

It's Not Just Jan. 6—Democratic Congress Ramps Up Intensity of Corporate Investigations

BY ANDREW GOUDSWARD

When oil and gas executives were called before a House committee for a hearing on climate change last fall, one congresswoman came prepared with props.

During her moment of questioning, Rep. Katie Porter, a California Democrat, appearing remotely for the hearing, opened the trunk of a minivan packed with 479 pounds of rice. Each grain, she said, represented one of the 13.9 million acres of public land available to oil companies that had so far not been used for drilling.

“How much more do you need?” asked Porter, who has [made headlines](#) and gained social media fame for her visual-friendly interrogations of corporate executives. “Our public land belongs to the American people, not to Big Oil. When you lobby and you sue so that you can take more of our public land, you’re saying ‘too much is never enough.’”



**Robert Kelner of
Covington & Burling.**

Photo: Diego M. Radzinski/ALM

investigations to draw favorable headlines and demonstrate progress on issues important to their base.

While the House Jan. 6 select committee has dominated headlines with a series of explosive and TV-friendly hearings this month, the nation’s leading congressional investigations attorneys said the number and intensity of investigations have increased across the board. With a friendly administration in the White House and a progressive movement eager to crack



Photo: Diego M. Radzinski/ALM

The U.S. Capitol building in Washington, D.C., on Thursday, December 12, 2019.

down on the excesses of corporate America, congressional committees have trained their investigative fire on major corporations, leading to a surge in work for the lawyers who steer companies through these often volatile inquiries.

“We are incredibly busy across a range of industries, issues and committees in a way that hasn’t been the case in years past,” said Joel Green, co-chair of the congressional investigations practice at Wilmer Cutler Pickering Hale and Dorr. “Our clients are dealing with more aggressive and insistent oversight, particularly as this Congress winds down.”

A small, specialized group of lawyers in Washington, D.C., prepare many large companies and high-profile witnesses to deal with the intense, fast-paced nature of congressional inquiries. It’s a unique practice that combines elements of white-collar defense, public policy and crisis communications.

“Congressional investigations are often an extraordinary crisis for a corporation. They dominate the time of the CEO, the general counsel and numerous senior business leaders of the company in a way that



Representative Bennie Thompson, a Democrat from Mississippi and chairman of the House Select Committee to Investigate the Jan. 6 attack on the U.S. Capitol, center, speaks during a hearing of the Select Committee to Investigate the Jan 6 attack on the U.S. Capitol in Washington, D.C., on June 21, 2022.

Photo: Al Drago/Bloomberg

few other litigations or government investigations ever do," said Robert Kelner, chair of the election and political law group at Covington & Burling. "And the reason for that is that most other litigation matters or investigations are conducted either out of the public limelight or in court in a highly disciplined, regulated environment. Congressional investigations are nationally televised, raw, unscripted, ungoverned by any rule of law. And so, the risks of public embarrassment and surprise and collateral damage are palpable and often quite startling for corporate executives."

Democratic Targets Under Scrutiny

Attorneys point to a number of reasons for the increase in corporate investigative activity on Capitol Hill. During this Congress, with Democrats in control of both chambers and the White House, congressional committees have not been inclined to examine the conduct of the administration.

Additionally, much of the party's legislative agenda has been stymied in Congress, leaving oversight investigations as one of the few remaining pathways for lawmakers to show progress on issues important to voters.

"They are being more vigorous in their oversight and investigations in order to keep issues that are

important to them, particularly to the progressive causes key to their constituencies, in the news," Green said. "If they can't make progress legislatively, they're at least trying to hold industries to account on issues that are squarely Democratic issues."



Alyssa DaCunha of Wilmer Cutler Pickering Hale and Dorr.

Courtesy photo

During this Congress, House and Senate committees have launched investigations into alleged efforts by the fossil fuel industry to [mislead the public on climate change](#), the [social and civic risks](#) posed by Facebook parent company Meta, and the [role of consulting giant McKinsey](#) in fueling the opioid addiction crisis. The House Oversight Committee has examined allegations of workplace misconduct involving the NFL's Washington Commanders, and last week [revealed](#) that the team's owner had conducted a "shadow investigation" to discredit accusers.

Those probes are in addition to two aggressive House select committees, one on the government's response to the COVID-19 pandemic, and the investigation into the Jan. 6 attack on the U.S. Capitol and broader attempts by former President Donald Trump to subvert the election.

