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GIBSON DUNN



Congressional Investigations Update

January 22, 2025

Congressional Investigations in the 119th Congress

To help organizations assess their preparedness for the 119th Congress, Gibson Dunn offers insights into Congress's likely investigative priorities and practical guidance on congressional committees.

With Republicans taking control of the U.S. Senate, the party now holds the majority in both chambers and Republican committee chairs will control the investigative agenda in the 119th Congress. We expect that Republicans will investigate a variety of topics, including: wasteful government spending (working with the Department of Government Efficiency); university responses to antisemitism; environmental, social, and corporate governance (ESG) efforts; Big Tech; China-related issues; the high cost of healthcare; the role of diversity, equity, and inclusion (DEI) programs; COVID origins; and debanking. Other focal points likely will include border security and cryptocurrency. With President Trump in the White House, Congress is less likely to focus investigations on the executive branch and allocate more of its resources to examining the private sector and causes perceived to be aligned with the left. Despite sharp partisan divides, there may be areas for bipartisan cooperation, particularly regarding cybersecurity threats, artificial intelligence, and investigations relating to China.

Unlike executive branch investigations, congressional probes can unfold quickly and attract immediate media attention, often requiring swift, strategic responses. Companies, universities, other organizations, and individuals facing potential investigations must be prepared to navigate not only the substantive issues raised but also the unique norms and procedures governing

congressional investigations, as well as the public and media scrutiny that often accompanies these inquiries.

To help organizations assess their preparedness for the 119th Congress, Gibson Dunn offers insights into Congress's likely investigative priorities and practical guidance on congressional committees. This includes a review of Congress's legal authority, common defenses, and best practices for managing requests for information. As the new Congress begins, now is the time for organizations and individuals to plan for the possibility of congressional scrutiny and ensure they are ready to respond to the challenges ahead.

I. Lay of the Land in the 119th Congress (House)

As we explained in prior alerts for the [116th](#), [117th](#), and [118th](#) Congresses, the House adopts rules at the beginning of each Congress. After re-electing Speaker Mike Johnson (R-LA-4), the House adopted its [rules package](#) for the 119th Congress on January 3, 2025. Although the rules package does not add any new investigative tools, it maintains the House's expansive investigative authorities, including the majority's ability to issue subpoenas without consulting members of the minority and deposition powers that allow staff to conduct depositions without members present.

Investigative Priorities: We expect several investigative priorities to continue over from the last Congress. For example, Big Tech—the most investigated industry during the 118th Congress—is likely to face continued scrutiny on multiple levels. We also expect increased investigative activity related to alleged censorship of conservative viewpoints on social media platforms and in the media. Similarly, healthcare companies, specifically pharmaceutical companies and pharmacy benefit managers, are likely to face continued scrutiny in the 119th Congress.

The **Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party** has been renewed for the 119th Congress.^[1] In the last Congress, the Select Committee pursued a number of investigations, generally on a bipartisan basis, and advanced legislative measures designed to counteract the Chinese Communist Party's (CCP) influence. The Select Committee has focused on areas such as research security,^[2] TikTok data collection and influence,^[3] banning certain CCP-influenced drone manufacturers,^[4] protecting Taiwan against possible invasion,^[5] and introducing legislation to combat the CCP's role in the fentanyl crisis^[6] and the use of forced labor and Uyghur labor,^[7] among others. The Select Committee is poised to continue its focus on the CCP's impact on the supply chain, U.S. capital flows to Chinese corporations, and technological decoupling.

Notably, the House Rules package broadens the Select Committee's investigative jurisdiction for the 119th Congress. The Select Committee's expanded jurisdiction now consists of "policy recommendations on **countering** the economic, technological, security, and **ideological** threats of the Chinese Communist Party **to the United States and allies and partners of the United States**,"^[8] a seemingly broader and more pointed focus than its jurisdiction in the 118th Congress, which was "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**."^[9] Chairman John Moolenaar (R-MI-2), who succeeded

Mike Gallagher (R-WI-8) in April 2024, has expressed optimism that the Select Committee will continue its bipartisan work into the 119th Congress.

