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CONGRESSIONAL INVESTIGATIONS IN THE 117TH CONGRESS: CHOPPY WATERS AHEAD FOR THE PRIVATE SECTOR?

To Our Clients and Friends:

With the 117th Congress now fully seated, the private sector is set to face greater scrutiny from the Legislative Branch than it has in a decade, as Democrats regain control of both chambers of Congress and the presidency for the first time since 2010. Democrats are assuming unitary control as a number of hot-button issues involving private sector entities are front and center in the public discourse—many of which are drawing bipartisan interest—including COVID-19 relief spending, climate change, healthcare and prescription drug costs, cybersecurity breaches, and regulation of big technology companies. And, because Democratic committee chairs are likely to spend significantly less time investigating the Executive Branch under a Biden Administration, additional staff resources will be deployed on the private sector, which should expect the spotlight to be even brighter.

Unlike receiving a civil complaint or compulsory process in an Executive Branch investigation, when a congressional letter or subpoena arrives, targeted organizations may have only a matter of days to consider their response and devise a strategy, and often must do so amid significant media scrutiny and public attention. Congressional investigations often involve public attacks on a company's reputation, which can imperil the goodwill upon which the company has built its business and maintains its competitive advantages. It is therefore crucial that potential targets evaluate their exposure to likely investigations in the 117th Congress, familiarize themselves with how such inquiries unfold—including the rules and procedures that govern them—and consider potential responses.

To assist possible targets and interested parties in assessing their readiness for responding to a potential congressional investigation, Gibson Dunn presents our view of the new landscape that the 117th Congress will present. We also present a brief overview of how congressional investigations are often conducted, Congress' underlying legal authorities to investigate, and various defenses that can be raised in response. In addition, we discuss missteps that subjects of investigations sometimes make when receiving an inquiry, and best practices for how to respond.

I. Lay of the Land in the 117th Congress

House of Representatives

As expected when Democrats regained control of the House Chamber in 2019 after eight years of GOP control, numerous private sector industries quickly saw a sharp uptick in congressional scrutiny. Moreover, as we explained in a prior client alert, upon assuming control of the House in the last Congress, Democrats expanded the investigative tools at their disposal in a number of ways. These expanded authorities have been carried over to the 117th Congress, and certain others have been added. Committees will organize over the coming weeks, and additional investigative tools could be added to their arsenals.

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Expanding investigative powers: In the rules package for the 117th Congress, Democrats have continued the trend of expanding and strengthening their investigative powers. This includes permitting certain committees to issue subpoenas before the committees are formally organized. Specifically, the House has authorized the Chair of the Committee on Oversight and Reform to issue subpoenas related to the investigation into the accuracy and timing of the 2020 census, and the Chair of the re-authorized Select Subcommittee on the Coronavirus Crisis has the power to issue subpoenas related to its investigation into political interference at the Department of Health and Human Services and Centers for Disease Control and Prevention.

In addition to the strengthened subpoena power, Democrats will maintain broad deposition authority. In the prior Congress, Democrats expanded the House's deposition authority by permitting staff counsel to conduct depositions and removing the requirement that a member be present during the taking of a deposition. As we previously noted, such broad authority makes it more difficult for minority members to affect, influence, or otherwise hinder investigations to which they are opposed. It is also important to remember that, unlike in the Senate, nearly every House 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.

Likely investigative priorities: As for investigative priorities, a wide array of topics is likely to be covered by House committees; however, Democrats have signaled that immediate priorities include investigating issues related to climate change and the ongoing coronavirus pandemic response. To that end, in addition to re-authorizing the House Select Subcommittee on the Coronavirus Crisis, the House also re-authorized the Select Committee on the Climate Crisis. The Subcommittee on the Coronavirus Crisis has been actively investigating various aspects of the pandemic since it was established by the CARES Act; it has a full suite of authorities, including subpoena power, pursuant to its organizing resolution. While much of the Subcommittee's focus during the last Congress was on the government's pandemic response, we expect more of the Subcommittee's attention will turn to private actors that are involved in the response or recipients of relief funds.

