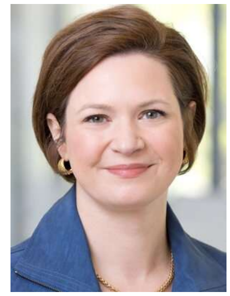
Intersecting Investigation Risks Loom In Next Congress

By **Alyssa DaCunha, Joel Green and Kerry Bollerman** (September 14, 2026)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As companies strategize about responding to potential oversight in the next Congress, corporate counsel will want to take into account a number of legal developments that may affect the arguments available to oversight targets.

Most recently, the U.S. Department of Justice's Office of Legal Counsel opined that executive privilege may extend to confidential communications between the president and private advisers who are not government employees.

While the OLC opinion has been the subject of press reporting and legal commentary, less attention has been paid to its interaction with July U.S. Court of Appeals for the District of Columbia Circuit decisions addressing congressional oversight.

In particular, in U.S. v. Navarro, the court rejected efforts by a congressional subpoena recipient to unilaterally invoke defenses related to executive privilege to excuse noncompliance with the subpoena. And, in de la Torre v. Cassidy, the court rejected an affirmative challenge to a congressional subpoena, underscoring that targets of congressional subpoenas ordinarily will need to raise objections in response to specific congressional demands, rather than through offensive litigation.

These developments highlight the complexity of congressional investigations involving the White House, and may affect the risk calculus for companies, executives and individuals navigating oversight in the next Congress.

This article summarizes the OLC opinion and recent cases, describes the practical implications of each, and identifies concrete steps to prepare for the next Congress.

The OLC Opinion

On Aug. 10, the OLC issued a memorandum opinion addressed to the White House counsel concluding that the presidential communications component of executive privilege can protect certain communications between the president or his direct advisers and private advisers who do not work for the executive branch.

While the presidential communications privilege has most commonly been invoked to protect internal executive branch communications, the opinion states that the privilege also encompasses "communications with private advisers so long as the communications relate to official presidential decisionmaking, involve or reflect communications with the President or his direct advisers, and are confidential."

The OLC grounds its conclusion in the president's "implied power [under Article II] to seek and obtain advice from whomever the President deems necessary," as well as the longstanding rationale for the presidential communications privilege: protecting "candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." Indeed, the OLC asserts that "the President 'must have the freedom to seek out whom he wishes for advice,' regardless of whether that individual is a government official or a private citizen."[1]

As a practical matter, the opinion suggests that privilege assertions could extend to a broad spectrum of information sought in congressional investigations, including documents, communications and witness testimony. Potentially covered communications may take many forms, from formal presentations and memoranda concerning matters pending before the executive branch, to emails and text messages, to formal and informal conversations.

The timing of the OLC opinion is also noteworthy, arriving shortly before the midterm election, as Democrats in Congress are preparing their oversight agendas should they win control of the U.S. House of Representatives and/or U.S. Senate. It suggests that the White House may attempt to invoke executive privilege over a wide swath of documents and communications with third parties, potentially including executives from the private sector, who may, in turn, feel compelled to address any such privilege concerns.

OLC opinions, while generally controlling within the executive branch, carry no formal weight with a reviewing court or with Congress. However, the opinion could still complicate Democrats' reported planned oversight — specifically, oversight directed at third parties with a nexus to the White House, given expectations that the White House is unlikely to cooperate with direct oversight requests related to President Donald Trump and his closest advisers.

U.S. v. Navarro

On July 21, the D.C. Circuit affirmed Trump adviser Peter Navarro's conviction on two counts of contempt of Congress arising from his refusal to comply with a subpoena from the House Select Committee to Investigate the January 6th Attack on the U.S. Capitol.[2]

The select committee had subpoenaed Navarro, a former senior White House adviser, for documents and deposition testimony concerning public statements he made about a plan to delay the certification of the 2020 election results. Navarro asserted executive privilege before seeing the subpoena and did not engage with the select committee.

The House voted to hold Navarro in contempt, and a grand jury indicted him. Navarro moved to dismiss the indictment, arguing that Trump had invoked executive privilege on his behalf.

Following an evidentiary hearing, the U.S. District Court for the District of Columbia found that no valid invocation of privilege had occurred and denied dismissal. The court also precluded Navarro from arguing to the jury that he mistakenly believed he was not required to respond. A jury convicted him on both counts.

The D.C. Circuit affirmed the district court's judgment, holding that only the president or a formally designated representative can invoke executive privilege; a witness cannot assert executive privilege unilaterally on the president's behalf.

The court also held that executive privilege, even if properly invoked, would not have excused Navarro's wholesale refusal to produce documents or appear, particularly when the subpoena sought information about his own public statements and writings.

Finally, the court affirmed that a witness's sincerely held mistaken belief that executive privilege applied does not excuse a failure to comply with a congressional subpoena.

The Navarro opinion reinforces that, while "[r]ecipients of congressional subpoenas 'retain common law and constitutional privileges,'"[3] those subpoenaed regarding their advice and communications with the executive branch cannot assert executive privilege on their own.

It also confirms that even a properly invoked privilege is not a blanket shield, particularly as to information that is already public or falls outside the president's own decision-making process.