Committee Leadership Changes and Priorities: While we expect many investigative priorities from the last Congress to carry forward, companies should be aware of new leadership at several key committee and subcommittee posts, as well as the creation of the new Subcommittee on Delivering on Government Efficiency, which may portend new investigative priorities.

The **Committee on Energy and Commerce** will be led by new [Chairman Brett Guthrie](#) (R-KY-2), a longtime member of the Committee who also previously chaired the Subcommittees on Health and Oversight and Investigations. Guthrie has expressed [interest](#) in broadband spectrum, privacy, artificial intelligence, and addressing Big Tech’s perceived role in censorship. Additionally, new **Health Subcommittee** Chairman Buddy Carter (R-GA-1), a former pharmacist, announced [\[10\]](#) plans to prioritize reducing drug prices and likely will focus his Subcommittee’s attention on pharmacy benefit managers, a topic about which he has been outspoken. Similarly, Chairman Gary Palmer (R-AL-6), plans to target the healthcare industry in his new role atop the **Oversight and Investigations Subcommittee**. [\[11\]](#)

The **Committee on Oversight and Government Reform** (previously the Committee on Oversight and Accountability) will again be led by Chairman James Comer (R-KY-1). Chairman Comer announced that Rep. Marjorie Taylor Greene (R-GA-14) will chair the new **Subcommittee on Delivering on Government Efficiency (the “DOGE Subcommittee”)**. It is expected that the DOGE Subcommittee will work closely with President Trump’s Department of Government Efficiency (DOGE). DOGE’s mission is to reduce the deficit, streamline the federal workforce, and curtail the administrative state. DOGE itself will not have the power to reduce spending or cut programs—that authority rests with Congress. Thus, we expect the DOGE Subcommittee and DOGE to work together, with the DOGE Subcommittee using its investigative powers to augment DOGE’s recommendations to Congress. [\[12\]](#) We discuss DOGE’s potential structure and implications in further detail in another [client alert](#).

The **Committee on the Judiciary** will again be led by Chairman Jim Jordan (R-OH-4), while Rep. Jefferson Van Drew (R-NJ-2) will lead the Subcommittee on Oversight. Notably, House leadership chose not to renew the Committee’s Select Subcommittee on the Weaponization of the Federal Government in the 119th Congress, though we anticipate the full committee to continue investigating alleged weaponization of the government and suppression of conservative speech.

Lastly, the **Committee on Education and Workforce’s** new Chairman Tim Walberg (R-MI-5), will likely continue to focus in part on how colleges and universities respond to antisemitism on campus—an investigative focal point of the 118th Congress.

II. Lay of the Land in the 119th Congress (Senate)

Senate committees soon will begin to organize and to publish their rules. We anticipate a relatively slow start to Senate investigations in the 119th Congress while the Senate focuses on the confirmation of President Trump’s cabinet nominees. That said, we may see early investigative and oversight activity from some Republicans who launched investigations from

their ranking member positions last Congress, and, as the Congress gets underway, we expect Senate Republicans to aggressively pursue investigations on various topics.

Key committees to watch: While all Senate committees have investigative jurisdiction and authorities, we focus on four that we expect to be active: the Commerce, Science, and Transportation Committee; the Judiciary Committee; the Homeland Security and Governmental Affairs Committee; and the Permanent Subcommittee on Investigations.

As Chairman of the **Senate Commerce, Science, and Transportation Committee**, Ted Cruz (R-TX) is likely to expand the investigative agenda he developed during the 118th Congress. During the 118th Congress, he investigated National Science Foundation grants for research projects allegedly pursuing [DEI agendas](#) and large technology companies' recommendation algorithms for allegedly [suppressing speech](#). Just this past November, then-Ranking Member Cruz opened an investigation into foreign influence on AI.[\[13\]](#) We anticipate Chairman Cruz will continue to show interest in these topics and likely expand into others.

