



# Resolving Subpoena Disputes in the January 6 Investigation

October 19, 2021

The inquiry conducted by the [House Select Committee to Investigate the January 6th Attack](#) on the U.S. Capitol (Select Committee) has recently garnered [headlines](#) not only for the Committee's extensive efforts to obtain information from a variety of public and private sources, but also for [speculation](#) that some high-profile witnesses may not comply with the Select Committee's subpoenas. Stephen Bannon, for example, has [refused](#) to provide the Select Committee with either his testimony or records. Because Bannon may not be the [only party](#) to decline to answer all of the Select Committee's demands, this Sidebar addresses how, as a legal and legislative matter, disputes over the Select Committee's authority to access relevant information could unfold. Various parties may raise different arguments for withholding information from the Select Committee, ranging from claims that withholding information from the Committee is necessary to protect the former President's interest in [executive privilege](#), to claims that the Committee's request infringes on individual constitutional rights such as the Fourth or Fifth Amendment, to claims that the subpoenas exceed the Committee's jurisdiction and authority. On Monday, October 18, former President Trump [filed suit](#) challenging the validity of certain Select Committee demands for information as constitutionally invalid and unenforceable. This Sidebar does not address the substantive merits of such arguments, though other [CRS products](#) explore how arguments against the validity of congressional subpoenas have typically been addressed by the courts.

## Background

The Select Committee has a broad mandate. It is charged with [investigating and reporting](#) on "the facts, circumstances, and causes relating to the domestic terrorist attack on the Capitol." The scope of inquiry explicitly includes a review of "influencing factors" that contributed to the attack, as well as the role played by "technology, including online platforms" in the "motivation, organization, and execution" of the attack. In its [final report](#), the Select Committee is to recommend "corrective measures" to "prevent future acts of domestic terrorism" and to "improve the security posture of the United States Capitol." The Select Committee has, therefore, cast a wide net in search of relevant information by issuing

- requests for documents and materials to [executive branch agencies](#) such as the National Archives and Records Administration (National Archives);

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- requests for materials to [social media companies](#), including Facebook, Google, and Twitter;
- subpoenas for documents and deposition testimony to a variety of individuals who worked in the [Trump Administration](#) on January 6, 2021, including former Chief of Staff Mark Meadows;
- subpoenas for documents and deposition testimony to private individuals with no formal governmental role on January 6, 2021, including Stephen Bannon and those who [organized rallies](#) such as “[Stop the Steal](#)”; and
- a subpoena for documents and deposition testimony to [Jeffrey Clark](#), a former Department of Justice (DOJ) official whom a recent [Senate Report](#) described as playing a substantial role in efforts to overturn the 2020 election.

Whenever a congressional committee demands information, recipients—whether private citizens or government officials—must, in the first instance, determine the extent to which they will comply. The Supreme Court has suggested that there is a civic “[duty](#)” component to this decision, but the law, or more specifically the prospect of legal consequences, also presumably plays a significant role in how extensively an individual cooperates with a congressional investigation.

With respect to subpoenas, the law is clear. Receipt of a valid subpoena triggers an “[unremitting obligation to respond](#)” absent a valid and overriding defense. Willful failure to comply with valid subpoena obligations constitutes a [federal misdemeanor](#) and subjects the recipient to potential prosecution by the DOJ for criminal contempt of Congress.

A letter request like those sent to the social media companies by the Select Committee, on the other hand, generally does not create the same legal duty or subject an individual to criminal prosecution for noncompliance. Nevertheless, requests can still trigger legal obligations, at least when issued pursuant to a [statutory provision](#) that requires disclosure of certain types of information upon the request of a congressional committee. As discussed [in an earlier Legal Sidebar](#), the Select Committee’s request to the National Archives was issued under [such a provision](#).

While most parties [appear](#) to be cooperating with the Select Committee’s demands, others, like Bannon, have not. Bannon’s attorneys [recently told](#) the Select Committee that former President Trump directed him not to provide documents or testimony to the Committee on the ground that the information sought was protected by executive privilege. (Executive privilege and its application to former Presidents is discussed [here](#), [here](#), and [here](#).) As a result, Bannon has asserted that he is “not required to respond at this time.” The Select Committee has [rejected](#) Bannon’s position and scheduled a business meeting on Tuesday, October 19, to [consider](#) initiating the criminal contempt of Congress process.

Before addressing legal options for the Select Committee in instances like Bannon’s refusal, this Sidebar first addresses the more common scenario of a cooperative witness.

