

## **Time to Prepare For Congressional Subpoenas in a Republican House**

By Alyssa DaCunha, Joel Green, and Anna Noone

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WilmerHale attorneys analyze the role that subpoenas are likely to play in congressional investigations this year. They say litigation will increase in a divided Congress, meaning companies should develop contingency plans to respond to inquiries.

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With a narrow Republican margin in the House of Representatives this coming year, constituencies in the caucus are likely to extract concessions in key areas, including committee assignments and rules, as well as resources and topics of oversight investigations.

Looking ahead to 2023, leadership may permit members to pursue active oversight agendas using a broad array of tactics to maintain greater unity in the majority. These include congressional subpoenas.

### **Trending Up**

While prior Congresses infrequently resorted to subpoenas as a method of enforcing compliance with their investigations, the Select Committee to Investigate the January 6th Attack on the United States Capitol made more liberal use of compulsory process over the past year.

The Jan. 6 committee has reportedly issued over 80 subpoenas, which have led to two key developments. First, there has been a substantial increase in the amount of litigation related to Congress's authority to issue and enforce such subpoenas, as well as in corresponding case law showing the reach and limits of congressional subpoena power. Second, the practice may carry over into the Republican-controlled House as incoming committee leadership seeks to match the resources and energy devoted to oversight in the prior Congress.

Both developments have implications for private parties in congressional inquiries. Potential oversight targets should have a plan to respond to congressional inquiries quickly and effectively.

### **Uptick in Subpoena Litigation**

Congress has broad authority to conduct investigations pursuant to its oversight and legislative functions. In *Watkins v. United States*, the Supreme Court was clear that this power is not unlimited. Investigations must serve a specific, enumerated legislative purpose.

Litigation around the scope of congressional subpoena authority has been infrequent, but the uptick in subpoena activity from the Jan. 6 committee—and the reluctance of recipients to comply—has led to a sharp increase in subpoena enforcement suits, with roughly 15 suits filed since the committee was formed.

This newly refreshed body of case law reaffirms congressional subpoena authority as well as its limits. The cases also address related issues that may be relevant to future subpoena challenges, such as the circumstances where a court will consider statements made by committee members in assessing the purpose of a subpoena.

Generally, courts are reluctant to second-guess legislative exercises of subpoena power, but recent cases demonstrate that there are situations in which a member's statements can undermine the alleged purpose that the legislature asserts for an investigation.

The litigation has also produced high-profile cases of severe penalties for non-compliance. In at least two cases, individuals received jail time for a failure to comply, serving as a very public reminder of Congress's enforcement authority.

While corporations are unlikely to be on the receiving end of these kinds of penalties, these reminders may reduce companies' appetite for pursuing the path of non-compliance. On the other hand, in some cases, the litigation had the effect of delaying subpoena compliance past the time that the committee could make use of the requested materials, leading the committee to withdraw its subpoena and rely on other sources. This may lead others to try to run out the clock on future subpoenas.

### **Prepare for Robust Oversight Activity**

GOP leadership has signaled that it is prepared to follow the example set by the Jan. 6 committee. The committee's willingness to go to court to enforce subpoenas makes it more likely that future Congresses will seek to match the resources and vigorous enforcement standard.

Likely future House Speaker Kevin McCarthy (R-Calif.) has already indicated his intention to create a select committee on China to investigate issues from intellectual property theft and Covid-19. Such a move would beef up the caucus's investigative resources. And incoming House Oversight Chair James Comer (R-Ky.) has said that his panel will "investigate between 40 and 50 different things. We have the capacity. We'll have 25 members on the committee,

and we're going to have a staff close to 70." Both statements underscore the intent to put significant resources behind the Republicans' priority investigations.

For private business, this spells a likely continuation of congressional focus on investigations and signals the need to shore up internal review and response processes. This could involve a proactive risk analysis in certain areas or doing inventory of key contacts on the Hill and reaching out to initiate dialogue.

Additionally, many companies are conducting tabletop drills and creating cross-functional teams that are prepared to respond to congressional inquiries. With the new Congress just around the corner, now is the time to prepare your company's response plan.

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