Senator Chuck Grassley (R-IA), always an active investigator, will once again chair the **Senate Judiciary Committee**, a position he held from 2015 to 2019. Last Congress, he used his position as Ranking Member of the Senate Committee on the Budget—a committee not usually associated with investigations—to pursue inquiries into private equity firms and banks. Back atop a more conventional investigative committee, we anticipate he will continue ongoing investigations as well as look into the Biden Department of Justice's special counsel investigation and charges against President Trump. We also expect him to investigate how antitrust laws apply to the purported monopolization of the tech sector and to conduct oversight to support President Trump's immigration policy agenda. Given his strong relationship with the whistleblower community, we expect Chairman Grassley to continue working with whistleblowers on investigations involving government contracting and other issues.

Senator Rand Paul (R-KY) will chair the **Senate Homeland Security and Governmental Affairs Committee** (HSGAC). Chairman Paul has one of the strongest voices in Congress against government waste, fraud, and abuse, publishing an annual "Festivus" Report on government waste.[\[14\]](#) We expect he will work closely with DOGE to highlight government waste through oversight and support legislation to effectuate DOGE's goals. He also has publicly promised to hold hearings to investigate the origins of COVID-19.[\[15\]](#)

The **Senate Permanent Subcommittee on Investigations** (PSI), a HSGAC subcommittee, has some of the broadest investigative authorities and jurisdiction in the Senate. Its jurisdiction has expanded over time and today includes including oversight all government agencies, organized crime and other criminal activities, national security, energy, and labor issues.[\[16\]](#) Chaired by Senator Richard Blumenthal (D-CT) during the 118th Congress, PSI was very active, holding investigative hearings on multiple topics, including Saudi Arabian investment in the United States, aircraft manufacturing safety, and the semiconductor industry. The new PSI chairman, Senator Ron Johnson (R-WI), is more likely to investigate COVID-19 origins, vaccine efficacy, and how to eliminate waste, fraud, and abuse in the federal government.

Senator Bill Cassidy (R-LA), a gastroenterologist, will be taking over as Chairman of the **Senate Health, Education, Labor, and Pensions (HELP) Committee**, and we expect he will wield his

investigative authorities aggressively. Senator Cassidy is likely to focus on healthcare issues such as prescription drug costs and unexpected medical bills; student loan debt; cybersecurity in the healthcare ecosystem; and lowering the cost of higher education. During the 118th Congress, Senator Cassidy demonstrated his interest in investigations, seeking information from [UnitedHealth Group](#) regarding a data breach of its subsidiary, Change Healthcare. He also began an investigation into the government's [340B Drug Pricing Program](#).

Potential Changes to Subpoena and Deposition Authority: We will be closely watching whether Senate Republicans strengthen their investigative arsenal, particularly when it comes to subpoena and deposition authority. On the House side, the chamber's rules allow committee chairs to issue subpoenas unilaterally—although specific committee rules may require giving notice to the ranking member or other procedures. In the Senate, there has been a longstanding hesitation on whether to grant committee chairs unilateral subpoena authority. We will see if any Senate chairs take a more aggressive approach to committee rules in the 119th Congress.

It is also important to keep a close watch on Senate deposition authority. In the last Congress, nine 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; and (9) Intelligence. Staff is expressly authorized to take depositions in each of these committees other than the Intelligence Committee. Note that Senate rules do not provide committees with authority to compel deposition testimony. Instead, the Senate may grant that power to certain committees through a Senate resolution. Hence, the Senate's committee funding resolution for the 118th Congress granted the Judiciary Committee, HSGAC, and PSI the ability to subpoena witnesses for depositions.^[17] While other committees may maintain deposition authority through their rules, any deposition testimony would be on a voluntary basis.^[18]

III. Unique Features of Congressional Investigations

Congressional investigations are unlike more familiar executive branch investigations in several respects. First, there are often complex motivations at work. Committee chairs may want to advance their political agenda, heighten their public profile, develop support for a legislative proposal, expose alleged criminal wrongdoing or unethical practices, pressure a company to take certain actions, or respond to public outcry. Recognizing these underlying objectives and evaluating the political context surrounding an inquiry can therefore be a key component of developing an effective response strategy.

