GIBSON DUNN

Congressional Investigations in the 118th Congress: ESG, China, and the Biden Administration Take Center Stage

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With Republicans taking control of the U.S. House of Representatives during the 118th Congress, congressional investigations in the House will shift focus from climate change and the Trump Administration to environmental, social, and corporate governance ("ESG") investing, social media censorship, China, COVID-19 origins and government preventative measures, and the Biden Administration. With an effective one-seat majority in the Senate, Democrats will have more authority to pursue their ongoing reviews of climate change, healthcare, big tech, and prescription drug costs. And although both parties are far apart on many issues, it is likely they will find common ground in investigations of the power of technology companies, international corporate and military competition and espionage, and cybersecurity breaches.

Unlike litigation or executive branch investigations, congressional investigations can arise with little warning and immediately attract the media spotlight. Potential targets must be prepared to respond quickly and appropriately. Upon receipt of a congressional subpoena or information request letter, targets must develop a full-fledged response strategy, including taking steps to appropriately answer the inquiry as well as create a consistent messaging strategy for media, shareholders, and other investigative bodies that may take an interest once Congress has raised the alarm. It is critical that targets of congressional investigations understand the norms, rules, and procedures that govern their potential courses of action and know how these unique investigations typically unfold.

To assist potential targets and interested parties in assessing their readiness for responding to a congressional investigation, Gibson Dunn offers our views on the future course of the 118th Congress—its new leadership, rules, and areas of focus. We also provide a brief overview of how congressional investigations often are conducted, Congress's underlying legal authorities to investigate, and various defenses that targets and witnesses can raise in response. In addition, we discuss missteps that investigative targets and witnesses sometimes make, as well as best practices for responding to a congressional request for information.

I. Lay of the Land in the 118th Congress

House of Representatives

As we explained at the start of 116th and 117th congresses, the House adopts new rules and investigative authorities each Congress as part of its organizing process. The House passed a new Rules package on January 9, 2023, after a historic 15 rounds of voting to elect Speaker Kevin McCarthy (R-CA). The hard-fought Rules package includes a number of provisions added or modified to secure support from different factions within the Republican Party.

Although Democratic control of a chamber of Congress usually portends more private sector investigations, the new House Republican majority is poised to investigate parts of

Related People

Michael D. Bopp

Thomas G. Hungar

Tim Velenchuk

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the private sector with equal vigor. Big tech, financial services, fintech companies, and corporations with ties to China all are likely to face congressional scrutiny this year.

The House Republican majority is well-equipped to conduct these investigations. When Democrats took the majority in 2019 after eight years of GOP control, they expanded their investigative tools and continued to add new ones in 2021. Now that Republicans are in charge, they will have the advantage of those expanded tools. And, under the Rules package, the House created new investigative bodies that will have authority to review private sector activities. Moreover, committees will organize over the coming weeks, and additional investigative tools could be added to their arsenals.

***Investigative Rules*:** Republicans will maintain rules Democrats have implemented over the last two congresses that expanded the House's investigative authorities. For example, Republicans will retain broad deposition authority. Democrats previously expanded the House's deposition authority by removing the requirement that a member be present during the taking of a staff deposition. As we previously noted, such broad authority makes it more difficult for minority members to influence or hinder investigations to which they are opposed. It is also important to remember that, unlike in the Senate, nearly every House standing committee chair is empowered to issue a deposition subpoena unilaterally, that is, without the ranking member's consent or a committee vote, after mere "consultation" with the ranking member.

***New investigative bodies*:** In the 118th Congress Rules package and related resolutions, the House has created three new investigative bodies. The Committee on Oversight and Accountability—formerly known as the Committee on Oversight and Reform—will have a Select Subcommittee on the Coronavirus Pandemic. The House Judiciary Committee will have a Select Subcommittee on the Weaponization of the Federal Government. And the Rules package and a separate House resolution add a new full investigative committee: the Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party.[1] Although each of these bodies, discussed further below, will aggressively seek information from the Biden Administration, we anticipate they also will gather information from the private sector.