The Jan. 6 probe, which is viewed as perhaps the most consequential congressional investigation in decades, is notable for its prosecutorial approach and [widespread use of subpoenas](#), an authority congressional committees have historically been reluctant to test.

Congressional investigations, which must be crafted to serve a legislative purpose, have traditionally been viewed primarily as a play for headlines for committees and their chairs, and a way to pressure and browbeat targets into changing their behavior.

The most active investigations often lead to public hearings, which in the social media age have become a valuable tool for members of Congress to generate viral moments.

"Members of Congress receive a direct return on investment for every successful congressional investigation through viral exposure on the internet and on social media," Kelner said. "So there's a huge incentive, even beyond what we saw in the television age, for members to generate a constant stream of media hits through dramatic and theatrical congressional



Joel S. Green of Wilmer Cutler Pickering Hale and Dorr.

Courtesy photo

hearings, and that in turn spurs more investigations that lead up to those hearings.”

Navigating Risks

A small group of Big Law firms in D.C. are viewed as the go-to destinations for companies under scrutiny by Congress, including Wilmer; Covington; Kirkland & Ellis; Akin Gump Strauss Hauer & Feld; Gibson, Dunn & Crutcher; and King & Spalding. But a growing number of firms see the practice as a potential growth area, according to lawyers in the industry.

Attorneys in the practice say their time spent on congressional investigations has jumped in recent years. One lawyer said his firm has gone from having about six or seven attorneys dedicated to this practice five years ago to about 35 to 40 lawyers currently assigned full-time to congressional inquiries.

For attorneys in the practice, the first objective is to keep the probe out of the spotlight and prevent it from becoming a priority of the chair. That’s because many investigations peter out without a public hearing or a significant investigatory focus, attorneys said.

But probes that gather momentum carry a host of risks. A bad performance at a congressional hearing can spark damaging headlines, drive down stock prices and, in rare cases, [force](#) an executive [out of a company](#). Investigations are conducted without any of the evidentiary rules that govern executive branch investigations.

Scorched-earth litigation tactics aren’t the way to steer clients through congressional scrutiny, practitioners said.

“So much of what we achieve for clients in the congressional space is based on a good-faith relationship and cooperation with staff,” said Alyssa DaCunha, co-chair of Wilmer’s congressional investigations practice. “Congressional oversight is a dialogue. And sometimes you get folks that come in with a litigation approach where their view is you take a hard line and send strongly worded letters as opposed to just picking up the phone and talking to the staff.”

If the probe escalates into a public hearing, firms have developed their own closely guarded processes for preparing executives to face the klieg lights on Capitol Hill. The preparation typically includes a review of past successful and poor performances on the Hill, strategy sessions to develop an affirmative message for the client, and a series of mock hearings

exposing clients to the questions and environment they are likely to face in the hearing room.

The goal is to prepare clients to respond to politically charged and off-topic questions, and to avoid becoming rattled or angered by the often combative questioning by members of Congress.

Increasingly, congressional investigations can lead to or run parallel with executive branch probes from agencies like the U.S. Securities and Exchange Commission, Federal Trade Commission or state attorneys general, creating an additional area of risk.

“The interconnectedness between the work of Congress and work with other regulatory bodies is a relatively new development,” one congressional investigations lawyer said. “It may start as a congressional inquiry that quickly metastasizes into an SEC inquiry or a state AG inquiry. So the new challenge is to have a coordinated strategy across forums.”

Republicans May Not Bring a Respite

Democrats appear poised to lose their majority in at least one if not both chambers of Congress in November’s midterm elections. Under normal circumstances, Republicans reclaiming the gavel on major investigative committees would lead to a reprieve for corporations, especially as lawmakers turn their attention to the Biden administration.

While congressional investigations lawyers expect the Biden administration, particularly the business dealings of the president’s son Hunter Biden, will be a significant focus for the GOP, the souring relationship between Republicans and Big Business means corporations aren’t likely to get a pass.

The ascendant populist wing of the party has [clashed with business](#) on “corporate wokeness,” criticizing companies for their increasingly outspoken stances on racial equity, voting laws and LGBTQ rights. The right has also attacked alleged censorship by Big Tech companies with progressive work forces.

Both are likely to be fodder for investigations should Republicans take charge of major congressional committees, attorneys said.

To prepare, one veteran lawyer said he’s reading “Woke, Inc: Inside Corporate America’s Social Justice Scam,” a book by the entrepreneur Vivek Ramaswamy condemning business’ increased focus on demographics and identity. The attorney recommended major corporate legal departments pick up their own copy.