Second, Congress's power to investigate is broad—as broad as its legislative authority—which can often make investigations unpredictable. The “power of inquiry” is inherent in Congress's authority to “enact and appropriate under the Constitution.”^[19] 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,^[20] 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.^[21]

Finally, unlike the relatively controlled environment of a courtroom or a confidential investigation, congressional investigations often unfold through public letters and subpoenas and before television cameras in hearing rooms. Targets must coordinate their legal, political, and communications strategies to respond effectively.

IV. Investigatory Tools of Congressional Committees

Congress has a broad range of investigatory tools at its disposal, which enable it to gather information, ensure compliance with legal and regulatory standards, and inform legislative and policy agendas. Although many of Congress's tools present opportunities for targets to comply voluntarily, it does have the ability to issue subpoenas for documents and testimony. It is essential for subjects of congressional oversight to understand both the scope and the limitations of these investigatory powers in order to respond effectively.

- **Requests for Information:** Any member of Congress may request information from an individual or entity, including through documents, briefings, or other formats.^[22] Absent the issuance of a subpoena, responding to such requests is 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 merits of different degrees of engagement.
- **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, transcribed, and taken under oath. As such, depositions tend to be 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, and a member no longer needs to be present in a House committee deposition.
- **Hearings:** While both depositions and interviews allow committees to acquire information quickly and (at least in many circumstances) confidentially,^[23] testimony at hearings, unless on a sensitive topic, is conducted in a public session led by the members themselves (or, on occasion, committee counsel).^[24] 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, Congress will usually seek voluntary compliance with its requests for information or testimony as an initial matter. If requests for voluntary compliance are met with resistance, however, or if time is of the essence, Congress may compel disclosure of information or testimony by issuing a subpoena.^[25] Like Congress's power of inquiry generally, there is no explicit constitutional provision granting Congress the right to issue subpoenas.^[26] 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.^[27] Congressional subpoenas are subject to few legal challenges,^[28] and "there is virtually no pre-enforcement review of a congressional subpoena" in most circumstances.^[29]

The authority to issue subpoenas is initially governed by the rules of the House and Senate, which delegate further rulemaking to each committee.^[30] While 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 119th Congress and can take many forms. For example, in the 118th Congress, most House committee chairs were authorized to issue subpoenas unilaterally if they provided notice to the ranking member. Other chairs, however, required approval of the ranking member, or, upon the ranking member's objection, required a vote of the majority of the committee in order to issue a subpoena.

Contempt of Congress

Failure to comply with a subpoena can result in one of three enforcement avenues: a criminal contempt referral, a civil contempt action, or exercise of Congress's inherent contempt power.

- **Statutory Criminal Contempt Power:** Congress possesses statutory authority to certify recalcitrant witnesses for criminal contempt prosecutions in federal court. In 1857, Congress enacted this criminal contempt statute as a supplement to its inherent authority.^[31] Under the statute, a person who refuses to comply with a subpoena is guilty of a misdemeanor and subject to a fine and imprisonment.^[32] "Importantly, while Congress initiates an action under the criminal contempt statute, the Executive Branch prosecutes."^[33] This relieves Congress of the burdens associated with its inherent contempt authority. The statute simply requires the House or Senate to certify a contempt finding to the Department of Justice. Thereafter, the statute provides that it is the "duty" of the "appropriate United States attorney" to prosecute the matter,^[34] although the Department of Justice maintains that it always retains discretion not to prosecute and often declines to do so. Although Congress rarely uses its criminal contempt authority, the House Democratic majority, following January 6, 2021, 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 the D.C. Circuit upheld his conviction.^[35] In September 2024, the Senate unanimously voted to find Ralph de la Torre, the CEO of a bankrupt hospital operator, Steward Health Care, in contempt of the Senate and to certify the report of his contempt to the U.S. Attorney for prosecution. This was the first time the Senate had held someone in criminal contempt since 1971.^[36]

- **Civil Enforcement Authority:** 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.^[37] This statute 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 federal district judges 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.”^[38]
- **Inherent Contempt Power:** The first, and least relied upon, form of compulsion is Congress’s inherent contempt power. The inherent contempt power has not been used by either body since 1935.^[39] 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.^[40] 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.^[41] As is apparent in this description, the inherent contempt authority is cumbersome and inefficient, and it is potentially fraught with political peril for legislators.^[42]