The **Select Subcommittee on the Coronavirus Pandemic** will investigate the origins of the pandemic, "including . . . the Federal Government's funding of gain-of-function research"; the use of taxpayer funds to address the pandemic; the implementation and effectiveness of laws and regulations to address the pandemic; the development of vaccines and treatments; the implementation of vaccine policies applied to federal employees and the military; the economic impact of the pandemic; the societal impact of decisions to close schools; executive branch policies related to the pandemic; protection of whistleblowers related to the pandemic; and cooperation by the Executive Branch with oversight of the pandemic response.[2] Unlike the Select Subcommittee on the Coronavirus Crisis, created by the Democratic-controlled House in the last Congress, this Select Subcommittee will not have its own subpoena authority. Instead, it will need to request that the chair of the full Committee on Oversight and Accountability issue subpoenas for it.[3]

Likely private sector targets of the Select Subcommittee on the Coronavirus Pandemic include healthcare research companies; medical and pharmaceutical companies; hospitals; and recipients and conduits of various financial aid programs such as the Paycheck Protection Program; the Homeowner Assistance Fund; the airline and national security relief programs; and the Coronavirus Economic Relief for Transportation Services program.

The resolution establishing the **Select Subcommittee on the Weaponization of the Federal Government** directs it to study and issue a final report on its findings regarding executive branch collection of information on and investigation of U.S. citizens, including criminal investigations; "how executive branch agencies work with, obtain information from, and provide information to the private sector, non-profit entities, or other government

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agencies to facilitate action against American citizens . . .”; and how the Executive Branch collects and disseminates information about U.S. citizens.[4] The Select Subcommittee will not have its own subpoena authority, but the chair of the full Judiciary Committee may issue subpoenas for it.[5] Further, the resolution authorizes the Select Subcommittee to receive information available to the Permanent Select Committee on Intelligence.[6] Although the Select Subcommittee on the Weaponization of the Federal Government is authorized to investigate ongoing executive branch investigations, we do not expect agencies to provide information on these ongoing investigations.

Although the focus of the Select Subcommittee is on executive branch activity, we anticipate it will gather information from social media companies, financial institutions, fintech companies, telecommunication companies, consulting firms, and non-profit organizations. The inquiries likely will focus on any collaboration with the federal government in its investigations and any activity that appeared to happen in parallel with government action, as well as financial activity of various targets of the investigations.

The **Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party**’s “sole authority” will be to “investigate and submit policy recommendations on the status of the Chinese Communist Party’s economic, technological, and security progress and its competition with the United States.”[7] Unlike the Select Committee on the Climate Crisis, created by the Democrat-controlled House in the 116th Congress, this Select Committee will have the same authorities as standing committees, including subpoena and deposition authority.[8] As a result, we can expect more of an investigative approach by this new body. Representative Mike Gallagher (R-WI), a veteran with a background in strategic intelligence and international relations, will chair the Select Committee.

The Select Committee likely will seek information from companies and individuals engaged in business activity in China, including social media companies and software companies; any organizations that have taken steps to appease the CCP in relation to their positions on Taiwan, Nepal, or other interests; and educational and corporate institutions that may have been infiltrated by agents or sympathizers of the CCP. We also anticipate that they will seek information from financial institutions and telecommunications companies serving any of those previously listed organizations.

***Other likely investigative priorities*:** The Republican majority in the House has announced its plans to focus on a wide variety of topics. Big tech will face scrutiny for censorship on various platforms. Financial companies will have to address their investment strategies in light of Republican opposition to ESG investing. Fintech companies will face questions regarding de-platforming users, as well as privacy and cybersecurity concerns. The House also will focus on the Biden Administration, including Hunter Biden’s business dealings, as well as the administration’s border policy, student loan forgiveness program, IRS enforcement priorities and funding, and withdrawal from Afghanistan.

Senate

The Senate Democrats’ new one-seat majority gives them substantially more power to pursue investigations in the 118th Congress than they had previously. During the last Congress, which was evenly divided between Republicans and Democrats, subpoenas required bipartisan support. In the 118th Congress, Democratic chairs will be able to issue subpoenas with the majority vote of their committees. It will take Senate committees several weeks to organize and publish their rules, but the 117th Congress gave them two years to define their priorities, hire staff, and build investigative muscle. We expect them to get an early and strong start to their investigative agenda in the 118th Congress.

