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Kevin O'Neill

All right, welcome to Lawyer Up: Congressional Investigations in the Next Congress. I'm Kevin O'Neill, and I'm joined by two of my favorite people at Arnold & Porter, Mark Epley and Rachel Cotton. I want to jump right into it. Rachel, you used to work in investigations for the Biden White House. Mark, you used to sit at the right hand of the Speaker of the House as he determined what investigations would occur in a Republican Congress.

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Kevin O'Neill

Now we've got a massive Democratic majority in the new House. We don't even know how big it will be yet, but we know it's going to be substantial. What are they going to do? Those new congressional Democrats holding the gavel with their new power to investigate. Let's start with you, Rachel.

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Rachel F. Cotton

Well, I think they've been very transparent about what they're going to do. I think you saw from incoming Chair of House Oversight, Robert Garcia—lawyer up. You saw from Ron Wyden, one word upon hearing that he was going to take the Senate: subpoenas. Investigations are going to be top of their agenda. They've been telling us for the past six months what they're going to investigate, and now they're looking forward to following through.

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Mark Epley

For sure, they'll start with aiming their fire at the administration. But I think, as Rachel can tell our listeners, the administration has lots of tools with which to resist those demands. And so what we expect is that congressional investigators will turn their fire on proxies, proxies, soft targets, those who have done business with the administration, even those companies that have done well, irrespective of actual contact with the administration.

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Mark Epley

Those are the kinds of targets that we might see congressional investigators pursue.

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Kevin O'Neill

So three of us have kind of talked about different layers of the onion here of where they'll focus, Mark. And the innermost is Trump and his family, right. So, where do private parties get concerned about the congressional focus on Trump to begin with?

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Rachel F. Cotton

I'll take that one. So I think you've seen over the past two years a lot of interaction between private industry and this administration. And one of the narratives that congressional Democrats are going to want to push is that this is a pay-for-play administration, which they perceive as corruption. As you and Mark have mentioned, this administration is not going to acquiesce to congressional demands. They didn't in Trump one. They're certainly not going to this time around.

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Rachel F. Cotton

And so what you're going to see is the congressional Democrats looking to the other side of the communication to the private industry, who interacted with this administration for information, to understand what were those dynamics, what were those conversations? What were those deals? There hasn't been a lot of transparency.

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Rachel F. Cotton

And the Democrats are going to see, I think rightfully, that companies have a different incentive structure around cooperating with congressional investigations. They don't have the legal tools that the executive branch has. They don't have the ability to unilaterally assert executive privilege. And also, again, there's just a different incentive structure for these companies. And so they will be seen as softer targets or more likely, sources of information.

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Mark Epley

There's a big interest, Kevin, in these questions like, "Gee, you gave to the inaugural ball. You gave to the ballroom."

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Kevin O'Neill

You gave to America's 250th.

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Mark Epley

250th, MAGA Inc.—these things—and the presumption, at least, that the questions are: What did you get for it? So that's going to be top of mind for congressional Democrats, for sure.

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Mark Epley

Pursuing these softer targets, those who, if they ultimately make a demand for testimony or documents, they have the power to issue subpoenas and compel that.

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Kevin O'Neill

So both of you have been in positions to work on investigations before. Take me inside the Democratic mindset of a congressional investigation. And maybe, Mark, contrast that with how Republicans would handle the same situation or what sort of water are they going to carry for the president in these investigations?

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Kevin O'Neill

Or have the does the election result mean they're not willing to be as closely aligned as before? But I want to start with, what do Democratic investigators, how do they structure these things? How do they think about them philosophically?

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Rachel F. Cotton

I think what they're looking at right now is they feel they have a mandate. You know, the Democrats were very transparent about what they were running on—accountability and affordability—and they're going to want

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Kevin O'Neill

I didn't hear subpoenas in that phrase at all.

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Rachel F. Cotton

They're going to use their subpoena power to pursue political narratives around both of those twin goals. And I think you're going to see a lot of investigations trying to hold the Trump administration accountable, and you're going to see a lot of investigations that actually try to tie the Trump administration to the price of goods and how administration policies are contributing to Americans paying more at the grocery store, at the pump, etcetera.

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Rachel F. Cotton

Democrats are going to try to drive those political narratives really hard, both because it's what they got elected on and because you're already starting to frame up the 2028 presidential. And those are the narratives they're going to want to deliver on, and there's going to be a lot of pressure on them to deliver on those narratives.

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Mark Epley

To that last point, when I was leading congressional investigations, there was below the surface, always the base, the base that felt like they were responsible for working hard to get us the majority, with expectations that if you're not pushing hard on these objectives, and I guess in this case, accountability, it's because you're not smart or you're weak.

