

Investigations, Compliance and Defense

New Congress, New Outlook: 10 Things In-House Counsel Need To Know About House Congressional Committees

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On January 3, 2019, the 116th Congress will be sworn in. The House of Representatives will look different from any previous Congress in many ways, including having more than 100 female members for the first time in our country's history^[1] and more Latino members than ever before (at least 42).^[2] The 2018 election will result in a number of other milestones as well: giving us the youngest woman Representative ever,^[3] the first Native American woman (in fact, two^[4]), and the first Muslim woman (in fact, two^[5]). And, of course, the Democratic Party will control the chamber for the first time since 2010.

Although the focus in the media has been on these important historical milestones and the expected increase in congressional oversight of the Executive Branch, it is also almost certainly the case that the business community will face renewed scrutiny from the incoming Democratic majority. In fact, on Sunday morning, the expected incoming chairman of the House Committee on Oversight and Government Reform (HOCR), Congressman Elijah Cummings (D-MD), laid out his priorities, stating, among other things: "I really want to look at some things that affect people on a day-to-day basis such as...drug prices and health care issues."^[6]

Below we summarize 10 things every in-house counsel should know when a House congressional committee comes calling.

- 1. Congress's oversight role is grounded in Article 1 of the Constitution.** Congress's power to investigate is derived from the Constitution and therefore must be grounded in its legislative function. This authority is broad but not unlimited; it cannot extend into matters over which Congress cannot otherwise lawfully act,^[7] and it is not tantamount to authority to conduct a "legislative trial."^[8]
- 2. Committees have limited jurisdiction and must follow their own rules.** Each committee is granted jurisdiction over specific matters, which in principle allows its members to develop expertise on a narrower set of issues. However, the jurisdiction of HOCR is essentially unlimited.^[9] In addition, both the House of Representatives as a whole, and each of the individual congressional committees, have their own set of rules, which are adopted at the outset of each new session.^[10] The 116th Congress will adopt new rules in early 2019, soon after the start of the new session. Because the rules are both complex and changeable, when interacting with any committee, it is imperative to closely scrutinize the applicable House rules as well as the specific jurisdiction and rules governing the committee.
- 3. There is an open question as to how many House committees will be granted "unilateral" subpoena power.** In 2015, toward the end of President Obama's second term, House Republicans granted unprecedented unilateral subpoena power to many committee chairs.^[11] Those committee chairs could, without a vote or consultation with the minority party, issue subpoenas. Before this change, only HOCR was regularly exercising unilateral subpoena power; afterward, 14 separate committees were granted some version of this power, and many began to use it liberally.^[12] House Democrats will have to decide in short order whether to maintain these rules at the outset of the new session after previously

“slamm[ing] the move as an abuse of the minority party’s rights.”^[13]

4. **Regardless, subpoenas are almost never the first step in the process when a committee begins to investigate.** Much has been made in the Washington press corps about the expected flurry of subpoenas that House Democrats will issue,^[14] but the reality is that, regardless of the specifics of *how* a committee may issue a subpoena, congressional committees almost always first proceed by seeking voluntary cooperation from an entity (whether public or private).
5. **It is important to cooperate.** Given the public nature of scrutiny by a congressional committee (as opposed to, for example, a confidential Department of Justice investigation), entities must be mindful that there are often significant – and very public – downsides to appearing adversarial or non-cooperative with a congressional committee. Committee staff is often willing to negotiate and narrow aspects of their information requests, particularly when an entity is being cooperative. For example, parties may seek to negotiate over the deadlines for a response contained in the request or secure an agreement to provide information on a rolling basis.
6. **If a committee is seeking information from a witness, there are multiple ways for a witness to provide information.** Although congressional hearings get all the headlines, committees often hear from individuals in more informal sessions. The different formats include: informal staff briefings, non-transcribed or transcribed interviews, congressional depositions, or full-blown public hearings. Preparing for each of these different formats is quite different from preparing to take questions in other fora.
7. **Entities should try to seek confidentiality agreements if the public dissemination of the information at issue is a concern, but be mindful that the information may become public anyway.** It may be possible to secure a confidentiality agreement from the committee, but parties should *always* be aware that information and documents provided to Congress may ultimately be made public.
8. **Entities facing scrutiny from a committee should determine whether they are represented by any members on the committee.** Members who represent the company’s district can be helpful as entities seek to negotiate. Companies should think broadly in this respect; not only about the “home-state” representative for company headquarters, but also about those members of Congress who represent areas where the company has operations or employees.
9. **Subpoenas are often a last resort, and, even if one is issued, parties should still try to negotiate with the committee.** Even if a subpoena is issued, entities are often successful in negotiating over the scope and deadlines contained within the subpoena.
10. **Even if the parties reach an impasse over a subpoena, enforcement actions are rare.** To enforce a subpoena, the House must go through an onerous process, which has meant that enforcement actions are unusual.^[15] Ultimately, “[t]he full House must adopt a resolution finding the person in contempt and authorizing the committee and/or the House General Counsel to pursue a civil action in federal district court.”^[16] Since 1980, the House has considered approximately twenty enforcement actions.^[17] For example, during the Obama Administration, HOCR sought to enforce a subpoena against then-Attorney General Eric Holder, ultimately holding him in contempt and initiating litigation in federal district court in Washington, DC.^[18]

[1] Eli Watkins, *Record Number of Women Elected to the House*, CNN (Nov. 9, 2018), <https://www.cnn.com/2018/11/07/politics/women-house-senate/index.html>.