## **In the Case of a Willing Witness**

Predicting the path of an investigative conflict begins with the initial position of the recipient of a subpoena. Consider, for example, the Select Committee’s subpoenas to former White House officials. Reportedly, former President Trump has asked some subpoena recipients not to comply, believing that the subpoenas are an attempt to obtain information related to his [privileged](#) communications with his presidential advisors. Though the former President may argue that some of the information covered by the subpoenas is protected by executive privilege, he lacks the same tools of control that a sitting President possesses over his current subordinates. While a [sitting President](#) may have the tools to direct his advisors not to comply with a congressional demand (and remove or instruct the removal of those who do not obey his directions), a former President has no such direct leverage over former officials. As such, if a witness

is predisposed to comply with the Select Committee’s demand for information, the burden would fall to the former President (or another interested party) to obtain a timely court order blocking that compliance.

Prior practice suggests it is unlikely that a pre-enforcement order quashing the subpoena could be obtained by directly suing the Select Committee, as that type of case is generally barred by the Constitution’s [Speech or Debate Clause](#). Instead, if the former President thinks the information sought by the Select Committee is protected by executive privilege, he would likely have to sue the recipient of the subpoena in an effort to obtain an injunction barring that person from disclosing the information. This type of third-party lawsuit was the [approach](#) then-President Trump took in challenging House committee subpoenas to his bank and accounting firms for personal financial records in the 116<sup>th</sup> Congress. That claim, which challenged the subpoenas as exceeding Congress’s authority rather than as infringing on executive privilege, ultimately resulted in the Supreme Court decision of *Trump v. Mazars* (discussed [here](#)).

With respect to official records generated during the Trump Administration but now in possession of the National Archives, federal law [provides](#) the former President with an opportunity to [ask the courts](#) to stop the National Archives from disclosing information he believes to be protected. Former President Trump [filed](#) such a lawsuit this week, asking a court, among other things, to block the National Archives from complying with the Select Committee’s request and to declare the Committee’s request invalid and unenforceable under the Constitution. As discussed in this [Sidebar](#), any executive privilege claim by the former President is weakened (though not necessarily extinguished) by the fact that President Biden has determined [not to support](#) the former President’s claim.

## In the Case of an Unwilling Witness

The scenario changes if a witness, like Bannon, does not comply with a Select Committee subpoena. In that event, the burden falls to the Select Committee to force the witness to comply.

[Often](#)—at least when dealing with interbranch subpoenas—an investigating committee may choose to negotiate over the requested information. There are [reports](#) that one or more subpoenaed persons are negotiating with the Select Committee over its information demands. If both sides are willing to accommodate each other’s needs to some degree, it is possible an agreement can be reached that is acceptable to both parties. This process generally requires good-faith negotiations among the parties; if one or both parties is unwilling to compromise, it will likely prove unfruitful.

Ultimately, if the requirements of a subpoena are not met, the Select Committee is left with two principal options for enforcing their subpoenas: [criminal contempt of Congress](#) and [civil enforcement](#) through the courts. Because these avenues serve different purposes, the Select Committee may choose to enforce its subpoenas through one or both mechanisms.

### *Criminal Contempt of Congress: Relying on DOJ*

Willful noncompliance with a committee subpoena is a [federal criminal offense](#) punishable by fine and imprisonment, but Congress cannot, as a matter of the [separation of powers](#), prosecute criminal offenses, even those committed against itself. [Federal statute](#) establishes a process by which each congressional chamber can refer a criminal contempt charge to DOJ for prosecution. This is the process that the Select Committee has stated it will consider beginning on [Tuesday, October 19, 2021](#).

[Under the law](#), if a congressional committee approves a contempt report, the report would go to the full House. As a matter of [practice](#), the House then votes on a criminal contempt [resolution](#), and the Speaker forwards the contempt to the appropriate U.S. Attorney for enforcement. Although the [law](#) states that a U.S. Attorney has a “duty” to bring the matter before a grand jury, the executive branch has [historically](#) asserted that it retains discretion on whether to pursue any criminal charge referred to it by the House. If

the prosecution is brought, the witness will be able to assert defenses to the subpoena in the prosecution. Courts have previously [overturned](#) contempt convictions on the ground that the subpoena was invalid or otherwise violated individual constitutional rights.

