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## House Approves Measure to Streamline Subpoena Enforcement

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On June 11, the House of Representatives voted along party lines to approve a measure, titled Resolution 430, to streamline the ability to enforce subpoenas issued to the targets of congressional investigations. Among other things, the new resolution allows a small leadership group within the House to grant consent for the chairs of House committees to bring suit to enforce subpoenas, a move which could have implications for both public and private sector entities involved in congressional inquiries.

### **Background**

Traditionally, Congress had three avenues to respond to targets of investigations who refused to comply with subpoenas: (1) through its inherent contempt power; (2) through the criminal contempt statute; or (3) through civil contempt proceedings. The first method allows Congress to incarcerate or fine an individual for failure to comply with a congressional subpoena, though it has not been used since 1935. The criminal contempt statute allows the House or Senate to approve a contempt citation, typically by a vote of the full body, then present it to a U.S. Attorney to bring the matter before a grand jury. Finally, and most commonly, Congress may use civil contempt proceedings to enforce a subpoena. This involves filing suit in federal court to obtain an injunction to enforce compliance with the subpoena.

Resolution 430 modifies and expedites the civil subpoena enforcement process and may affect the criminal enforcement avenue as well.

### **Operation of Resolution 430**

#### *Civil Contempt*

The resolution empowers chairs of House committees to bring suit to enforce their subpoenas with only the approval of the Bipartisan Legal Advisory Group (BLAG). BLAG is a five-person body established by the Rules of the House of Representatives (House Rules) consisting of the Speaker and the majority and minority leadership. Traditionally such proceedings were initiated by a vote of the full House of Representatives. Resolution 430 affirms one reading of the House Rules, which state that BLAG “speaks for and articulates” the House’s litigation positions and may have already authorized BLAG to independently enforce House subpoenas through litigation.

In addition to accelerating subpoena enforcement, Resolution 430 ensures legal representation during the process so long as the Speaker agrees. The House Office of the General Counsel must, with the Speaker's approval, represent a committee pursuing this expedited enforcement procedure and may retain private counsel to assist in the representation.

Democrats emphasized that the purpose of the resolution was to preserve precious House floor time which otherwise could be consumed by subpoena enforcement votes. Today BLAG consists of three Democrats and two Republicans: Speaker Nancy Pelosi (D-CA), Majority Leader Steny Hoyer (D-MD), Majority Whip Jim Clyburn (D-SC), Minority Leader Kevin McCarthy (R-CA), and Minority Whip Steve Scalise (R-LA).

Finally, the measure enables the House Judiciary Chair (Jerry Nadler, D-NY) to bring suit on behalf of the Judiciary Committee to enforce two recent subpoenas of particular interest to the House: (1) the subpoena issued to Attorney General William Barr demanding the unredacted Special Counsel report and underlying materials, and (2) the subpoena issued to former White House Counsel Donald F. McGahn requesting documents related to the Special Counsel's investigation.

### *Criminal Contempt*

The scope of Resolution 430 is limited to civil contempt proceedings. However, it may open the door to novel arguments leading to the acceleration of congressional subpoena enforcement under the criminal contempt statute as well. If the resolution is read broadly to affirm BLAG's power to speak for and articulate the House's litigation positions, and if presenting a contempt citation to a U.S. Attorney comes within that power, BLAG may assert a right to independently refer criminal sanctions for subpoena noncompliance to a U.S. Attorney. Under that scenario, the resulting enforcement steps remain unclear because the Executive Branch has generally taken the position that U.S. Attorneys maintain discretionary authority to launch grand jury proceedings, consistent with separation of powers doctrine.

### **Key Implications**

Significant implications for both the Trump administration and the private sector stem from Tuesday's vote. House investigative committees have already made clear that they will not hesitate to issue subpoenas to agencies and individuals. Companies may find that documents that they have provided to agencies or information about their interactions with political staff are implicated by these congressional requests. And entities in the private sector may find that committees conducting oversight inquiries issue subpoenas with more frequency knowing that the enforcement process has been simplified. Establishing a dialogue with committees early in the inquiry process may allow companies to negotiate the scope or timing of a subpoena, or navigate alternative means of cooperation through voluntary responses.

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