***Key committees to watch*:** We expect three Senate bodies to be more active than others in their investigations: the Senate Finance Committee, the Senate Homeland Security and Governmental Affairs Committee, and the Permanent Subcommittee on Investigations.

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Senator Ron Wyden (D-OR) will continue to serve as Chairman of the **Senate Finance Committee**. During the 117th Congress, he investigated pharmaceutical company tax practices; companies that use offshore account reporting; and potential Trump Administration conflicts of interest in international trade. We anticipate he will continue many of those investigations into the 118th Congress and will use his new subpoena authority as needed. We also expect to see him pursue investigations into big tech and oil companies.

Senator Gary Peters (D-MI) will continue to serve as Chairman of the **Senate Homeland Security and Governmental Affairs Committee** ("HSGAC"). In the last Congress, HSGAC held hearings on COVID-19 preparedness, ransomware attacks enabled by cryptocurrency, and social media's impact on homeland security. We expect the Committee to continue its focus on these issues, with potential investigations into cryptocurrencies and social media companies. Under its jurisdiction over government waste, fraud, and abuse, HSGAC also likely will investigate pandemic relief fraud and ways to mitigate fraud in government programs going forward.

The **Senate Permanent Subcommittee on Investigations** ("PSI"), a subcommittee of HSGAC, has some of the broadest investigative authorities and jurisdiction in the Senate. PSI has the responsibility of studying and investigating the efficiency and economy of operations relating to all branches of the government and is also tasked with studying and investigating the compliance or noncompliance with rules, regulations, and laws, investigating all aspects of crime and lawlessness within the United States, which have an impact upon or affect the national health, welfare, and safety, including syndicated crime, investment fraud schemes, commodity and security fraud, computer fraud, and the use of offshore banking and corporate facilities to carry out criminal objectives. Chaired by Senator Jon Osoff (D-GA), PSI was less active last Congress than under previous Democratic chairmen, but it is likely that he will take advantage of Democrats' increased authority in the Senate to advance his party's agenda.

Other investigative bodies to note include the Senate Health, Education, Labor, and Pensions Committee and the Senate Commerce, Science, and Transportation Committee.

Senator Bernie Sanders (I-VT) will be taking over the chairmanship of the **Senate Health, Education, Labor, and Pensions ("HELP") Committee**, and we expect he will wield his investigative authorities aggressively. In particular, he is likely to focus on drug prices, healthcare executive salaries, workers' rights, and educational and medical debt.

As Chairwoman of the **Senate Commerce, Science, and Transportation Committee**, Senator Maria Cantwell (D-WA) already has announced hearings related to December's airline flight cancellations. She also may find bipartisan support for investigating and legislating on the threats social media platforms pose to children.

***Potential Changes to Subpoena and Deposition Authority*:** We will be closely watching whether Senate Democrats strengthen their investigative arsenal, particularly when it comes to subpoena and deposition authority. With respect to subpoenas, currently only the Chair of PSI is authorized to issue a subpoena unilaterally, a significant difference with the House where nearly all committee chairs may do so. Because Senate investigations have historically been more bipartisan than those in the House, there has been a longstanding hesitation on both sides to expand unilateral subpoena power. It remains to be seen if that philosophy will continue to hold sway in the 118th Congress.

It is also important to keep a close watch on Senate deposition authority. In the last Congress, ten Senate bodies included deposition provisions in their rules: (1) Judiciary; (2) HSGAC; (3) PSI; (4) Aging; (5) Agriculture, Nutrition, and Forestry; (6) Commerce, Science, and Transportation; (7) Ethics; (8) Foreign Relations; (9) Indian Affairs; and (10) Intelligence. Staff is expressly authorized to take depositions in each of these committees other than the Agriculture, Nutrition, and Forestry, Commerce, Science, and Transportation, Indian Affairs, and Intelligence Committees. Note that Senate Rules do not

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authorize committees to take depositions. Hence, Senate committees cannot delegate that authority to themselves through committee rules, absent a Senate resolution or a change in Senate rules. The committee funding resolution for the 117th Congress, S. Res. 70, explicitly provides deposition authority only for PSI and the Senate Judiciary Committee.

