decided to invoke his Fifth Amendment right against self-incrimination and would not appear after all. The Committee then informed counsel that the witness's appearance was required pursuant to the lawfully issued subpoena and that he would have an opportunity to exercise his Fifth Amendment right in response to questions at the hearing. After de la Torre failed to appear, the Committee unanimously voted to refer a contempt resolution to the full Senate, which then approved it.

Last week, de la Torre sued the Committee, as well as each of its members, clearly hoping to preempt potential DOJ action to prosecute him for contempt by seeking the court's intervention to declare the subpoena invalid. Very aggressive in tone, the complaint alleges that the defendants "are collectively undertaking a concerted effort to punish Dr. de la Torre for invoking his Fifth Amendment rights" and asserts two claims: (1) that the subpoena does not advance a valid legislative purpose and (2) that the committee's actions violated the witnesses Fifth Amendment rights. With respect to the second claim, the complaint alleges that compelling a witness to appear when they have invoked their Fifth Amendment rights is "wrong as a matter of law" and suggests that "it is well-established that a witness need not take the witness stand at a trial for the sole purpose of creating a spectacle whereby the public may observe him invoke the Fifth Amendment." However, the complaint cites no legal authority for this proposition, and, in any event, a congressional hearing is not a trial.

The complaint also alleges that the D.C. Bar Legal Ethics Committee has "repeatedly recognized that when a Fifth Amendment privilege is asserted before a congressional committee, 'there is no

---

Gregory A. Brower, William E. Moschella, and David D. Ransom are Shareholders with Brownstein Hyatt Farber Schreck, LLP. Mr. Brower also serves on WLF's Legal Policy Advisory Board.

need to test that claim of privilege in public.'" However, the D.C. Bar opinion cited isn't so clearly supportive of this proposition. What the D.C. Bar Ethics Committee said in that 2011 opinion was that an ethical violation occurs only where the subpoena "serves no substantial purpose other than to embarrass, delay, or burden the witness." Of course, this is exactly what de la Torre's counsel is arguing, but the Committee will argue that its purpose in subpoenaing de la Torre does serve a valid legislative purpose, and that while every witness is protected by the Fifth Amendment against self-incrimination, they must first show up, be sworn in, and then, in response to individual questions, assert their Fifth Amendment right and refuse to answer.

Similar disagreements over Congress's power over witnesses have been litigated in the past and, historically, courts have been extremely reluctant to interfere in such matters by considering claims made by recalcitrant witnesses seeking declaratory relief. Indeed the U.S. Supreme Court has been clear that Congress may issue subpoenas for any information that serves to inform its legislative function. *See*, *e.g.*, *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Watkins v. United States*, 354 U.S.178 (1957); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

This unique situation will be interesting to watch with the civil case at least having the potential to undermine any potential prosecution for criminal contempt. Next, the U.S. Attorney for the District of Columbia will have to decide whether to present the matter to a grand jury and seek an indictment. Even though some recent contempt referrals aimed at executive branch officials have not resulted in any DOJ action, this case could be different, given that the target is a corporate executive, not an Administration official, and the Committee's efforts have been decidedly bipartisan and seemingly apolitical. In any event, this case shows the potential power that Congressional committees can wield, including the power of having DOJ's criminal prosecutors at their disposal when witnesses refuse to cooperate. The clear message for individuals and organizations of all types is that requests from congressional committees are to be taken seriously, and threats by committees to issue subpoenas should be taken even more seriously.