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Steward Health CEO Saga Signals Escalation of Coercive Congressional Oversight Against Private Parties

By Emily Loeb, Sam Ungar and Michael Brady
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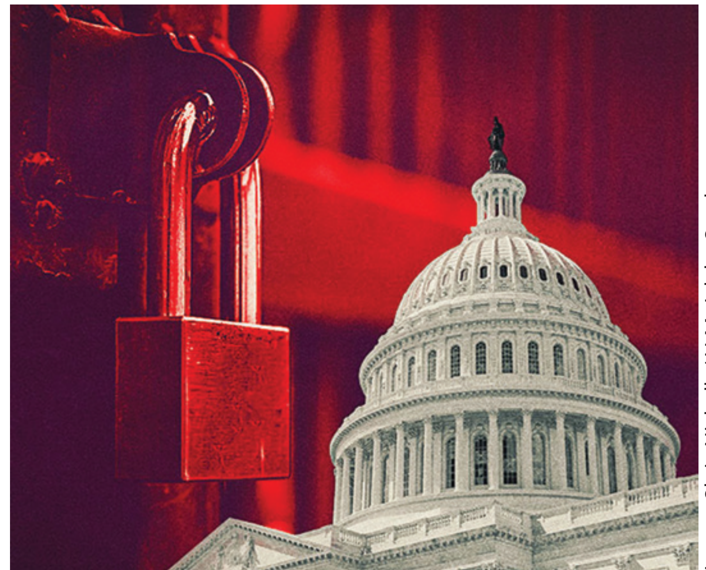
In September, amid the divisive runup to the election, Senate Democrats and Republicans found something they could agree on: the CEO of Steward Health Care should be referred for criminal prosecution for refusing to appear at a hearing. The Senate's ***unanimous*** vote against Dr. Ralph de la Torre marked the latest escalation in the legislative branch's use of its coercive powers against private individuals. As the 119th Congress assembles next year, this vote may be a harbinger of even more aggressive private sector oversight to come.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Dr. de la Torre Doesn't Go to Washington

As CEO of Steward Health, de la Torre oversaw a national network of some 30 hospitals that experienced financial struggles and alleged failures of care. At the same time, he allegedly received large personal windfalls.

On July 25, the Senate HELP Committee voted to initiate an investigation into Steward Health and de la Torre—issuing a subpoena compelling him to attend a hearing in September. Committee Chairman Bernie Sanders claimed that "time and time again [Republican Ranking Member] Cassidy, Senator Markey, and I have invited Dr. de la Torre to come before Congress to testify… [a]nd time and time again, he has arrogantly refused." The Committee's subpoena vote was bipartisan, with all Democrats and most Republicans voting in favor. It was the first subpoena issued by the Committee since 1981.

Nevertheless, de la Torre did not appear. His counsel first argued that bankruptcy proceedings prevented him from speaking publicly about Steward Health and that the Committee was attempting to "turn the hearing into a pseudo-criminal proceeding… to convict Dr. de la Torre in the eyes of public opinion," and later attempted to invoke his Fifth Amendment right not to testify. The Committee dismissed those arguments, voting unanimously on September 19 to hold the doctor in contempt of Congress. The full Senate unanimously followed suit a few days later, holding de la Torre in criminal contempt and referring the matter to the U.S. Attorney for the District of Columbia to consider whether he should be prosecuted under 2 U.S.C. § 192. This was the first time the Senate has held anyone in **criminal contempt since 1971**.

Dr. de la Torre Goes to Court

After the Senate acted, de la Torre resigned as CEO and filed suit in an attempt to block the enforcement of the subpoena and contempt certification. In his complaint, he argues that he should be able to rely on his written invocation of the Fifth Amendment, and should not be forced to appear for a "televised circus" where he claims he will do nothing other than assert his protection from self-incrimination.

While the Supreme Court has held that invoking the Fifth Amendment during a congressional investigation protects witnesses from self-incrimination, the Court did not specify if a witness must ***physically appear*** to assert the right. No other courts have stepped in to resolve the question. Instead, the most direct authority comes from the D.C. Bar in its role as an ethical authority for congressional staff attorneys. In 2011, they concluded that congressional staff can compel a witness to appear to invoke the Fifth Amendment, unless the sole purpose of the appearance is to embarrass or harass the witness—effectively reversing their own 1977 opinion that congressional attorneys *could not* compel witnesses to appear in person to invoke their rights. Ultimately, neither opinion is binding law, so the legal issue remains unresolved.

Over the last fifteen years, congressional committees have launched intense pressure campaigns against witnesses attempting to avoid appearances by pleading the Fifth. Recent examples in the House include Lois Lerner (Oversight Committee), Bryan Pagliano (Benghazi Committee), and Glenn Simpson (Judiciary Committee). All three witnesses ultimately appeared. Carl Ferrer, CEO of Backpage.com, also attempted to avoid appearing before the Senate Permanent Subcommittee on Investigations by invoking the Fifth—and while he never appeared, he was ultimately held in *civil* contempt by a unanimous Senate for failing to produce subpoenaed documents.

Subpoenas and Contempt in the New Congress

The Steward Health saga is a warning sign for private parties facing adversarial congressional investigations. At the same time there

is a bipartisan high-water mark of congressional interest in investigating companies and private individuals, Congress has also demonstrated a growing appetite to aggressively wield powerful legislative oversight tools in service of these investigations. Even when a *witness appearance* is not at stake, the House Judiciary Committee recently proved its willingness to threaten criminal contempt against CEOs to obtain documents. And not all private individuals and companies will have plausible Fifth Amendment interests to assert—or be willing to face the reputational fallout from asserting their rights.

With unified control, we may also see unprecedented collaboration between the executive branch and Congress in the coming months. Committee chairs allied with the President may be amenable to opening investigations that serve the administration's interests. And if a company or individual resists, Committees may react by attempting to hold them in contempt.

To be sure, Congressional committees seeking to exercise these powers would likely need to proceed carefully. The Supreme Court has said that Congress must investigate with a valid legislative purpose and cannot act for the purpose of punishment, harassment, or exposing a witness. More civil suits could be filed challenging Congress's authority—although such litigation would likely be prolonged, costly, and may garner unwanted public attention. Experienced congressional counsel will be able to advise clients on the best way to confront these difficult choices.

Emily Loeb *chairs Jenner & Block's Congressional Investigations practice and is recognized as a leading lawyer nationwide by Chambers USA. As a former Associate Deputy Attorney General at the DOJ and a former Associate White House Counsel, Emily guides companies and institutions through multi-faceted investigations and congressional inquiries, and regularly prepares senior executives for high stakes testimony in Washington, DC and around the globe.* ***Sam Ungar*** *is an experienced litigator and crisis manager who guides clients past high-pressure threats and through high-stakes government oversight inquiries in the United States and internationally. He has prepared clients to testify before Congress and similar government bodies across multiple countries and continents.* ***Michael Brady*** *focuses his practice on investigations, regulatory, and defense work. He represents executives, companies, and high-profile individuals facing complex reputational and legal challenges, both domestically and internationally. Prior to joining Jenner & Block, Michael served as Congresswoman Anna Eshoo's chief communications advisor in the US House of Representatives.*

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