

Five Ways House Jan. 6 Panel Will Alter Congressional Probes

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During his time with the Select Committee, Temidayo led day-to-day investigative work on several issues, including the baseless assertions that President Trump was the winner of the 2020 election, the Trump re-election campaign's use of these false claims to raise hundreds of millions of dollars after the election, and the funding behind the rallies that preceded the attack on the Capitol.

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For the past two centuries, Congress has conducted investigations that furthered its constitutional responsibility to consider and pass legislation.

The U.S. House of Representatives Select Committee to Investigate the January 6th Attack on the U.S. Capitol was no different — it provided 11 legislative proposals designed to ensure the peaceful transfer of power between presidents that eluded the U.S. after the 2020 presidential election.

As senior investigative counsel on the Jan. 6 committee, I helped conduct what is widely considered one of the most complex and consequential investigations in congressional history.

The Jan. 6 committee demonstrated that Congress' power to investigate a subject on which it may legislate is quite broad, and the tactics available to Congress to do so are extensive — embracing an

array of legal topics, targeting large-scale criminal conduct, and utilizing new tools in media management and storytelling.

The recent growth in the scope and sophistication of congressional investigations is remarkable on its own, but the peril faced by targets of this new class of investigation is exacerbated by the polarization gripping our country and its representatives in Congress.

It's hard to imagine a subject more divisive than former President Donald Trump's attempt to overturn the 2020 election, but it's easy to see why politicians might inject new levels of conflict and vitriol into future investigations — whether or not the underlying issue deserves it.

With this in mind, entities and individuals who find themselves in the crosshairs of a congressional investigation need to understand how the Jan. 6 committee affected the nature of these inquiries, and how to be ready for future investigations.

1. Bottom-up, DOJ-style investigations will target every level of an organization.

Long before the Jan. 6 committee was formed, it was clear that the attack on the U.S. Capitol was criminal in nature, even if all causes of the crimes remained obscure.

By the time I joined the Jan. 6 committee in 2021, the U.S. Department of Justice had already arrested numerous individuals for their role in the day-of violence.

Hundreds more needed to be interviewed to uncover the origins of the insurrection — those who planned the rallies that preceded the attack, those who secured the permits and financed the events, those who coordinated the attack itself, those who benefited financially from spreading lies about the election, those closest to Trump who helped him orchestrate his attempted political coup, and the myriad individuals who may have witnessed criminal activity along the way.

The Jan. 6 committee responded to this situation by organizing a DOJ-style investigation involving seasoned former prosecutors with experience conducting wide-scale, complex criminal investigations.

Before the Jan. 6 committee, congressional investigations generally hewed to a familiar pattern, especially in the perception of the public: High-profile witnesses, often corporate officers, get peppered in live televised hearings by questions from politicians — some friendly, some hostile — about a scandal or alleged malfeasance.

The Jan. 6 investigation took a different tack. Following a pattern commonly used by prosecutors, the committee proceeded from the bottom up — subpoenas and other formal requests for information were issued to hundreds of individuals with information relating to facts, circumstances or causes of the Jan. 6 attack, with their testimony in turn leading to further subpoenas or testimony from others further up the chain in organizations that influenced or participated in the events of Jan. 6.

This was true not only for the various activist and paramilitary groups that participated in the attack, but for political organizations as well.

Much as in a standard investigation into a criminal enterprise, the aim was to flip lower-level participants to expose those who inspired, coordinated or otherwise supported the attack on American democracy.

The investigation notably concluded with a criminal referral to the DOJ for the prosecution of Trump.

This approach, justified by the underlying facts surrounding Jan. 6 and the need for a fast-paced and thorough investigation, will have significant effects on the structure and purpose of future congressional investigations, whether or not they actually require the sensibility and approach of a criminal investigation.

In the future, a wide range of personnel, from C-suite executives to middle management and even front-line workers, may be subpoenaed or tapped for information, and any organization facing congressional inquiry in the future will need to plan accordingly.

Many individuals in lower organizational tiers are not accustomed to this style of inquiry, or being a part of an investigation at all.

This difference in investigatory style opens up multiple subjects to unfamiliar or intimidating forms of questioning, often about topics outside their expertise — a recipe for unforeseen legal peril.

2. Criminal referrals will become run-of-the-mill.

Although the DOJ did not have oversight or input into the Jan. 6 committee's investigation, the misperception that the committee was somehow collaborating with the DOJ is likely to be weaponized in future inquiries.

Many political actors who assailed the techniques used by the Jan. 6 committee understood that it was conducting an inquiry drawing on former DOJ staff and investigative techniques, and they will likely avail themselves of the same techniques when given the opportunity.

Indeed, the purported legislative function of future investigations may be a mere pretense for retaliatory criminal referrals, which are likely to become more frequent.

Ironically, this misperception will in turn place pressure on the DOJ and other regulatory and enforcement bodies to pursue their own investigations and legal actions.

The overwhelming public response to the televised committee's hearings — not to mention the committee's criminal referrals of Trump and his associates — certainly quickened the pace of calls for his prosecution by the DOJ, pressure that the department must feel.

Consider also that the committee raised campaign finance issues in the course of its investigation, which might draw the Federal Election Commission into the fray; this new investigative posture may inspire the attention of other agencies as well.

3. Recorded testimony will generate additional risk.

In another break from typical congressional investigations, the committee elected to videorecord depositions and transcribed interviews. This choice, which made the televised hearings possible, is especially consequential for future investigation subjects.

In traditional investigations, committees would subpoena records and conduct nonhearing depositions or transcribed interviews, but rely solely on transcripts of those interviews — stale words on the paper that are, as in a civil litigation, the official record of the interview.

