

Expert Opinion **Legislation**

Why a Friendly DOJ Won't Save Congressional Subpoena Defiers

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If current forecasts prove correct, control of the U.S. House of Representatives will shift from Republican to Democratic hands in January 2027. Democrats appear ready to treat that shift as a mandate to reassert Congress's broad oversight powers—reasonable scrutiny of executive branch conduct, spending, conflicts of interest and agency rule-making and enforcement discretion—which, as is typical under unified party control, have been exercised sparingly since January 2025. To that end, House Democrats have already begun issuing document preservation requests and initial request letters to private sector companies and executives connected to

Trump administration contracts, policies or decisions that have raised ethics concerns.

Recipients of letters from House and Senate Democrats include the cryptocurrency venture World Liberty Financial Inc. over its ties to the president's family and the administration; private prison operator The GEO Group Inc., over certain U.S. Department of Homeland Security contracts; X Corp. (f/k/a Twitter) over the use of its private-messaging function for government business; media conglomerate Paramount Skydance over its interactions with the administration regarding the Skydance and Warner Bros. mergers; and Atlantic Industrial Coatings LLC and Green Water Solutions LLC over the Lincoln Memorial Reflecting Pool project. Other letters target issues that the administration is perceived to be neglecting, such as AI risks and regulation.

Congress's oversight and investigative powers are typically exercised through committee hearings, document requests and—when compliance isn't voluntary—subpoenas backed by the threat of contempt. The prospect of a Democratic House wielding that power has prompted speculation that some subpoena recipients may simply refuse to comply, betting that the current U.S. Department of Justice (DOJ), which has exclusive authority over the criminal prosecution of contempt of Congress, will decline to bring charges. Garber, *Inherent Contempt: The Zombie Power Democrats Are Poised to Revive*, Garber Files (Feb. 22, 2026). Others have recently characterized counting on DOJ inaction as a "risky bet." Bantz, *Congressional Probes Raise Legal, 'Reputational' Risks*, Law360 (Sept. 24, 2026).

In our view, the bet is even riskier than this framing suggests, because counting on DOJ inaction assumes that criminal prosecution by the current DOJ is the only enforcement mechanism with teeth. It's not. A friendly DOJ can decline to prosecute. But it cannot stop a chamber of Congress from exercising its own inherent contempt power, stop a state bar from disciplining the lawyer who advised defiance or stop a future DOJ from bringing criminal charges.

Congress's Subpoena Power and Criminal Contempt

Congress's power to investigate and compel testimony and documents from private citizens, not just government officials, is rooted in its grant of legislative power in Article I of the Constitution. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (holding that the power to investigate is implicit in the power to legislate). Congress has several tools for enforcing its subpoenas, including civil enforcement and its rarely used inherent contempt authority. But the mechanism carrying direct criminal consequences is criminal contempt, codified at 2 U.S.C. § 192. This statute makes it a federal crime to willfully ignore or refuse to comply with a subpoena for documents or testimony from either house of Congress. Each violation is punishable by up to one year in federal prison and a fine of up to \$100,000 for an individual, or a fine of up to \$200,000 for a company. 18 U.S.C. §§ 3571(b)(5), (c)(5), (e). The statute specifies a minimum sentence of incarceration—one month—leading at least one federal court to hold that courts

cannot legally impose straight probation (no jail time). *United States v. Bloch*, 762 F. Supp. 2d 115, 122 (D.D.C. 2011).

Even a Friendly DOJ Doesn't Get the Last Word

There's no guarantee that a friendly DOJ would decline to prosecute a criminal contempt referral from Congress, especially for private sector companies and executives outside the administration. But even if it did, today's DOJ does not necessarily get the last word. Criminal contempt is subject to the general five-year federal statute of limitations. 18 U.S.C. § 3282(a). So a person who willfully defies a valid congressional subpoena in February 2027 may generally remain exposed to criminal prosecution until February 2032—well into the next presidential administration and long after the political winds may have shifted. (The criminal referral survives the legislative session that produced it. Continuing Effect of a Congressional Subpoena Following the Adjournment of Congress, 6 Op. O.L.C. 744 (1982).) Recent history also shows how a subsequent change in DOJ policy may come too late: the current DOJ has moved to dismiss the prior DOJ's criminal contempt case against former presidential adviser Stephen K. Bannon, but only after he completed his four-month federal prison sentence. And while a presidential pardon could foreclose prosecution by a future DOJ, counting on a pardon is an even bigger gamble, and a pardon still would not reach state bar discipline or Congress's own inherent contempt power.