V. Defenses to Congressional Inquiries

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

Legislative Purpose

Because the Constitution grants Congress the power to investigate as a means of informing its legislative responsibilities, a congressional investigation must have a “valid legislative purpose,” that is, it must be “related to, and in furtherance of, a legitimate task of Congress.” The Supreme Court provided guideposts on legislative purpose defenses in *Trump v. Mazars*.^[43] In *Mazars*, the Court announced what it called a “balanced approach” to govern future interbranch disputes, laying out a somewhat more rigorous set of guideposts that it viewed as protecting Congress’s ability to investigate the president while also mitigating the risk of improper congressional inquiry. The Court’s language emphasized that legislative purpose must serve as a limiting principle with respect to Congress’s subpoena power. Accordingly, to demonstrate a valid legislative purpose, Congress must, in effect, show its work and adequately describe the nexus between the records sought and the legislation the committee is considering.

Courts recently evaluating legislative purpose have largely followed *Mazars* while ultimately showing deference to committees.^[44] Based on current information, the last time this defense was successfully argued was in 1880.^[45]

Committee Jurisdiction and Procedural Defenses

Committees are created by the Senate and House. They have no independent authority beyond their delegations. Each committee creates its own rules based on Senate or House delegation, and the committee is then bound by those rules. These rules provide procedural protections to targets of congressional investigations. If a committee fails to follow its rules and violates the

rights of witnesses in the process, the violation is cognizable in court and can be used as an effective defense against contempt.^[46] In addition, the subject matter of an inquiry must also be within the scope of jurisdiction clearly delegated to the committee by Congress.

As an example of the potential importance of rule violations in the authorization of subpoenas, we note the Senate Judiciary Committee's attempt to authorize subpoenas against Harlan Crow and Leonard Leo in November 2023. There, the Committee majority committed three rule violations. First, the Committee majority violated the Senate's "Two-Hour Rule," which prohibits committees from conducting business after two hours have elapsed from when the Senate convenes on a given day.^[47] While the Senate convened at 10 AM that day, the Committee's vote did not conclude until 12:02 PM. Second, the Committee violated Senate Judiciary Committee Rule IV, which requires that a matter may be brought to a vote without further debate only if at least one of the votes to end debate is "cast by the minority."^[48] No Republican senators voted to bring the matter to a vote. Third, the Committee violated Senate Judiciary Committee Rule III, which requires that at least "[n]ine Members of the Committee, including at least two Members of the minority," be present in order to transact business. No Republican members of the Committee were present during the vote. Although the significance of these rule violations were never litigated, the Committee majority's procedural missteps provided a strong potential defense if the Committee attempted to enforce the subpoenas, which it never did.

Constitutional Defenses

Constitutional defenses under the First, Fourth, 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.

The First Amendment protects petitioning, lobbying, association, and speech on matters of public concern, and it prohibits government officials from taking retaliatory actions on account of protected speech. 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."^[49] 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."^[50] A First Amendment defense has succeeded in cases where committees have used their powers to investigate political ideas with which they disagree – though not since the 1950s.^[51]

The First Amendment also constrains judicially compelled production of information in certain circumstances.^[52] Accordingly, it is clear that the First Amendment limits congressional subpoenas in some circumstances. Moreover, targets of congressional investigations sometimes contend that the investigation itself constitutes impermissible retaliation in violation because it was allegedly initiated and pursued because of the target's exercise of First Amendment rights. It is an open question whether retaliatory motives can be inferred from committees' and members' public statements regarding the nature and purpose of an investigation.^[53]

The Fourth Amendment protects individuals from subpoenas that are overly broad and that lack congruence and proportionality to the scope of the investigation.^[54] Supreme Court dicta suggest the Fourth Amendment can be a valid defense in certain circumstances related to the

issuance of congressional subpoenas.^[55] Nevertheless, no court has relied on it to reverse a contempt conviction.^[56]

The Fifth Amendment's privilege against self-incrimination is available to witnesses—but not entities—who appear before Congress.^[57] The right generally applies only to *testimony*, and not to the production of documents,^[58] unless those documents satisfy a limited exception for “testimonial communications.”^[59] Congress can circumvent this defense by granting transactional immunity to an individual invoking the Fifth Amendment privilege.^[60] This allows a witness to testify without the threat of a subsequent criminal prosecution based on the testimony provided.