The only interviewees the public sees in this scenario are individuals subpoenaed for a public hearing. When they do appear, they are treated perhaps as a friendly witness facing friendly questions.

The same witness might then be confronted by a committee member of the opposing party who gives a long, three-minute speech punctuated by a hostile question — a member who is trying to make a big impression during a small window of time.

In contravention of this model, many of the Jan. 6 committee interviewees sat down with a skilled interviewer for hours at a time in a neutral environment, facing targeted, well-directed questions, rather than appearing for a short time in front of panel members who were often speaking directly to their constituents rather than pursuing rigorous inquiry.

This change added a new public relations dimension to every recorded interview.

Recorded testimony afforded the committee expanded opportunities to craft the hearings in a narrative designed for effective public consumption, of course — an innovation that will surely continue. But recorded interviews will also change the game for future interviewees.

Corporate leaders who are adept at answering — or sidestepping — questions in public may have to contend with congressional depositions or transcribed interviews akin to depositions in civil litigation.

Moreover, testimony from hours of video recordings can be excised to highlight unfavorable testimony, and small moments that seem insignificant in a conference room — such as awkward pauses in conversations or emotional reactions, however slight — can be interpreted in negative ways.

Media training and preparation of witnesses — tailored to how they will be interviewed, and in what forum — is essential.

4. Investigations will be driven by the media cycle.

Much has been made of the Jan. 6 committee's novel use of the media to present its narrative; indeed, The New York Times celebrated the hearings as one of the best television shows of 2022.[1]

This high praise was no accident, but rather the product of deliberate planning. The committee understood that to make an impact, it would have to eschew a simple question-and-answer format, the results of which are simply posted online.

Combining the fruits of our investigative work with an element of entertainment was imperative.

As a result of these efforts, the committee successfully captured and maintained the public's attention throughout the hearings. Its work demonstrated to future investigations the great flexibility and power that the tools of contemporary media offer.

House Speaker Kevin McCarthy's post-midterm pledge to hold congressional hearings on immigration at the U.S.-Mexico border is an example of the new House majority employing lessons learned from the committee.[2]

To make an impact, hearings will become evermore imaginative and sensational. For example, the committee repeatedly highlighted the difference between the public statements of political figures who supported Trump and the insurrectionists in public, but then acted differently in private.

This distinction was highlighted by the committee's inclusion of footage showing Sen. Josh Hawley, R-Mo. — who raised his fist in solidarity with a crowd of Trump supporters outside the Capitol before the attack — running through the Capitol, fleeing from those same supporters.

This juxtaposition not only made for good television, but also for effective messaging.

The new normal raises the stakes for target organizations and their leaders. It was difficult enough for a CEO to be brought before Congress to face a public hearing; future investigations may, fairly or not, make that same executive into the villain of a compelling multimedia drama. Potential damage to reputation and brand identity will take on new dimensions.

5. Early cooperation can confer added value.

How, when and whether to cooperate: These are some of the first questions a subject faces in a congressional investigation, and there's no clear-cut answer.

A successful response depends on any number of factors, including, above all, understanding what it is that a particular member of Congress or congressional committee wants from the investigation, a factor that's often difficult to discern or define.

Early, quiet and swift cooperation is often the key to avoiding legal difficulties, public relations issues and brand damage. Such an approach presented an additional benefit to those who were contacted by the Jan. 6 committee.

Discreet and proactive cooperation often positively affected the committee's decision to not issue a public subpoena to individuals, sparing them the need for a combative posture in a politically charged environment.

Many of the players, participants and witnesses to the events of Jan. 6, and the preceding political efforts to overturn the election, held or expressed negative or outright hostile views toward the Democratic Party and the government in general as a matter of course in their careers as political operatives, media figures or activists.

Although the committee was in fact bipartisan, many voices on the right saw the committee as a mere political actor on behalf of the Democratic Party. For many witnesses that were contacted during the investigation, the committee was not just unpopular — it was illegitimate.

Nevertheless, the vast majority of these same individuals cooperated with the investigation. Because their participation was low-profile, they were able to credibly maintain their public-facing positions regarding the committee, the investigation and the insurrection itself.

By contrast, individuals who hesitated to cooperate, or did so in a piecemeal fashion, incurred the negative attention of both sides of the political spectrum, and the suspicion of everyone in between.

Political polarization is at a fever pitch and shows no sign of abating. Early and discreet cooperation in future investigations will help subjects avoid being drawn into larger public political and ideological conflicts they can ill-afford.

Conclusion

It's clear that in the wake of the Jan. 6 committee, the congressional investigation as we knew it has fundamentally changed. Individuals and entities responding to them will need to prepare strong, nimble, media-savvy strategies to manage or defuse them.

But at least one vector remains the same — human psychology. Understanding the motivations that define investigative committees and their individual members is as important as ever given the heightened stakes of future investigations.

Will a witness face committee members who have a political ax to grind in public hearings? Did the committee send the subpoena early in the process, with little fanfare, or did it wait until the last minute to serve it? Is the head of the committee interested in dominating short-term news cycles, or are they likely to favor a plodding, by-the-numbers investigation? Which committee members are acting in good faith, and which are not?

It is important to discern the aims and objectives underlying an investigation and draw on media- and crisis-management assets, as well as the soft skills required to successfully navigate the multiple players involved in every level of an investigation. It's a tall order, but this new brand of investigation requires nothing less.

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[1] <https://www.nytimes.com/2022/12/01/arts/television/best-tv-shows.html>.

[2] <https://www.msn.com/en-us/news/us/mccarthy-pledges-to-hold-house-hearings-at-the-southern-border-when-republicans-take-majority/ar-AA14qz1H>.

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