

## What to Expect From the Select Subcommittee on the Weaponization of the Federal Government

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As one of its first acts, the new Republican majority in the House of Representatives created the Select Subcommittee on the Weaponization of the Federal Government. The committee has extraordinary powers to investigate anything related to how the federal government collects or uses information about Americans, including in ongoing criminal investigations.

This committee is sure to make headlines as it carries out its investigative mission. But its novel power to probe *ongoing* criminal investigations is just as likely to generate conflicts with the executive branch. And for its targets, the committee is a reminder that navigating congressional investigations requires creativity and political savvy.

### The Committee's Origins

From 2020 through 2022, Democrats exercised control over both Chambers of Congress and the White House. As the minority party, Republicans had few opportunities to exercise oversight over the executive or to conduct investigations. That's changed with the 118th Congress as control over the House of Representatives shifted to the GOP.

Advocates for aggressive investigations of perceived abuses at the FBI and the Justice Department gained leverage as the race for House



(Courtesy photo)

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Speaker extended into multiple rounds of voting. The GOP holdouts in that speakership battle exercised their leverage to extract a promise that, once elected Speaker, Kevin McCarthy would create a powerful new committee to investigate these perceived abuses, among other topics.

The Select Subcommittee on the Weaponization of the Federal Government is the result. Chaired by Rep. Jim Jordan (R-Ohio), the committee will investigate the full range of allegations that the executive branch, with private-sector help, has been gathering and using information to violate Americans' civil liberties.

The committee has broad, but not unlimited, powers. For example, unlike other congressional committees, the committee itself cannot issue

subpoenas. Jordan, however, has the authority to do so as chair of the Judiciary Committee, meaning that, in practice, the committee will likely exercise standard subpoena power.

Though the committee is formally a select subcommittee within the Judiciary Committee, it will likely function more like a full committee. Indeed, unusually, members of the committee need not be members of the Judiciary Committee, suggesting the committee is likely to act independently.

Republicans will have a disproportionately large representation on the committee. While Republicans control the House by a margin of 51.1% to 48.8%, they will hold eight seats on the committee to the Democrats' five.

Expect Democrats to make the most of those five seats, however, and to use their presence on the committee to challenge any narrative put forth by Republicans.

### **Subjects of Investigation**

The committee's agenda is no secret. Back in November 2022, Jordan sent a series of letters to the Justice Department, FBI, Department of Homeland Security and White House laying out his planned investigations. Those letters suggest the committee may investigate the following:

- The Special Counsel investigation into the retention of classified documents at Mar-a-Lago and attempts to overturn the 2020 election;
- Former Special Counsel Robert Mueller's investigation into Russian interference in the 2016 election;
- The FBI's updates to its Domestic Terrorism Symbols Guide on Militia Violent Extremism and the creation of a new domestic terrorism unit;
- The investigations into the January 6th attack on the Capitol;

- The FBI Inspection Division's 2019 Domestic Investigations and Operations Guide Audit, which found hundreds of violations of FBI rules in sensitive investigations;
- The use of federal resources in response to a request from the National School Boards Association for support following violent threats against public school officials.

The committee is also guaranteed to closely monitor Special Counsel Robert Hur's investigation of President Biden's handling of classified documents. That the committee will investigate the Justice Department's response to various accusations against Hunter Biden is another safe bet.

Private-sector entities will draw their own scrutiny. Congress specifically authorized the committee to investigate how the executive branch obtains or shares information with the private sector to "facilitate action against American citizens." H.R. 12, §1(b)(1)(B). Though social media companies will likely receive the most attention, Big Tech, financial institutions, consulting firms and even non-profits that cooperate with federal law enforcement could get caught up in such a broad investigation.

### **What Makes the Committee Different**

The committee's most remarkable feature is its interest in reviewing *ongoing* criminal investigations. Congressional committees often investigate Justice Department and FBI activities, but they usually do so in hindsight. They rarely interfere with open criminal investigations. And when committees have occasionally done so, the executive branch has refused to provide any information regarding open investigations in all but a few instances, such as when prosecutors testified in closed-door hearings about open cases against oil companies during the

1970s. But never has a committee intentionally targeted ongoing criminal investigations on the scale this committee proposes. Nor has any other committee probed open criminal investigations in which its own members may be witnesses, as this committee is poised to do by scrutinizing law enforcement investigations involving January 6.

The right to access the highest-level classified intelligence typically reserved for the House Intelligence Committee also sets the committee apart. As does its freewheeling authority to investigate anything related to federal information gathering or perceived violations of civil liberties. Most select committees are authorized to investigate a discrete topic, such as the Select Committee on Benghazi, which focused solely on the events surrounding the attacks on the U.S. embassy in Libya, or the Select Committee on the January 6th Attack on the United States Capitol, which focused solely on the attack on the U.S. Capitol.

### **Looming Conflict**

Given the committee's agenda and powers, conflict with the executive branch is inevitable. Federal law prohibits the executive branch from revealing some information the committee likely wants, such as grand jury materials and wiretap applications. And Justice Department policy prohibits disclosing case materials regarding open criminal investigations. Indeed, the Department believes executive privilege protects "law enforcement files" from disclosure in all but "the most extraordinary circumstances." *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 32 (1982).

The executive branch is likely to resist this committee's intruding into active law enforcement investigations. Witnesses and informants might resist working with investigators if doing so could draw congressional scrutiny or if congressional scrutiny might publicly spotlight their cooperation or involvement in the DOJ probe. And if the committee immunizes witnesses to obtain testimony, that immunity might derail a later prosecution, as it did with Oliver North.

No matter how these conflicts play out, some of them are likely to land in court. The past decade has generated substantial litigation regarding Congress's investigatory power and the executive's right to withhold information from Congress. With its potential to impede criminal investigations, the committee is likely to add to that litigation.

### **Tips for the Committee's Targets**

Expect the committee to move quickly. Potential targets should begin considering how to respond to a congressional inquiry even before the subpoena or request for information arrives. The standard advice for investigations applies—retain counsel promptly, implement document holds as necessary, and assess potential areas of liability.

But this unusual committee is a reminder that navigating congressional investigations requires consideration of not just the legal implications, but also the public relations and political implications of any response—or refusal to respond—to a committee inquiry. That takes creativity, an understanding of the committee's political goals, and flexibility to adjust as political realities shift.

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