

House Amends and Accelerates Subpoena Enforcement Process

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The U.S. House Committee on the Judiciary continues to await a response to subpoenas it issued earlier this year to Attorney General William Barr and former White House Counsel Don McGahn. But, after a resolution recently passed by House Democrats, it may be only a matter of time before Judiciary Committee Chair Jerry Nadler (D-NY) seeks to enforce these subpoenas in the Federal courts. And, beyond impacting House enforcement of subpoenas to the Federal executive branch, the recent resolution will also accelerate the process through which the House may go to the Federal courts to enforce document or testimonial subpoenas issued to private individuals, corporations, and other organizations.

On June 11, 2019, by a party-line vote of 229 to 191, the U.S. House of Representatives passed House Resolution (H. Res.) 430, addressing the process by which the House may seek Federal court enforcement of committee subpoenas. In floor debate Rep. Doug Collins (R-GA) called the resolution “a novel, untested, and risky proposition” by an “audacious” majority. Conversely, bill sponsor and Chair of the House Committee on Rules Rep. James McGovern (D-MA) characterized it as “an appropriate response” to the “administration’s constant obstruction” and stated it would “strengthen our hand in court as Congress tries to get the documents [the] administration is currently trying to hide . . .”

Whether H. Res. 430 represents a sea-change in House process and procedure for subpoena enforcement or merely affirms existing protocol, the resolution achieves two principal purposes: First, it substantially bolsters the legal position that committee chairs have standing to enforce subpoenas in Federal court, even without a supporting vote by the full House. Second, by facilitating committee

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chairs' inherent enforcement authority, it allows the majority to pursue enforcement of current and future subpoenas without repeated and protracted interruption of the public proceedings of the full House.

Res. 430 has two major prongs. First, it specifically authorizes the Chair of the Judiciary Committee "to initiate or intervene in any judicial proceeding in any Federal court" to seek declaratory judgments with respect to, or to otherwise seek enforcement of, the subpoenas issued to Attorney General Barr and to McGahn. Following a June 10, 2019 announcement that DOJ had agreed to comply with the Committee's subpoena, any potential enforcement litigation against Attorney General Barr is currently in abeyance. As to the outstanding subpoena to McGahn for his testimony, press reports at the time of this writing suggest that enforcement action under H. Res. 430 may be imminent.

Of note, neither the Judiciary Committee nor the full House has found Attorney General Barr or McGahn to be in contempt as a result of the outstanding Judiciary Committee subpoenas. Opponents of H. Res. 430 have pointed out that House authorization to seek enforcement in Federal court, without a preceding House finding of contempt, is unprecedented. As Rep. Debbie Lesko (R-AZ) observed during floor debate, "[t]he House has only sued for documents twice before. In both cases, the individuals in question were first found in contempt of Congress at both the committee level and by the full House. This has not happened here."

This innovation to House procedure and precedent regarding subpoena enforcement – that is, authorizing enforcement without a preceding finding that the subpoenaed individual is in contempt of the relevant committee or of the House – is taken even farther in the second major prong of H. Res. 430, which provides with respect to **any** House subpoena (i.e., not just subpoenas issued to the executive branch):

That the chair of each standing and permanent select committee, when authorized by the Bipartisan Legal Advisory Group, retains the ability to initiate or intervene in any judicial proceeding before a Federal court on behalf of such committee, to seek declaratory judgments and any and all ancillary relief, including injunctive relief, affirming the duty of the recipient of any subpoena duly issued by that committee to comply with that subpoena. Consistent with the Congressional Record statement on January 3, 2019, by the chair of the Committee on Rules . . . , a vote of the Bipartisan Legal Advisory Group to authorize litigation and to articulate the institutional position of the House in that litigation is the equivalent of a vote of the full House of Representatives.

The Bipartisan Legal Advisory Group (or BLAG) comprises the Speaker, the Majority and Minority Leaders, and the Majority and Minority Whips; in other words, although BLAG is nominally bipartisan, the majority party controls it by a margin of 3 to 2. So, as now authorized by H. Res. 430, the chair of each standing and permanent select committee of the House needs only the authorization of the majority-controlled BLAG – without any action by the committee or full House, either on contempt or on subpoena enforcement – to seek a ruling in Federal court affirming the validity of the subpoena and the duty of the recipient to comply. If the recipient then refuses to comply with the subpoena, the court may initiate contempt of court proceedings.

Proponents have characterized H. Res. 430 as no more than a “reaffirmation” of authorization already provided by House Rule II(8)(b). This characterization of H. Res. 430’s pedigree may be technically correct, but realistically it is a bit of a stretch. Here’s why.

House Rule II(8)(b) provides as follows:

There is established a Bipartisan Legal Advisory Group composed of the Speaker and the majority and minority leaderships. Unless otherwise provided by the House, the Bipartisan Legal Advisory Group speaks for, and articulates the institutional position of, the House in all litigation matters.

The purpose of this clause in the House Rules is to explicitly authorize BLAG to act *as and for* the House in relevant Federal district court litigation – that is, to bolster BLAG’s claim to legal standing on behalf of the House. But does the phrase “all litigation matters” as used in the Rule encompass all legal proceedings in Federal court relating to enforcement of a House committee subpoena? After all, the House adopted Rule II(8)(b) in 2015 in the context of a very specific historical backdrop – namely, BLAG’s intervention on behalf of the House in lawsuits challenging the constitutionality of the Defense of Marriage Act. To address apparent concerns as to whether the authorization in Rule II(8)(b) also encompasses committee subpoena enforcement, Rules Committee Chair McGovern explained in a January 3, 2019 Congressional Record statement:

If a Committee determines that one or more of its duly issued subpoenas has not been complied with and that civil enforcement is necessary, the BLAG, pursuant to House Rule II(8)(b), may authorize the House Office of General Counsel to initiate civil litigation on behalf of [that] Committee to enforce the Committee’s subpoena(s) in federal district court.

But Chairman McGovern’s individual January 3 statement, even though included in the Congressional Record, was not an action, or an authorization, by the full House regarding the authority of House committees in subpoena enforcement actions. H. Res. 430, on the other hand, *does* provide such full House authorization. Further, it materially expands on Chairman McGovern’s statement to make clear that, following an authorizing vote by BLAG, subpoenas may be enforced by committee chairs; may include initiation of or intervention in subpoena enforcement actions in Federal court; and may include seeking declaratory judgments and any other ancillary relief.

Will the procedure created/affirmed by H. Res. 430 accelerate the actual civil enforcement process with respect to House subpoenas issued to an Administration or its agencies, or to private individuals or entities? Yes, but perhaps only marginally. By clarifying that a vote of the full House is not required, H. Res. 430 will certainly cut down on the time needed within the House to authorize an enforcement action and to place the issue before a court. But this may shave only days, or at most weeks, off the total process. At least with respect to subpoenas to Administration officials or to executive branch agencies, the exceedingly rare cases that have reached Federal court for civil enforcement have taken years to resolve – when they have been resolved at all. At this time, the subpoena enforcement action commenced in August 2012 by the House Oversight and Government Reform Committee against then-Attorney General Eric Holder is still pending final, formal resolution.