

Congressional Investigations Alert

October 24, 2017

Key Points

- Yesterday, the House passed a bill that could expand Congress's investigative authority and significantly impact companies and individuals involved in congressional investigations. While the bill was crafted to strengthen Congress's oversight of the executive branch, it nonetheless would change the landscape of all congressional investigations, including those of private citizens and corporate entities.
- If enacted, the new legislation would allow the House to seek expedited judicial civil enforcement of congressional subpoenas—versus the existing criminal contempt procedures currently available to the House. It would also statutorily require that all recipients of a congressional subpoena produce a detailed, timely privilege log.
- The bill is the latest example of Congress's concerted efforts to ratchet up the stakes of its investigations. Even if the bill is not ultimately enacted—which would require Senate passage and President Trump's approval—it nonetheless underscores the necessity of corporations and other targets of congressional scrutiny to approach such investigations with caution and an awareness of the legal duties and pitfalls attendant with an inquiry.



House Passes Resolution to Expand Congressional Subpoena Power and Demand Extraordinary Compliance from its Targets

Yesterday, the House passed a bill that could expand Congress's investigative authority and alter the manner in which investigations are conducted—with a potentially significant impact on companies and individuals involved in such inquiries. If enacted, the bill, which would still need to be passed by the Senate and signed into law by President Trump, would shift the current landscape regarding judicial review of congressional subpoenas and place significant burdens on all recipients of such subpoenas. As the latest example of a concerted effort to ratchet up the stakes of congressional investigations, it is one that all industries should carefully watch.

In recent years, Congress has sparred with the executive branch over the lines between congressional oversight power and executive privilege—perhaps most notably in Congress's investigations into the

Department of Justice's so-called "Fast and Furious" program, in which Congress fought for years to gain access to certain records and other information. In the course of this investigation, as well as in many others, both parties have called upon the executive branch to more fulsomely and more promptly comply with congressional subpoenas. At the same time, Congress has bolstered its committees' authority to subpoena documents and witnesses. In the current Congress, the Republicans' focus on executive branch oversight continues, notwithstanding the fact that a Republican now occupies the White House. Indeed, in the first nine months of President Trump's term, congressional Republicans called upon the President to fire Internal Review Service Commissioner John Andrew Koskinen, began investigating the use of private travel by cabinet officials and opened several inquiries into the alleged Russian interference in the election—all hitting very close to home for the Administration.

The new resolution, introduced by Rep. Darrell Issa (R-CA) and Rep. Bob Goodlatte (R-VA)—and passed unanimously by the House Judiciary Committee earlier this month—is a clear effort to pressure the executive branch into compliance. But, no matter the genesis, if passed, this legislation could have a remarkable impact on all targets of congressional investigations, including private parties and corporations—not just executive branch agencies. There are at least two immediate and significant impacts relevant to all individuals and corporate actors who are, or may become, involved in a congressional inquiry.

First, the legislation would fundamentally alter the process by which congressional subpoenas could be challenged in the courts. Currently, judicial review of House subpoenas can occur only after the House refers a reluctant witness to the U.S. Attorney for prosecution and the witness is indicted for criminal contempt under 2 U.S.C. §§192 and 194. In other words, a private party that wants to challenge the breadth or constitutionality of a subpoena has no standing or recourse to challenge the subpoena in court **until** Congress has held that party in contempt for refusing to produce the requested documents and the witness must be willing to face a federal criminal misdemeanor charge to perfect the challenge. The proposed legislation, however, would allow the House, at its option, to seek civil enforcement of a subpoena. Thus, even though a private party would still lack standing to bring the matter to the courts for judicial review, the private party would not need to become a criminal defendant in the matter to seek such review.

In providing the House with civil enforcement authority (an authority that only the Senate currently holds), the legislation is intended to expedite judicial review and compliance with Congress's oversight investigations. However, it may very well have the opposite effect with respect to private parties and corporations, since such investigation targets may be more inclined to defy a congressional subpoena (in order to appropriately challenge it) when there is a civil judicial mechanism to use that would not necessarily subject the party to potential criminal exposure. Further, under the statute, the dispute would be heard on an expedited basis by a panel of three federal district court judges, rather than just one.

Second, the legislation would enact a statutory requirement to submit a detailed privilege log in response to any congressional subpoena. While congressional subpoenas often contain an instruction calling for a

log of documents withheld for attorney-client, attorney work product or other privileges, in practice, providing such a log often requires discussion between outside counsel and committee staff, and is often addressed on a case-by-case basis. The proposed legislation would statutorily require a subpoena recipient to prepare a detailed privilege log even if the committee does not need or want one. Further, the statute would require an exhaustive privilege log, including the relationship between a document's author and its addressee. If a subpoena recipient fails to produce such a detailed log, or fails to "timely" claim a specific privilege over a document, the legislation declares that the privilege has been waived. Thus, a subpoena recipient who wishes to challenge the constitutionality of a congressional subpoena must, under the legislation, specifically assert each and every privilege at the time of production; otherwise, should the matter be brought to the courts for resolution, Congress may argue that the privileges were waived and cannot be litigated judicially. This has obvious and serious implications for any party engaging with Congress—and particularly those with relevant parallel matters to consider, be they civil, criminal, regulatory, or other.

As noted above, this legislation is Congress's latest attempt to sharpen its investigational toolbox. The bill has strong support in the House, having unanimously passed the Judiciary Committee with a vote of 26-0, and having passed yesterday by voice vote. Despite the House's support, however, the bill now needs Senate approval. Of course, even if both chambers pass the legislation, President Trump would still have an opportunity to veto it—which would certainly raise its own political considerations. While ultimate passage of the proposed bill is hard to predict, the efforts of Rep. Goodlatte, Rep. Issa and their House colleagues nonetheless underscore the necessity of corporations and other targets of congressional scrutiny to approach such investigations with caution and an awareness of the legal duties and pitfalls attendant with an inquiry.

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