The discretion exercised by DOJ has often made the criminal contempt process an ineffective and arguably futile means of enforcing subpoenas against an executive branch official. As discussed [here](#), presidential administrations have generally been unwilling to prosecute current or former officials, especially when the official was acting under direction from the President or to protect the interests of the executive branch. However, the Select Committee faces a very different situation with respect to Bannon and possibly others. Bannon appears to be asserting an executive privilege defense to the subpoena that the Biden Administration [reportedly](#) does not support, and President Biden has stated that he [believes](#) that failure to honor the Select Committee's subpoena should be grounds for criminal prosecution (DOJ later [stated, however](#), that it will "make its own independent decisions in all prosecutions."). It is unclear exactly how [the current DOJ](#) would respond to a referral, but that decision would likely be [informed](#) by existing Office of Legal Counsel opinions. Still, in light of recent statements by the Biden Administration reflecting its unwillingness to support executive privilege invocations by the former President, Bannon could face a more credible threat of criminal prosecution than was the case in other recent criminal contempt of Congress referrals.

There are different ways the Select Committee (and the House, if it considers a criminal contempt resolution) may view the value of pursuing criminal contempt against a person who refuses to comply with a committee subpoena. First and perhaps foremost, the mere prospect of a criminal prosecution often provides a committee with leverage over a witness. There have been many instances in which an uncooperative witness becomes a [cooperative witness](#) under the threat of criminal prosecution.

However, once the internal House process is finished and a criminal charge is referred to the executive branch, criminal contempt becomes a punitive process with the aim of punishing a noncompliant witness. A successful contempt prosecution does not result in a committee obtaining the requested information; it instead results in the fine or imprisonment of the noncompliant witness. In short, it is not a remedial process. There is also the question of time. It is difficult, especially in light of the rarity of criminal contempt prosecutions, to predict how long such a case would take. It could become a lengthy process.

There is another, broader purpose behind criminal contempt: deterrence. A criminal prosecution of a witness may not result in a committee obtaining the testimony sought, but it could significantly deter other parties from refusing to cooperate with an ongoing or future investigation. Even absent a conviction, the mere initiation of a criminal prosecution could have the prospective effect of providing a committee with greater access to information from other sources.

### ***Civil Enforcement: Relying on the Courts***

The Select Committee, with authorization from the House, may also attempt to enforce a subpoena by asking a federal court to order Bannon or another noncompliant witness to comply. The lawsuit would allow the parties to litigate the matter in civil court, providing the witness with a venue to raise legal objections to the subpoena. The House Judiciary Committee took this route in its efforts to enforce a subpoena issued to former White House counsel Don McGahn.

This process of civil enforcement serves a different purpose than criminal contempt. The Committee would not be seeking to punish a noncompliant witness, but would instead be seeking only to obtain the information sought through a court order.

Like criminal contempt, there are limits to this route's effectiveness. In addition to the uncertainty associated with any lawsuit, and [subpoena litigation](#) specifically, there is again concern about the time that it would take to obtain a judicial order. As discussed in greater detail [here](#), recent House subpoena

enforcement cases have taken years, without ever being resolved on the merits. The *McGahn* case, for example, was settled after almost two years of litigation. Cases against private parties have tended to proceed more swiftly—partly because they do not involve substantial separation of powers questions—but a recent case [arising from a Senate subpoena](#) still took five months to obtain a district court decision and another nine months of appeals. Representative Bennie Thompson, Chairman of the Select Committee, has [stated](#) that he hopes the Committee can complete its investigation by next spring. As such, it may be unlikely that a suit to enforce a Committee subpoena would proceed on a time frame acceptable to the Committee.

### *Inherent Contempt: Relying on Congress's Independent Power*

There is a final option for the Committee to address a noncompliant witness. It could recommend to the House that it use [its inherent contempt powers](#) to enforce Committee subpoenas. Prior to 1857, the House and Senate would enforce subpoenas not through criminal prosecution or the courts, but by directing the Sergeant at Arms to arrest witnesses who refused to turn over documents or provide testimony and detain them until they gave Congress what it demanded. The inherent contempt process has not been used in the House since the early 1900s, and like criminal contempt and civil enforcement, the party subject to detention would likely be able to [raise defenses](#) to the validity of the underlying subpoena in litigation.

### *Other Considerations*

The courts have generally characterized Congress's investigatory powers as “[indispensable](#).” It is for this reason that the “process to enforce” investigative demands has been [deemed](#) an “essential and appropriate auxiliary to the legislative function.” As set forth above, the Select Committee has various options for enforcing its subpoenas. How it chooses to approach any specific conflict, and what tools it chooses to utilize, will likely depend on the Select Committee's—and perhaps ultimately the House's—individualized assessment of a variety of contributing legal, practical, and political factors. It will also likely need to weigh the risks and benefits of any approach, not only to the Select Committee's investigation but also to the institutional interests of Congress.

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