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Mark Epley

So I expect there will probably be a lot of pressure from the base. "Hey, what are you doing?" Even the question of impeachment is something that Democratic elected

leadership will have to deal with. If that's not a priority for them, they will need to help direct committee fire toward more productive outcomes.

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Kevin O'Neill

So you mentioned the I-word. I want to go down that tangent real fast because off, off, you know, before we tape this, you mentioned something that there's actually a legitimate reason that they would want to file articles of impeachment as it, as it pertains to investigations. I can take that. I mean it in normal course congressional investigations, you have to have a legislative purpose.

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Rachel F. Cotton

I can take that. I mean it, in normal course of congressional investigations, you have to have a legislative purpose. And there's only certain things you can legislate on—it's a wide set, but there are some things you can't legislate on. You can't legislate outside of congressional power and authority. And theoretically, Congress is not supposed to be an investigator of wrongdoing. They're not supposed to be exposing for the sake of exposure. There's all these Supreme Court teachings on those.

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Rachel F. Cotton

When you pursue impeachment, you don't need a legislative purpose. You have actually, a lot of the guardrails, a lot of those Supreme Court teachings—don't apply. And so the utility of articles of impeachment is that you can pursue investigative targets with even fewer guardrails than Congress normally has—which, by the way, aren't many.

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Mark Epley

Right. And this, Kevin, the Supreme Court has, through its teaching, said pretty clearly that the power of Congress to investigate is as broad as its power to make laws.

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Mark Epley

And that includes laws that we don't have right now have. But to your point, impeachment is a power given to Congress in Article I, and it doesn't need to be tied to lawmaking. It looks a lot more like an investigation in pursuit of enforcement.

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Rachel F. Cotton

It looks more like a prosecution. And, you know, we lived through the—

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Kevin O'Neill

Well, that's a good that's a good tangent. That word prosecution. Congressional investigations are not a prosecution. You just said that, right? So how does it-

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Rachel F. Cotton

Well, they're not supposed to be.

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Kevin O'Neill

They're not supposed to be. They're a persecution, but maybe not a prosecution. Right. But how do they differ from, you know, me landing in court in a criminal or civil matter? What are the major differences we're going to see?

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Rachel F. Cotton

So we spent a lot of time talking about this. Congress is a forum like no other. So civil litigators are accustomed to things like protective orders. They are accustomed to having a neutral arbiter and a judge. They are accustomed to the judge being separate from the prosecutor or from the other side.

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Rachel F. Cotton

In Congress, you don't have any of those. There are actually very few rules, and even the rules that do exist can be waived or varied. So it really can feel like the Wild West.

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Mark Epley

Well, and there isn't even a standard form to commence a contest, unlike a civil litigation or civil criminal investigative demand letter, you know that you're in it.

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Mark Epley

If you are served with this kind of thing with Congress, an investigation could start with something as sort of light as a call from staff making an inquiry, all the way up to a letter with turnover documents now under threat of subpoena.

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Rachel F. Cotton

I think the other way in which they are fundamentally different, although maybe civil litigation would disagree, but is the extent to how they are politics at base.

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Rachel F. Cotton

You know, it is important to hire a lawyer who understands the legal dimensions of them, but at base they are a combination of law, politics, and communications. And depending on the investigation, actually the sort of PR communications side can actually be driving harder than the legal considerations. And at core, again, they are political exercises. And that is very different from traditional criminal prosecutions or your typical civil litigation.

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Mark Epley

Well, I think to that point, the congressional power, there is the power to compel, and there are some means by which they can enforce, but in truth, their power is at their highest when it speaks to matters of public concern. So, just reflecting on experience I had leading investigation involving Tea Party targeting. At that point President Obama was, that administration opened the doors to it.

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Mark Epley

I think that everyone imagined, yeah, we ought not to have an IRS that treats people differently based on their views or names. And the administration moved forward hard with being cooperative, I think, because it was speaking to a matter of public concern.

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Rachel F. Cotton

Or because it was the good old days.

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Mark Epley

Or was the good old days.

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Kevin O'Neill

All right. So you're in my mind, you're kind of saying that it's not like the FBI showing up on my doorstep when I'm watching, you know, a police procedural. It's a little bit like a frog getting slowly boiled in a pot. The temperature can go up quickly. It can go up slowly. But let's talk from the corporate. Right. So we talked about the first concentric circles, sort of the president and his family.