Attorney-Client Privilege & Work Product Defenses

Although the House and the Senate have taken the position that they are not required to recognize the attorney-client privilege, in practice, they generally do. Moreover, no court has ruled that the attorney-client privilege does not apply to congressional investigations. In *Mazars*, the Court stated that recipients of congressional subpoenas retain both “common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege.”^[61] While the Court's treatment of common law privileges in *Mazars* is arguably dicta, both the executive branch and private litigants can be expected to take the position that Congress is obligated to observe common law privileges in the same way that courts and grand juries must observe them. Recent court decisions have followed the *Mazars* language on attorney-client privilege. For instance, while the district court in *Eastman v. Thompson* rejected the plaintiff's broad attorney-client privilege claims over an entire cache of documents requested by the government, it permitted the plaintiff leave to reassert privilege claims in the context of specific documents, concluding that “[t]he party must assert the privilege as to each record sought to allow the court to rule with specificity.”^[62]

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. The question is whether such investigations are the type of “adversarial proceeding” required to satisfy the “anticipation of litigation” requirement.^[63]

VI. 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 closely-coordinated 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 119th Congress is poised to continue a robust and wide-ranging slate of investigations, driven by Republican priorities in both the House and Senate. While investigations into Big Tech, healthcare, government efficiency, and Chinese influence remain central, the new leadership and shifting committee structures will likely introduce additional areas of focus, such as the role of DEI programs, ESG efforts, and border security. Organizations, companies, and universities must remain vigilant, prepared not only for the substantive policy scrutiny these investigations may bring but also for the public attention and political dynamics that often accompany congressional probes. With the heightened scrutiny of both media and public opinion, navigating congressional investigations requires careful, proactive preparation. 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 likely, please feel free to contact us for assistance.

[1] See H.R. Res. 5, 119th Cong, § 4(a) (2025).

[2] See Report Summary: How American Taxpayers and Universities Fund the CCP's Advanced Military and Technological Research. The Select Committee on the Chinese Communist Party (Sept. 24, 2024), <https://selectcommitteeontheccp.house.gov/media/videos/report-summary-how-american-taxpayers-and-universities-fund-ccps-advanced-military-and>.

[3] See Letters to CEOs of TikTok, Apple & Google Following DC Circuit Court Decision. The Select Committee on the Chinese Communist Party (Dec. 13, 2024), <https://selectcommitteeontheccp.house.gov/media/letters/letters-ceos-tiktok-apple-google-following-dc-circuit-court-decision>.

[4] See Press Release, Moolenaar, Krishnamoorthi: Commerce's Move to Restrict PRC Drones Enhances National Security (Jan. 3, 2025), <https://selectcommitteeontheccp.house.gov/media/press-releases/moolenaar-krishnamoorthi-commerces-move-restrict-prc-drones-enhances-national>.

[5] See Ten For Taiwan: Policy Recommendations to Preserve Peace and Stability in the Taiwan Strait. The Select Committee on the Chinese Communist Party (May 24, 2023), (<https://docs.house.gov/meetings/ZS/ZS00/20230524/116035/HRPT-118-2.pdf>).

[6] See Fentanyl Policy Working Group Unveils Bipartisan Legislation. The Select Committee on the Chinese Communist Party (Dec. 17, 2024), <https://selectcommitteeontheccp.house.gov/media/press-releases/fentanyl-policy-working-group-unveils-bipartisan-legislation>.

[7] See *generally* The Select Committee on the CCP: Uyghur Genocide, <https://selectcommitteeontheccp.house.gov/issues/uyghur-genocide>.

[8] H.R. Res. 5, 119th Cong, § 4(a)(2) (2025) (emphasis added).

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

[10] See Press Release, Rep. Buddy Carter, Carter Selected to Chair Energy and Commerce Subcommittee on Health (Dec. 20, 2024), <http://buddycarter.house.gov/news/documentsingle.aspx?DocumentID=15295>.