II. Unique Features of Congressional Investigations

As a practical matter, numerous motivations often drive a congressional inquiry, including: advancing a chair's political agenda or public profile, developing support for a legislative proposal, exposing alleged criminal wrongdoing or unethical practices, pressuring a company to take certain actions, and responding to public outcry. Recognizing the presence of these underlying objectives and evaluating the political context surrounding an inquiry can therefore be a key component of developing an effective response strategy.

Congress's power to investigate is broad—as broad as its legislative authority. The "power of inquiry" is inherent in Congress's authority to "enact and appropriate under the Constitution."[9] And while Congress's investigatory power is not a limitless power to probe any private affair or to conduct law enforcement investigations, but rather must further a valid legislative purpose,[10] the term "legislative purpose" is understood broadly to include gathering information not only for the purpose of legislating, but also for overseeing governmental matters and informing the public about the workings of government.[11]

Congressional investigations present a number of unique challenges not found in the familiar arenas of civil litigation and executive branch investigations. Unlike the relatively controlled environment of a courtroom, congressional investigations often unfold in a hearing room in front of television cameras and on the front pages of major newspapers and social media feeds.

III. Investigatory Tools of Congressional Committees

Congress has many investigatory tools at its disposal, including: (1) requests for information; (2) interviews; (3) depositions; (4) hearings; (5) referrals to the Executive Branch for prosecution; and (6) subpoenas for documents and testimony. If these methods fail, Congress can use its contempt power in an effort to punish individuals or entities who refuse to comply with subpoenas. It is imperative that targets be familiar with the powers (and limits) of each of the following tools to best chart an effective response:

- **Requests for Information:** Any member of Congress may issue a request for information to an individual or entity. A request may seek documents or other information.[12] Absent the issuance of a subpoena, responding to such requests is entirely voluntary as a legal matter (although of course there may be public or political pressure to respond). As such, recipients of such requests should carefully consider the pros and cons of different degrees of
- **Interviews:** Interviews also are voluntary, led by committee staff, and occur in private (in person or remotely). They tend to be less formal than depositions and are sometimes transcribed. Committee staff may take copious notes and rely on interview testimony in subsequent hearings or public reports. Although interviews are typically not conducted under oath, false statements to congressional staff can be criminally punishable as a felony under 18 U.S.C. § 1001.
- **Depositions:** Depositions can be compulsory, are transcribed, and are taken under As such, depositions are more formal than interviews and are similar to those in traditional litigation. The number of committees with authority to conduct staff depositions has increased significantly over the last few years. During the 117th Congress, the then-Democratic House majority eliminated the requirement that one or more members of Congress be present during a deposition,[13] which increased the use of depositions as an investigative tool, and we expect this trend will continue in the 118th Congress. In the 117th Congress, staff of six Senate

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committees and subcommittees were authorized to conduct staff depositions: Judiciary; HSGAC; PSI; Aging; Ethics; and Foreign Relations.[14] Judiciary, however, required that a member be present during deposition, unless waived by agreement of the chair and ranking member.The House Rules Committee's regulations for staff depositions in the 118th Congress will likely mirror in many respects the regulations issued by that Committee in the 117th Congress. Significantly, those regulations changed past practice by authorizing the immediate overruling of objections raised by a witness's counsel and immediate instructions to answer, on pain of contempt. Those regulations also appeared to eliminate the witness's right to appeal rulings on objections to the full committee (although committee members may still appeal). Assuming these changes are preserved in the 118th Congress, as seems likely, they will continue to enhance the efficiency of the deposition process, as prior to the 116th Congress the staff deposition regulations required a recess before the chair could rule on an objection. Additionally, the regulations for the 116th Congress expressly allowed for depositions to continue from day to day and permit, with notice from the chair, questioning by members and staff of more than one committee. Finally, the regulations removed a prior requirement that allowed objections only by the witness or the witness's lawyer. This change appears to allow objections from staff or members who object to a particular line of questioning.[15]