In addition to the threat of criminal prosecution by a future DOJ, each chamber of Congress also retains an inherent contempt power that does not depend on DOJ at all. Rather than refer a recalcitrant witness to DOJ, a chamber may instead direct its own sergeant-at-arms to arrest the witness, bring the witness before the chamber or a committee and detain the witness (and potentially impose a series of escalating fines) until the witness complies or the chamber's authority to continue the detention expires. Garvey, Cong. Rsch. Serv., RL34097, Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure (2017).

The Supreme Court recognized this power more than 200 years ago in *Anderson v. Dunn*, reasoning that without it, each chamber would be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it." 19 U.S. 204, 228-29 (1821). The Court reaffirmed it in *McGrain* in 1927 and upheld the Senate's detention of a recalcitrant witness in *Jurney v. MacCracken* in 1935. 294 U.S. 125, 150 (1935).

Neither chamber has used the power since then, and it has real limits. The underlying inquiry must be tied to a valid legislative purpose, the witness is entitled to due process and habeas corpus review, and a House detention cannot outlast the legislative session. *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1881); *Marshall v. Gordon*, 243 U.S. 521, 542 (1917). (The Senate, a continuing body, faces less clearly defined limits.) These limitations may explain why recent efforts to revive the inherent contempt power have not translated into an actual arrest or detention. But the conditions that made inherent contempt seem

unnecessary for 90 years—a DOJ willing to prosecute Congress’s referrals—are exactly what defiance strategies now bet against. A House majority that concludes DOJ will not enforce its subpoenas and that civil litigation is too slow to matter has a stronger case than ever for dusting off a power the Supreme Court has repeatedly upheld.

The Lawyer’s Exposure

Defiance also carries risk for the lawyers who recommend it. The professional conduct rules adopted in some form in every state prohibit a lawyer from counseling or assisting a client in conduct the lawyer knows is criminal, which would include deliberately refusing to comply with a valid congressional subpoena without a legally supportable basis for doing so. Model Rules of Prof’l Conduct r. 1.2(d) (Am. Bar Ass’n 2025). Lawyers remain free to assert good-faith objections on grounds of privilege, overbreadth, improper purpose, separation of powers, or other supportable grounds. Subpoena recipients need not simply acquiesce in subpoenas that lack a valid legislative purpose, exceed a committee’s authority, or seek information unrelated to the inquiry; Congress has “no ... power to expose for the sake of exposure.” *Watkins v. United States*, 354 U.S. 178, 200 (1957). But there is a difference between asserting a good-faith legal objection and advising a client to refuse to comply in anticipation of DOJ declining to prosecute. The former is advocacy; the latter may constitute counseling a client to commit a federal crime, risking state bar discipline (up to disbarment) and malpractice claims.

A Question of Institutional Integrity

Beyond the legal exposure, defiance threatens the rule of law itself. If congressional subpoena recipients comply only when the same party controls Congress and the White House, compulsory process becomes a function of partisan alignment rather than law. Nor is there an obvious limiting principle: The same logic could migrate to administrative subpoenas and other forms of government process, leading to a broader erosion of institutional authority. That should trouble anyone who values government accountability, regardless of party. Committees led by both parties rely on the same power: Earlier this year, the prospect of contempt proceedings in the Republican-led House helped persuade former President Bill Clinton and former Secretary of State Hillary Clinton to agree to testify in an Epstein-related investigation. Moreover, businesses rely on the predictability of U.S. laws and on trust in U.S. markets and institutions to commit capital and plan for the long term. Companies and executives who treat congressional subpoenas as optional help erode the very stability they depend on.

The Better Approach

For companies and executives facing congressional subpoenas, the right strategy depends on the facts. But it is worth noting that a committee’s request for voluntary production nearly always precedes a subpoena, and that is where recipients have the most leverage. In our firm’s experience advising clients involved in congressional investigations, voluntary compliance typically offers several advantages,

including negotiating protections for privileged or confidential material (which committee rules typically do not recognize), narrowing the scope of the requests to reduce cost and burden and agreeing to a reasonable production timetable. Moreover, satisfying a voluntary request often obviates the need for a subpoena—and with it, any contempt exposure.

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