The Select Committee on the Climate Crisis was formed to deliver climate policy recommendations to Congress and was given the jurisdiction to "study, make findings, and develop recommendations on policies, strategies, and innovations" to tackle the climate crisis.[1] The Committee has the power to "hold public hearings in connection with any aspect of its investigative functions." [2] The Committee does not have subpoena power of its own, but it can request that other committees issue subpoenas. The Committee has thus far focused on holding climate policy hearings on topics such as clean energy, industrial emissions, and the health impacts of the climate crisis rather than on conducting investigations. However, the Committee may turn its attention towards the private sector's impact on climate change as the Biden Administration makes climate change a focus of its first term.

House Democrats have authorized another new committee, the Select Committee on Economic Disparity and Fairness in Growth. This Committee has been given broad jurisdiction covering "economic fairness, access to education, and workforce development." [3] It is possible this Committee will be interested in a range of private sector industries, including consumer-facing financial institutions, student loan lenders, and credit agencies. Like the Climate Crisis Committee, this committee does not have its own

subpoena power and must rely on standing committees to issue subpoenas in support of its investigations. This arrangement makes it unlikely that either of these select committees' investigations will involve the issuance of subpoenas unless House Democratic leadership tasks this or the Climate Crisis Committee with a contentious investigation and instructs standing committees to back up the investigation with subpoena authority.

While the Democrats' focus is likely to shift to the private sector as the Biden Administration begins its term, there will no doubt be a continued desire to investigate former President Trump and the outgoing administration, particularly in light of the violent events at the Capitol on January 6. To that end, the House Democrats' new rules package includes explicit language allowing the House to issue subpoenas to "the President, and the Vice President, whether current or former, in a personal or official capacity" as well as White House and executive office employees.^[4] Additionally, private parties with business connections to President Trump or his organization may continue to face scrutiny.

Senate

Democrats will steer the Senate's investigative agenda during the 117th Congress after ten years of being in the minority. While Senate committees have yet to organize and publish their rules, it is likely that Democrats will spare little time in getting a number of investigations off the ground, particularly those that complement the Biden Administration's first-100-days policy priorities.

Key committees to watch: Two committees to pay particular attention to will be the Senate Finance Committee and the Senate Committee on Banking, Housing and Urban Affairs. Senator Ron Wyden (D-OR) is expected to become Chairman of the Senate Finance Committee. Senator Wyden has a reputation as an aggressive investigator, and his past work has included investigations into international trade issues, the NRA, tax benefit abuse, and other topics. Recently, Senator Wyden, together with Senator Grassley (R-IA), issued a report illuminating the extensive connections among opioid manufacturers, opioid-related products, and tax-exempt entities. Wyden and Grassley also teamed up last Congress on a two-year investigation into insulin pricing. Companies can expect Senator Wyden to continue to pursue investigations into a wide range of consumer protection issues and other topics.

The Senate Committee on Banking, Housing and Urban Affairs is similarly likely to be active. Senator Sherrod Brown (D-OH) is expected to become Chairman of the Committee and likely will conduct aggressive oversight of the banking industry. Senator Elizabeth Warren (D-MA) may become Chairwoman of the Subcommittee on Financial Institutions and Consumer Protection, or even of a newly-created oversight committee. This would give Senator Warren oversight and investigation authority, including the ability to hold hearings and to issue subpoenas. Senator Warren has long been a proponent of broader regulation of financial institutions, including calling for stricter separation between commercial banks and investment banks and for efforts to expand access to lenders for average Americans.

Another committee to watch is the Commerce, Science, and Transportation Committee, which Senator Maria Cantwell (D-WA) is expected to chair. The panel has a wide set of responsibilities, including overseeing the regulation of technology companies and handling transportation infrastructure—both

issues that are likely to demand attention in the new Congress. It also sets policy for research agencies including NSF, the National Oceanic and Atmospheric Administration, and the National Institute of Standards and Technology. Senator Cantwell, a former technology industry executive, has a strong interest in research and climate issues, which could influence the panel's work, particularly in light of the Biden Administration's stated commitment to advancing climate change legislation. While Senator Cantwell has historically not been an active investigator, we can expect the Committee to be active in its legislative activities, and it may launch investigations that are ancillary to these legislative activities.