[11] See @RepGaryPalmer, X (Dec. 20, 2024, 6:04 PM), <http://x.com/USRepGaryPalmer/status/1870243948234518704>.

[12] See *also* Theodore Schleifer and Madeleine Ngo, *Inside Elon Musk's Plan for DOGE to Slash Government Costs*, The New York Times (Jan. 12, 2025), <https://www.nytimes.com/2025/01/12/us/politics/elon-musk-doge-government-trump.html>.

[13] Letter from The Hon. Ted Cruz, Ranking Member, S. Comm. on Commerce, Science & Transp. to the Hon. Merrick Garland, Atty Gen., U.S. Dep't of Justice (Nov. 21, 2024), <https://www.commerce.senate.gov/services/files/55267EFF-11A8-4BD6-BE1E-61452A3C48E3>.

[14] See *e.g.*, Press Release, Dr. Paul Releases 2024 'Festivus' Report on Government Waste (Dec. 23, 2024), <https://www.hsgac.senate.gov/media/rep/dr-paul-releases-2024-festivus-report-on-government-waste/>.

[15] John Wilkerson, Rand Paul plans to investigate Covid-19 origins from his new perch leading a key committee, STAT News (Nov. 22, 2024), <https://www.statnews.com/2024/11/22/rand-paul-senate-investigation-covid-19-origin-lab-leak-theory-anthony-fauci-nih/>.

[16] S. Res. 59, 118th Cong. §§ 12(e)(1)(A)–(G).

[17] S. Res. 59, 118th Cong. §§ 12(e)(3)(E), 13(e) (2023).

[18] See Authority and Rules of Senate Committees, 2023–2024 (118th Congress), <https://www.govinfo.gov/content/pkg/CDOC-118sdoc4/pdf/CDOC-118sdoc4.pdf>.

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

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

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

[22] *Id.*

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

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

[25] *Id.* at 457.

[26] *Id.*

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

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

[29] *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). It also could be argued that a subpoena is subject to pre-enforcement challenge if it lacks a valid legislative purpose. The idea is that the Speech or Debate Clause might not preclude a preemptive litigation challenge to such a subpoena on the rationale that a subpoena lacking any valid legislative purpose is not a legislative act at all. In *Trump v. Committee on Ways & Means*, the district court explained that “in the context of investigations, and in particular cases involving congressional efforts to gather information, . . . Speech or Debate Clause immunity is available only when those efforts are undertaken for a legitimate legislative purpose, that is, to gather information ‘concerning a subject “on which legislation could be had.”’” 415 F. Supp. 3d 38, 45-46 (D.D.C. 2019) (quoting *McSurely v. McClellan*, 553 F.2d 1277, 1284-85 (D.C. Cir. 1976) (en banc), in turn quoting *Eastland*, 421 U.S. at 506). The argument faces the challenges discussed earlier in that we have not seen a successful challenge based on legislative purpose in nearly a century and a half.

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

[31] *Id.* at 461.

[32] See 2 U.S.C. §§ 192 and 194.

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

[34] See 2 U.S.C. § 194.

[35] *United States v. Bannon*, 101 F.4th 16, 18 (D.C. Cir. 2024).

[36] 170 Cong. Rec. S6405-02 (daily ed. Sept. 25, 2024); S. Res. 837 (118th Cong.).

[37] See 2 U.S.C. §§ 288b(b), 288d.

[38] Bopp, *supra* note 11, at 465. A panel of the U.S. Court of Appeals for the D.C. Circuit ruled in August 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*, 973 F.3d 121 (D.C. Cir. 2020). That decision was vacated when the D.C. Circuit decided to rehear the case en banc, but the case then settled without a final judicial resolution, thereby leaving the question unresolved in the D.C. Circuit.

[39] See *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, Congressional Research Service (May 12, 2017), at 12.

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

[41] *Id.*

[42] *Id.* at 466.

[43] *Trump v. Mazars*, 140 S. Ct. 2019 (2020).