- **Hearings:** While both depositions and interviews allow committees to acquire information quickly and (at least in many circumstances) confidentially,[16] testimony at hearings, unless on a sensitive topic, is conducted in a public session led by the members themselves (or, on occasion, committee counsel).[17] Hearings can either occur at the end of a lengthy staff investigation or take place more rapidly, often in response to an event that has garnered public and congressional concern. Most akin to a trial in litigation (though without many of the procedural protections or the evidentiary rules applicable in judicial proceedings), hearings are often high profile and require significant preparation to navigate successfully.
- **Executive Branch Referral:** Congress also has the power to refer its investigatory findings to the Executive Branch for criminal prosecution. After a referral from Congress, the Department of Justice may charge an individual or entity with making false statements to Congress, obstruction of justice, or destruction of evidence. Importantly, while Congress may make a referral, the Executive Branch retains the discretion to prosecute, or not.

Subpoena Power

As noted above, Congress will usually seek voluntary compliance with its requests for information or testimony as an initial matter. If requests for voluntary compliance meet with resistance, however, or if time is of the essence, it may compel disclosure of information or testimony through the issuance of a congressional subpoena.[18] Like Congress's power of inquiry, there is no explicit constitutional provision granting Congress the right to issue subpoenas.[19] But the Supreme Court has recognized that the issuance of subpoenas is "a legitimate use by Congress of its power to investigate" and its use is protected from judicial interference in some respects by the Speech or Debate Clause.[20] Congressional subpoenas are subject to few legal challenges,[21] and "there is virtually no pre-enforcement review of a congressional subpoena" in most circumstances.[22]

The authority to issue subpoenas is initially governed by the rules of the House and Senate, which delegate further rulemaking to each committee.[23] While nearly every standing committee in the House and Senate has the authority to issue subpoenas, the specific requirements for issuing a subpoena vary by committee. These rules are still being developed by the committees of the 118th Congress, and can take many forms.[24] For example, several House committees authorize the committee chair to issue a subpoena unilaterally and require only that notice be provided to the ranking member. Others, however, require approval of the chair and ranking member, or, upon the ranking

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member's objection, require approval by a majority of the committee.

Contempt of Congress

Failure to comply with a subpoena can result in contempt of Congress or a civil enforcement action. Although Congress does not frequently resort to its contempt power to enforce its subpoenas, it has three potential avenues for seeking to implement its authority to compel testimony and production of documents.

- **Inherent Contempt Power:** The first, and least relied upon, form of compulsion is Congress's inherent contempt power. Much like the subpoena power itself, the inherent contempt power is not specifically authorized in the Constitution, but the Supreme Court has recognized its existence and legitimacy.[25] To exercise this power, the House or Senate must pass a resolution and then conduct a full trial or evidentiary proceeding, followed by debate and (if contempt is found to have been committed) imposition of punishment.[26] As is apparent in this description, the inherent contempt authority is cumbersome and inefficient, and it is potentially fraught with political peril for legislators. It is therefore unsurprising that Congress has not used it since.[27]
- **Statutory Criminal Contempt Power:** Congress also possesses statutory authority to refer recalcitrant witnesses for criminal contempt prosecutions in federal court. In 1857, Congress enacted this criminal contempt statute as a supplement to its inherent authority.[28] Under the statute, a person who refuses to comply with a subpoena is guilty of a misdemeanor and subject to a fine and imprisonment.[29] "Importantly, while Congress initiates an action under the criminal contempt statute, the Executive Branch prosecutes "[30] This relieves Congress of the burdens associated with its inherent contempt authority. The statute simply requires the House or Senate to approve a contempt citation. Thereafter, the statute provides that it is the "duty" of the "appropriate United States attorney" to prosecute the matter, although the Department of Justice maintains that it always retains discretion not to prosecute, and often declines to do so.[31] Although Congress rarely uses its criminal contempt authority, the Senate used it in 2016 against Backpage.com, and the House Democratic majority employed it against a flurry of Trump administration officials, including Attorney General Bill Barr, Secretary of Commerce Wilbur Ross, Secretary of Homeland Security Chad Wolff, political adviser Steve Bannon, and White House Chief of Staff Mark Meadows. The Department of Justice prosecuted Bannon for defying a subpoena from the Select January 6 Committee. A jury found him guilty, and his conviction is now on appeal.
- **Civil Enforcement Authority:** Finally, Congress may seek civil enforcement of its subpoenas, which is often referred to as civil contempt. The Senate's civil enforcement power is expressly codified.[32] This statute authorizes the Senate to seek enforcement of legislative subpoenas in a S. District Court. In contrast, the House does not have a civil contempt statute, but most courts have held that it may pursue a civil contempt action "by passing a resolution creating a special investigatory panel with the power to seek judicial orders or by granting the power to seek such orders to a standing committee."[33] In the past, the full House has typically "adopt[ed] a resolution finding the individual in contempt and authorizing a committee or the House General Counsel to file suit against a noncompliant witness in federal court."[34] In the 116th Congress, however, the Chairman of the House Rules Committee took the position that the House rules empower the Bipartisan Legal Advisory Group ("BLAG"; consisting of the Speaker, the Majority and Minority Leaders, and the Majority and Minority Whips) to authorize a civil enforcement action without the need for a House vote.[35] The House subsequently endorsed that position, and the BLAG authorized at least one civil enforcement action during the 116th Congress.[36] It seems likely that this authority will be continued in the 118th Congress.