One final investigative body of note is the Senate Permanent Subcommittee on Investigations ("PSI"), which is a subcommittee of the Senate Homeland Security and Government Affairs Committee. 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. While it is unclear who will chair PSI at this time, we can expect it to be active in its investigations. When Democrats last controlled the Senate, former Michigan Senator Carl Levin chaired PSI and launched a series of high profile and wide-ranging investigations of the financial sector. It's likely the next Democratic Chair will follow Levin's lead and adopt an aggressive posture. Also worth watching is who will fill former Senator Kamala Harris's seat on PSI.

Potential Changes to Subpoena and Deposition Authority: We will also 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 117th Congress.

It is also important to keep a close watch on Senate deposition authority. In the last Congress, seven Senate bodies had authorization to take depositions: (1) Judiciary, (2) Homeland Security and Governmental Affairs ("HSGAC"), (3) PSI, (4) Aging, (5) Indian Affairs, (6) Ethics, and (7) Intelligence. Of these, HSGAC, PSI, Judiciary, and Aging can subpoena an individual to appear at a deposition. HSGAC, Judiciary, and Aging rules require concurrence of the ranking member or a Committee vote to authorize the issuance of a subpoena, while the Chair of PSI is empowered to issue a subpoena unilaterally. Moreover, staff is expressly authorized to take depositions in each of these committees except in the Indian Affairs and Intelligence Committees. However, heretofore the Senate's view is that Senate Rules do not authorize staff depositions pursuant to subpoena. Hence, Senate committees cannot delegate that authority to themselves through committee rules, absent a Senate resolution or a change in Senate rules. It remains to be seen whether and to what extent Democrats may expand these authorities.

II. Unique Features of Congressional Investigations

As a practical matter, numerous motivations (not always legitimate) often drive a congressional inquiry, including: advancing a chair's political agenda or public profile, 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.”^[5] 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,^[6] 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.^[7]

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/or 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, which request may seek documents or other information.^[8] Absent the issuance of a subpoena, responding to such requests is entirely voluntary as a legal matter (although of course there may be public and/or political pressure to respond). As such, recipients of such requests should carefully consider the pros and cons of different degrees of responsiveness.
- **Interviews:** Interviews also are voluntary, led by committee staff, and occur in private (in person or over the phone). 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 oath. 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. In the last Congress, the House required (with limited exceptions) that one or more Members of Congress be present during a deposition. Importantly, the House rules for the 117th Congress have eliminated this requirement (*see infra*, Section IV), which will likely result in an increase in the use—or at least threatened use—of depositions as an investigative tool.[9] It is expected that the House Rules Committee soon will issue guidance on how staff depositions are to be conducted. In the 116th Congress, staff of five Senate committees/subcommittees were authorized to conduct staff depositions: Judiciary, HSGAC, PSI, Aging and Ethics.[10] However, Judiciary 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 117th Congress will likely mirror in many respects the regulations issued by that Committee in the 116th 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 117th 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.[11]

- **Hearings:** While both depositions and interviews allow committees to acquire information quickly and (at least in many circumstances) confidentially,[12] testimony at hearings, unless on a sensitive topic, is conducted in a public session led by the members themselves (or, on occasion, committee counsel).[13] 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

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As noted above, Congress will usually seek voluntary compliance with its requests for information or testimony as an initial matter. If initial 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.^[14] Like Congress's power of inquiry, there is no explicit constitutional provision granting Congress the right to issue subpoenas.^[15] 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.^[16] Congressional subpoenas are subject to few legal challenges,^[17] and "there is virtually no pre-enforcement review of a congressional subpoena" in most circumstances.^[18]

The authority to issue subpoenas is initially governed by the rules of the House and Senate, which delegate further rulemaking to each committee.^[19] 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 117th Congress, and can take many forms.^[20] 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 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. Although Congress does not frequently resort to its contempt power to enforce its subpoenas, it has three potential avenues for seeking to implement its contempt authority.