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Kevin O'Neill

And then I think next is cabinet officials. But eventually we get to corporations. Mark mentioned earlier people that are alleged that there's some sort of quid pro quo, but there's really a much broader universe of corporations. It's kind of anyone who's had a policy interaction with the Trump administration, right? They are potentially a target. And what should they be thinking about as they consider how to prepare for a potential knock on the door or a letter or a phone call?

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Rachel F. Cotton

I'll try to answer that. I don't think it's truly any company that has had any interaction with the Trump administration has actual vulnerability, but certainly they could get a letter and have to respond. You know, Democratic Congress has a lot of investigative resources, but they are finite. And so they're going to have to pick their targets.

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Rachel F. Cotton

And so they're going to knock on a lot of doors, but who they actually pursue, I think, will get winnowed over time. So what companies need to do is understand what their interactions were. What about those interactions was unusual, to the extent they have received anything from the administration. Get your facts in line. Know where your vulnerabilities are so that when you get the knock on the door, the metaphorical knock on the door, you can respond appropriately, accurately, and hopefully be able to convince the committee that you're not nearly as interested.

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Kevin O'Neill

These aren't the droids you're looking for.

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Mark Epley

Which raises the point too. I think it's really, really important, often when you have, you have a certain narrative about how it is that you came to get a license or a deal or a grant or contract or whatever, that's only sort of so, so deep. And in anticipating a congressional investigation, it's really important to do a meaningful internal investigation to to really know what the true story is, who talked to whom.

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Mark Epley

And how is it that this, this, this benefit came to be conferred? It may be the case. It had nothing to do with meaningful interaction with the administration. But knowing the truth, the ground truth, is going to be super important.

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Rachel F. Cotton

I think the point is that you want to be prepared. You don't want to be surprised by the allegations in a letter that you get, and you don't want to be putting together the chronology for the first time.

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Rachel F. Cotton

When you get a letter with a deadline, with the possibility of compulsion behind it.

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Kevin O'Neill

Yeah. So let's jump down that. So we've talked about how it's different than the traditional legal process. What sort of rights do I have? What sort of privilege can I sue to quash a subpoena? Do I owe them a response? Can I simply ignore, you know, what are my options here, Mark?

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Mark Epley

So, well, one, there's a powerful protection given by the Constitution to Congress called the Speech or Debate Clause, and it says that you cannot go to court, or at least it's difficult to imagine a legal theory that allows you to go to court to quash a subpoena.

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Rachel F. Cotton

We have some creative ones, though.

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Mark Epley

For sure, but in the ordinary course, hoping that this would be treated like, hey, I have nothing to do with this in this civil action, you know, the court protect me by quashing the subpoena.

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Mark Epley

That's not an ordinary course way to find protection. So look, if if a subpoenas issued, it's a it's a and it's pertains to a matter within the committee's jurisdiction. And it is articulately related to a legislative purpose. It's a legitimate demand that you need to take seriously. And, I mean, we often say, look, the fact that there aren't any rules really invites creativity and innovation in dealing with the committee.

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Mark Epley

But defiance is not a great tactic. That's a sure way to get a bad result.

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Kevin O'Neill

Yeah. You know, one thing I always think about compared to civil or criminal litigation is in a congressional investigation, you're always having ex parte communications with the judge and the jury. Like, you can work the crowd from day one to the end.

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Kevin O'Neill

So I want to end on this note. Like, what are the big mistakes that a company should know? Gosh, if I've done one of these three things, this is a sign I need to stop and get counsel. You know, as I prepare for this, what are the things that tell me I'm doing this wrong?

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Rachel F. Cotton

So I think I understand the question, but maybe answer it slightly differently. As far as mistakes in when you get an incoming. Is not understanding the forum. The biggest mistake I think we see is companies either being dismissive because they're dismissive of Congress, or treating it like a grand jury subpoena, where they actually are going to take the request as written and go find every scrap of paper anywhere without any engagement with the staff to actually understand what's behind the

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Kevin O'Neill

It's a middle ground.

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Rachel F. Cotton

I think it's an understanding of what's motivating the member and the committee and the forum and responding appropriately.

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Kevin O'Neill

Mark, you have any last words of advice for corporate clients that are thinking through their exposure here?

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Mark Epley

So it's possible, and you should prepare if there's a reasonable belief that you might receive an inquiry. There are ways to prepare for this.

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Mark Epley

And one of the most important things is to assemble your team first before you get the inquiry. So there's no panic about who is it that's going to help you navigate this, both from a legal perspective and a communications perspective. Get your team squared away early.

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Kevin O'Neill

Great advice, guys. Thanks for joining us on Lawyer Up: Congressional Investigations In The Next Congress.

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Kevin O'Neill

If you want more information, please reach out to Rachel Cotton and Mark Epley via their email or phone call.