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IV. Defenses to Congressional Inquiries

While potential defenses to congressional investigations are limited, they are important to understand. The principal defenses are as follows:

Jurisdiction and Legislative Purpose

As discussed above, a congressional investigation is required generally to relate to a legislative purpose, and must also fall within the scope of legislative matters assigned to the particular committee at issue. In a challenge based on these defenses, the party subject to the investigation must argue that the inquiry does not have a proper legislative purpose, that the investigation has not been properly authorized, or that a specific line of inquiry is not pertinent to an otherwise proper purpose within the committee's jurisdiction. Because courts generally interpret "legislative purpose" broadly, these challenges can be an uphill battle. Nevertheless, this defense should be considered when a committee is pushing the boundaries of its jurisdiction or pursuing an investigation that arguably lacks any legitimate legislative purpose.

Constitutional Defenses

Constitutional defenses under the First and Fifth Amendments may be available in certain circumstances. While few of these challenges are ever litigated, these defenses should be carefully evaluated by the subject of a congressional investigation.

When an investigative target invokes a First Amendment defense, a court must engage in a "balancing" of "competing private and public interests at stake in the particular circumstances shown."[37] The "critical element" in the balancing test is the "existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness."[38] Though the Supreme Court has never relied on the First Amendment to reverse a criminal conviction for contempt of Congress, it has recognized that the First Amendment may restrict Congress in conducting investigations.[39] Courts have also recognized that the First Amendment constrains judicially compelled production of information in certain circumstances.[40] Accordingly, it would be reasonable to contend that the First Amendment limits congressional subpoenas at least to the same extent. First Amendment issues arose in several investigations during the 117th Congress and are likely to be implicated by certain investigations in the 118th Congress as well.

The Fifth Amendment's privilege against self-incrimination is available to witnesses—but not entities—who appear before Congress.[41] The right generally applies only to *testimony*, and not to the production of documents,[42] unless those documents satisfy a limited exception for "testimonial communications."[43] Congress can circumvent this defense by granting transactional immunity to an individual invoking the Fifth Amendment privilege.[44] This allows a witness to testify without the threat of a subsequent criminal prosecution based on the testimony provided. Supreme Court dicta also suggests the Fourth Amendment can be a valid defense in certain circumstances related to the issuance of congressional subpoenas.[45] The Fourth Amendment has never been successfully employed to quash a congressional subpoena, however.

Attorney-Client Privilege & Work Product Defenses

Although House and Senate committees have taken the position that they are not required to recognize the attorney-client privilege, in practice the committees generally acknowledge the privilege as a valid protection. Moreover, no court has ruled that the attorney-client privilege does not apply to congressional investigations. Committees often require that claims of privilege be logged as they would in a civil litigation setting. In assessing a claim of privilege, committees balance the harm to the witness of disclosure against legislative need, public policy, and congressional duty. Notably, in 2020, the Supreme Court for the first time acknowledged in dicta that the attorney-client privilege is presumed to apply in congressional investigations. In *Trump v. Mazars*, the Supreme

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Court stated that “recipients [of congressional subpoenas] have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege.”[46] It remains to be seen if members and committee staffers will take the same view going forward.