[44] See *Committee on Ways and Means, U.S. House of Representatives v. U.S. Dep't of Treasury* (D.C. Cir. 2022) (upholding the subpoena as valid, the court found a valid legislative purpose in the requests: the Presidential Audit Program); *Bragg v. Jordan* (S.D.N.Y. 2023) (holding that the subpoena had a valid legislative purpose, the court accepted Defendant's argument that subpoenas related to federal funding and possible legislative reforms to insulate current and former presidents from state prosecutions had valid legislative purposes); *Eastman v. Thompson* (C.D. Cal. 2022) (finding a valid legislative purpose, the court held that "the issues surrounding the 2020 election and the January 6th attacks [are] clearly 'subjects on which legislation could be had,' [and that] there are numerous legislative measures that could relate to [Plaintiff's] communications.").

[45] See *Kilbourn v. Thompson*, 103 U.S. 168 (1880) (overturning a contempt conviction on the ground that the House lacked a legislative purpose, because the investigation was deemed judicial rather than legislative in character).

[46] See *Liveright v. United States*, 347 F.2d 473 (D.C. Cir. 1965) (holding a subpoena was invalid where a subcommittee's rules required the whole subcommittee to issue subpoena, but the subpoena was issued only by the Chair, without consulting the rest of the subcommittee); *Shelton v. United States*, 327 F.2d 601 (D.C. Cir. 1963) (finding a subpoena invalid where

committee rules permitted a chairman to delegate “ministerial responsibility” but did not authorize delegation of discretionary function of calling witnesses “it deem[ed] advisable”; “[s]ince the Subcommittee did not authorize the issuance of the subpoena to Shelton, the subpoena was invalid”).

[47] See Senate Rule XXVI(5)(a).

[48] Committee Rule IV.

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

[50] *Id.* at 126–27.

[51] See *Rumely v. United States*, 345 U.S. 41 (1953) (relying at least in part on the First Amendment in that the Court imposed a heightened level of scrutiny in assessing the jurisdictional question because of substantial doubts about the constitutionality of the inquiry under the First Amendment); *United States v. Peck*, 154 F. Supp. 603 (D.D.C. 1957) (granting motion for acquittal for contempt conviction where committee asked for names of fellow Communists and defendant refused to answer on First Amendment grounds). However, in *Republican Nat’l Comm. v. Pelosi*, Chairman Bennie Thompson (D-MS) of the January 6th Select Committee issued a subpoena to Salesforce.com, ordering the company to produce documents and to testify at a Select Committee deposition about, *inter alia*, the Republican National Committee’s (RNC) use of the platform. 602 F. Supp. 3d 1, 12–15 (D.D.C. 2022), *vacated*, No. 22-5123, 2022 WL 4349778 (D.C. Cir. Sept. 16, 2022). The RNC sued Speaker Nancy Pelosi (D-CA), the Select Committee, and each member of the Select Committee to challenge the subpoena, arguing in part that the subpoena violated the First Amendment. *Id.* at 15. The district court rejected the RNC’s First Amendment objections to the subpoena, *id.* at 35, but the DC Circuit granted an injunction pending appeal, meaning that the DC Circuit found a likelihood of success on appeal, see *Republican Nat’l Comm. v. Pelosi*, No. 22-5123 (May 25, 2022). The Select Committee withdrew the subpoena, mooting the case. *Republican Nat’l Comm. v. Pelosi*, No. 22-5123, 2022 WL 4349778, at *1 (D.C. Cir. Sept. 16, 2022). Thus, while there was ultimately no decision made on the merits, this may be viewed as a case in which the First Amendment defense was ultimately successful.

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

[53] See *Hartman v. Moore*, 547 U.S. 250, 260 (2006) (“Evidence of the motive and the [adverse action are] sufficient for a circumstantial demonstration that the one caused the other.”); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019) (demonstrating that motive may be inferred when individuals “otherwise similarly situated” but “not engaged in the same sort of protected speech” are not subject to the same adverse action).

[54] *McPhaul v. United States*, 364 U.S. 372 (1960).

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

[56] *Id.*

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

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

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

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

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

[62] See *Eastman v. Thompson*, 594 F. Supp. 3d 1156, 1175 (C.D. Cal. 2022).

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

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