- **Inherent Contempt Power:** The first, and least relied upon, 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.^[21] 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.^[22] 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 1934.^[23]
- **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.^[24] Under the statute, a person who refuses to comply with a subpoena is guilty of a misdemeanor and subject to a fine and imprisonment.^[25] "Importantly, while Congress initiates an action under the criminal contempt statute, the Executive Branch prosecutes it."^[26] 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

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Justice maintains that it always retains discretion not to prosecute, and often declines to do so.[27] Although utilized as recently as the 1980s, the criminal contempt power has largely fallen into disuse.[28]

- **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.[29] This statute expressly authorizes the Senate to seek enforcement of legislative subpoenas in a U.S. District Court. In contrast, the House does not have a civil contempt statute, but 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.”[30] 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.”[31] 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.[32] The House subsequently endorsed that position, and the BLAG authorized at least one civil enforcement action during the 116th Congress.[33] It seems likely that this authority will be continued in the 117th Congress.

IV. Defenses to Congressional Inquiries

While potential defenses to congressional investigations are limited, they are important to understand—likely more so now with Democrats taking control of both chambers. 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 a First Amendment challenge is invoked, a court must engage in a “balancing” of “competing private and public interests at stake in the particular circumstances shown.”^[34] 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.”^[35] 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.^[36] Courts have also recognized that the First Amendment constrains judicially compelled production of information in certain circumstances.^[37] Accordingly, it would be reasonable to contend that the First Amendment limits congressional subpoenas at least to the same extent.

The Fifth Amendment’s privilege against self-incrimination is available to witnesses—but not entities—who appear before Congress.^[38] The right generally applies only to *testimony*, and not to the production of documents,^[39] unless those documents satisfy a limited exception for “testimonial communications.”^[40] Congress can circumvent this defense by granting transactional immunity to an individual invoking the Fifth Amendment privilege.^[41] 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.^[42]

Attorney-Client Privilege & Work Product Defenses

Although committees in the House and Senate 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 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.”^[43] 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.^[44]

V. Top Mistakes and How to Prepare

Successfully navigating a congressional investigation requires a multifaceted 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:

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- **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 even 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.

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Democratic control of both congressional chambers and the White House is certain to usher in a more perilous landscape over the next two years for a wide array of public-facing industry actors, particularly those intertwined with current policy debates and hot button issues. 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.

[1] H.R. Res. 6, 116th Cong. § 104(f)(2)(B) (2019).

[2] *Id.*

[3] H.R. Res. 8, 117th Cong. § 4(g)(2)(B) (2021).

[4] H.R. Res. 8, 117th Cong. § 2(m) (2021).

[5] *Barenblatt v. United States*, 360 U.S. 178, 187 (1957).

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

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[7] 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 (2015).

[8] *Id.*

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

[10] *See* The Power to Investigate: Table of Authorities of House and Senate Committees for the 116th Congress, <https://www.gibsondunn.com/wp-content/uploads/2019/07/Power-to-Investigate-Table-of-Authorities-House-and-Senate-Committees-116th-Congress-07.2019.pdf>. Consistent with past practice, Gibson Dunn will release a client alert outlining the specific subpoena rules for each committee in the 117th Congress as soon as they become available.

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

[12] Bopp, *supra* note 7, at 457.

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

[14] *Id.* at 457.

[15] *Id.*

[16] *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504-05 (1975).

[17] Bopp, *supra* note 7, at 458.

[18] *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).

[19] *Id.* at 458.

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

[21] Bopp, *supra* note 7, at 460 (citing *Anderson v. Dunn*, 19 U.S. 204, 228 (1821)).

[22] *Id.*

[23] *Id.* at 466.

[24] *Id.* at 461.

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[25] See 2 U.S.C. §§ 192 and 194.

[26] Bopp, *supra* note 7, at 462.

[27] See 2 U.S.C. § 194.

[28] Bopp, *supra* note 7, at 467.

[29] See 2 U.S.C. §§ 288b(b), 288d.

[30] Bopp, *supra* note 7, at 465. However, the law on this point is currently unsettled after 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*, No. 19-5331 (D.C. Cir. 2020). The ruling is currently being considered *en banc*.

[31] *Id.*

[32] 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”).

[33] 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)).

[34] *Barenblatt*, 360 U.S. 109, 126 (1959).

[35] *Id.*

[36] See *id.* at 126-7.

[37] See, e.g., *Perry v. Schwarzenegger*, 91 F.3d 1147, 1173 (9th Cir. 2009).

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

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

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

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

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

[43] *See Trump v. Mazars USA, LLP* (591 U.S. ____ (2020)).

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



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