The work product doctrine protects documents prepared in anticipation of *litigation*. Accordingly, it is not clear whether or in what circumstances the doctrine applies to congressional investigations, as committees may argue that their investigations are not necessarily the type of “adversarial proceeding” required to satisfy the “anticipation of litigation” requirement.[47]

V. Top Mistakes and How to Prepare

Successfully navigating a congressional investigation requires mastery of the facts at issue, careful consideration of collateral political events, and crisis communications.

Here are some of the more common mistakes we have observed:

- **Facts:** Failure to identify and verify the key facts at issue;
- **Message:** Failure to communicate a clear and compelling narrative;
- **Context:** Failure to understand and adapt to underlying dynamics driving the investigation;
- **Concern:** Failure to timely recognize the attention and resources required to respond;
- **Legal:** Failure to preserve privilege and assess collateral consequences;
- **Rules:** Failure to understand the rules of each committee, which can vary significantly; and
- **Big Picture:** Failure to consider how an adverse outcome can negatively impact numerous other legal and business objectives.

The consequences of inadequate preparation can be disastrous on numerous fronts. A keen understanding of how congressional investigations differ from traditional litigation and executive branch or state agency investigations is therefore vital to effective preparation. The most successful subjects of investigations are those that both seek advice from experienced counsel and employ multidisciplinary teams with expertise in government affairs, media relations, e-discovery, and the key legal and procedural issues.

* * *

The change in control of the House portends a shift in investigative focus, and this particular Republican majority appears keen to investigate both public and private sector entities. Senate Democrats will use their enhanced authority to pick up their investigative tempo, as well. Gibson Dunn lawyers have extensive experience in both running congressional investigations and defending targets of and witnesses in such investigations. If you or your company become the subject of a congressional inquiry, or if you are concerned that such an inquiry may be imminent, please feel free to contact us for assistance.

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[1] H.R. Res. 5, 118th Cong. § 5(e)(1) (2023).

[2] H.R. Res. 5, 118th Cong. § 4(a)(2)(A) (2023).

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[3] H.R. Res. 5, 118th Cong. § 4(a)(3)(A)(ii) (2023).

[4] H.R. Res. 12, 118th Cong. § 1(b)(1) (2023).

[5] H.R. Res. 12, 118th Cong. § 1(c)(1)(B) (2023).

[6] H.R. Res. 12, 118th Cong. § 1(c)(1)(C) (2023).

[7] H.R. Res. 11, 118th Cong. § 1(b)(2) (2023).

[8] H.R. Res. 11, 118th Cong. § 1(c)(3) (2023).

[9] *Barenblatt v. United States*, 360 U.S. 109, 111 (1957).

[10] *See Wilkinson v. United States*, 365 U.S. 399, 408-09 (1961); *Watkins v. United States*, 354 U.S. 178, 199-201 (1957).

[11] Michael D. Bopp, Gustav W. Eyler, & Scott M. Richardson, *Trouble Ahead, Trouble Behind: Executive Branch Enforcement of Congressional Investigations*, 25 Corn. J. of Law & Pub. Policy 453, 456-57 (2015).

[12] *Id*.

[13] *See* H.R. Res. 6, 116th Cong. § 103(a)(1) (2019).

[14] *See* U.S. Senate Committee on Rules and Administration, Authority and Rules of Senate Committees, 2021–2022, S. Doc. No. 117-6 (117th Cong. 2022), https://www.govinfo.gov/content/pkg/CDOC-117sdoc6/pdf/CDOC-117sdoc6.pdf.

[15] *See* 165 Cong. Rec. H1216 (Jan. 25, 2019) (statement of Rep. McGovern).

[16] Bopp, *supra* note 11, at 457.

[17] *Id.* at 456-57.

[18] *Id.* at 457.

[19] *Id.*

[20] *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975).

[21] Bopp, *supra* note 11, at 458.