As a practical matter, the opinion may lead at least some third parties to engage with the White House early regarding requests for potentially privileged information, and it counsels in favor of engaging in good faith with congressional committees.

De la Torre v. Cassidy

On July 31, the D.C. Circuit affirmed the dismissal of a suit brought by Ralph de la Torre, the former CEO of Steward Health Care System LLC, against the Senate Committee on Health, Education, Labor and Pensions and all but one of its members.

The committee subpoenaed de la Torre following Steward Health's 2024 bankruptcy. Rather than appear, de la Torre sent the committee a letter invoking his Fifth Amendment privilege against self-incrimination and declined to attend the hearing.

The committee rejected his objection and held him in civil and criminal contempt, and the full Senate thereafter unanimously adopted the criminal contempt resolution. De la Torre sued, arguing that the committee's subpoena and its subsequent enforcement via contempt violated his Fifth Amendment right.

The D.C. Circuit affirmed the district court's dismissal, emphasizing that the speech or debate clause immunity applies to legislators' work on committees. Issuing the subpoena, conducting the hearing and voting on the contempt resolutions were all "core legislative acts" entitled to absolute immunity under the speech or debate clause, depriving the courts of jurisdiction to hear the suit.

The court further held that allegations of improper motives — e.g., that the committee was really seeking to punish the witness, rather than pursue a legitimate legislative purpose — did not create an exception. To be legitimate, "a congressional investigation need only be 'related to and in furtherance of a legitimate task of Congress.'"

The court also rejected the argument that de la Torre's invocation of the Fifth Amendment stripped the committee's actions of their legislative character, noting that invocation of a constitutional claim "makes no difference to [the] analysis."

The de la Torre decision suggests that affirmative challenges to congressional subpoenas are not likely to succeed in courts. While Congress' authority remains subject to certain constitutional and common-law privileges, including executive privilege and the Fifth Amendment, such privileges should be asserted while otherwise complying with congressional processes.

In practice, these protections could be raised in the context of engaging with congressional staff and negotiating the scope of document productions or in preparing for potential testimony.

Practical Implications

Taken together, these recent developments point toward a congressional oversight environment in which procedural defenses have narrowed, even as the potential scope of substantive privilege protections is, at least arguably, expanding.

In this environment, oversight targets who communicated with the White House on relevant issues may find themselves in the middle of a separation-of-powers clash as they respond to congressional oversight demands while also navigating potential White House confidentiality concerns.

Indeed, targets of relevant congressional inquiries may feel compelled to consult with the White House before complying with an oversight request to determine whether the president intends to invoke executive privilege.

Although these parties may be advised by the White House that their communications are privileged, under the Navarro decision, executive privilege can only be validly asserted by the president or a formally designated representative; a witness or the witness's counsel may not unilaterally invoke it.

Additionally, even properly invoked privilege is qualified — it is not a blanket shield, particularly as to information that is already public or falls outside the president's decision-making process. This places oversight targets in a complicated legal and political dynamic.

In attempting to navigate this landscape, third parties may confront heightened legal risk, including subpoenas and possible contempt proceedings, as Congress seeks information that the executive branch contends is protected from disclosure.

Furthermore, the question of whether privilege extends to communications with private advisers has never been tested in litigation. In this case, the third party may be pulled into litigation as the subpoena recipient, even though the White House or the DOJ would presumably participate in the case to defend the president's assertion.

What's more, the third party's relationship with Trump and the White House, as well as the third party's advice, could become the subject of public scrutiny and discovery with respect to whether executive privilege applies.

Steps to Prepare

As companies and private individuals anticipating congressional scrutiny in the next Congress prepare, they should consider taking a few key steps.

First, oversight targets should determine which officers, employees or other representatives have engaged in communications with the White House, specifically Trump and his direct advisers. Companies may opt to evaluate the substance, frequency and context of relevant communications to determine whether such communications are confidential and relate to official presidential decision-making.

Additionally, companies that believe they may receive oversight inquiries in the next Congress should begin developing communications, government relations and stakeholder engagement strategies now, in advance of any inquiries.

Congressional investigations are often high-stakes and politically charged even in the ordinary course, and any assertion of executive privilege over sought-after information is likely to intensify media attention, public interest and the potential for reputational impact. In particular, an executive privilege dispute may focus attention on the role that private individuals played in advising the president and the substance of the communications for which privilege was invoked.

Finally, third parties should formulate legal strategies, including document preservation obligations and the risks of noncompliance, should they find themselves on the receiving end of subpoenas or contempt proceedings.

As Congress and the executive branch navigate these evolving privilege questions, oversight disputes next term are likely to present high-stakes, complex and potentially unprecedented challenges, making productive engagement with congressional stakeholders more important than ever.

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[1] 50 Op. OLC ___ at 2 (Aug. 10, 2026).

[2] U.S. v. Navarro, No. 24-3006, slip op. at 4 (D.C. Cir. July 21, 2026) (citing Trump v. Mazars USA LLP, 140 S. Ct. 2019, 2032 (2020).

[3] 50 Op. OLC ___ at 2 (Aug. 10, 2026).