[22] *Id.* at 459. The principal exception to this general rule arises when a congressional subpoena is directed to a custodian of records owned by a third party. In those circumstances, the Speech or Debate Clause does not bar judicial challenges brought by the third party seeking to enjoin the custodian from complying with the subpoena, and courts have reviewed the validity of the subpoena. *See, e.g.*, *Trump v. Mazars*, 140 S. Ct. 2019 (2020); *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34 (D.D.C. 2018).

[23] Bopp, *supra* note 11, at 458.

[24] Gibson Dunn will detail these rules when they are finalized in an upcoming publication.

[25] Bopp, *supra* note 11, at 460 (citing *Anderson v. Dunn*, 19 U.S. 204, 228 (1821)).

[26] *Id.*

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[27] *Id.* at 466.

[28] *Id.* at 461.

[29] *See* 2 U.S.C. §§ 192 and 194.

[30] Bopp, *supra* note 11, at 462.

[31] *See* 2 U.S.C. § 194.

[32] *See* 2 U.S.C. §§ 288b(b), 288d.

[33] Bopp, *supra* note 11, at 465. A panel of the U.S. Court of Appeals for the D.C. Circuit ruled in August of 2020 that the House may not seek civil enforcement of a subpoena absent statutory authority. *Committee on the Judiciary of the United States House of Representatives v. McGahn*, 951 F.3d 510 (D.C. Cir. 2020). On rehearing en banc, the D.C. Circuit reversed, concluding that "the Committee on the Judiciary of the House of Representatives has standing under Article III of the Constitution to seek judicial enforcement of its duly issued subpoena." *Committee on Judiciary of United States House of Representatives v. McGahn*, 968 F.3d 755, 760 (D.C. Cir. 2020) (en banc).

[34] Bopp, *supra* note 11, at 465.

[35] *See* 165 Cong. Rec. H30 (Jan. 3, 2019) ("If a Committee determines that one or more of its duly issued subpoenas has not been complied with and that civil enforcement is necessary, the BLAG, pursuant to House Rule II(8)(b), may authorize the House Office of General Counsel to initiate civil litigation on behalf of this Committee to enforce the Committee's subpoena(s) in federal district court.") (statement of Rep. McGovern); House Rule II.8(b) ("the Bipartisan Legal Advisory Group speaks for, and articulates the institutional position of, the House in all litigation matters").

[36] *See* H. Res. 430 (116th Cong.) ("a vote of [BLAG] to authorize litigation . . . is the equivalent of a vote of the full House of Representatives"); Br. for House Committee at 33, *Committee on Ways and Means, United States House of Representatives v. U.S. Dep't of the Treasury*, No. 1:19-cv-01974 (D.D.C. 2019) (stating BLAG authorized suit by House Ways & Means Committee to obtain President Trump's tax returns pursuant to 26 U.S.C. § 6103(f)).

[37] *Barenblatt*, 360 U.S. at 126.

[38] *Id.* at 126-27.

[39] *See id*.

[40] *See, e.g.*, *Perry v. Schwarzenegger*, 591 F.3d 1147, 1173 (9th Cir. 2009).

[41] *See Quinn v. United States*, 349 U.S. 155, 163 (1955).

[42] *See Fisher v. United States*, 425 U.S. 391, 409 (1976).

[43] *See United States v. Doe*, 465 U.S. 605, 611 (1984).

[44] *See* 18 U.S.C. § 6002; *Kastigar v. United States*, 406 U.S. 441 (1972).

[45] *Watkins*, 354 U.S. at 188.

[46] *See Mazars*, 140 S. Ct. at 2032.

[47] *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 924 (8th Cir. 1997).

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The following Gibson Dunn attorneys assisted in preparing this client update: Michael D. Bopp, Thomas G. Hungar, Roscoe Jones Jr., Amanda Neely, Daniel P. Smith, Megan B. Kiernan, and Timofey Velenchuk.

Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work or the following lawyers in the firm's Congressional Investigations group in Washington, D.C.:

Michael D. Bopp – Chair, Congressional Investigations Group (+1 202-955-8256, mbopp@gibsondunn.com)

Thomas G. Hungar (+1 202-887-3784, thungar@gibsondunn.com)

Roscoe Jones, Jr. – Co-Chair, Public Policy Group (+1 202-887-3530, rjones@gibsondunn.com)

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