[2] James Hohmann, *The Daily 202: Four ways the midterm results challenged conventional wisdom*, Washington Post (Nov. 9, 2018), <https://www.washingtonpost.com/news/powerpost/paloma/daily->

[202/2018/11/09/daily-202-four-ways-the-midterm-results-challenged-conventional-wisdom/5be50aa81b326b39290546e0/?noredirect=on&utm_term=.07288a60a254](https://www.washingtonpost.com/news/energy-environment/wp/2018/11/09/daily-202-four-ways-the-midterm-results-challenged-conventional-wisdom/5be50aa81b326b39290546e0/?noredirect=on&utm_term=.07288a60a254).

[3] Alexandria Ocasio-Cortez (D-NY) is 29 years old. Abby Finkenauer (D-IA), who was 29 on Election Day, will turn 30 in December before being sworn in to the House.

[4] Sharice Davids (D-KS) and Deb Haaland (D-NM).

[5] Rashida Tlaib (D-MI) and Ilhan Omar (D-MN).

[6] Jake Sherman et al., *POLITICO Playbook: Dems Lay Out Investigation Priorities*, Politico (Nov. 11, 2018), <https://www.politico.com/newsletters/playbook/2018/11/11/dems-lay-out-investigation-priorities-344934>.

[7] *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. . . . But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to ‘punish’ those investigated are indefensible.”); see also *McGrain v. Daugherty*, 273 U.S. 135, 170 (1927).

[8] *United States v. Icardi*, 140 F. Supp. 383, 388 (D.D.C. 1956) (“While a committee or subcommittee of the Congress has the right to inquire whether there is a likelihood that a crime has been committed touching upon a field within its general jurisdiction and also to ascertain whether an executive department charged with the prosecution of such crime has acted properly, this authority cannot be extended to sanction a legislative trial and conviction of the individual toward whom the evidence points the finger of suspicion.”).

[9] H.R. Doc. No. 114-192, at 476–479 (clause 1 of Rule X) (2017), <https://www.gpo.gov/fdsys/pkg/HMAN-115/pdf/HMAN-115.pdf>.

[10] See, e.g., *id.*; Staff of H.R. Comm. on Rules, 115th Cong., Adopted Rules RCP 115–35 (Comm. Print 2017), <https://www.gpo.gov/fdsys/pkg/CPRT-115HPRT27270/pdf/CPRT-115HPRT27270.pdf>.

[11] Of the 21 House committees, 14 may currently issue subpoenas at the chairman’s own initiative. Michael L. Koempel, *A Survey of House and Senate Committee Rules on Subpoenas*, Congressional Research Service (Jan. 29, 2018), <https://crsreports.congress.gov/product/pdf/R/R44247>.

[12] Anthony Adragna, *The Powerful Weapon House Republicans Handed Democrats*, Politico (Oct. 28, 2018), <https://www.politico.com/story/2018/10/28/house-republicans-subpoena-trump-943265> (“One of the most aggressive to use the new authority was House Science Chairman Lamar Smith (R-Texas), who issued dozens of subpoenas to the Obama administration.”).

[13] *Id.*

[14] Michael Hirsh, *Who Will Speak for the Democrats?*, New York Review of Books (Nov. 8, 2018), <https://www.nybooks.com/articles/2018/11/08/who-will-speak-for-democrats/> (“Sources tell me that subpoenas would fly like ticker tape”); see also Ken Dilanian, *Here Come the Subpoenas: What House Democrats Plan For Their Russia Probe*, NBC News (Nov. 7, 2018), <https://www.nbcnews.com/politics/congress/here-come-subpoenas-what-house-democrats-plan-their-russia-probe-n933681>; Billy House, *Democrats Gain Subpoena Power They Can Use to Investigate Trump*, Bloomberg News (Nov. 7, 2018), <https://www.bloomberg.com/news/articles/2018-11-07/democrats-biggest-gain-is-subpoena-power-to-quiz-trump-aides>.

[15] There is also a rarely used process to enforce a subpoena via criminal contempt, see 2 U.S.C. §§ 192, 194.

[16] Alissa M. Dolan *et al.*, *Congressional Oversight Manual*, Congressional Research Service 35 (2014), <https://fas.org/sqp/crs/misc/RL30240.pdf>.

[17] See Todd Garvey, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, Congressional Research Service (May 12, 2017), <https://fas.org/sqp/crs/misc/RL34097.pdf>.

[18] See generally *Comm. on Oversight and Gov't Reform, U.S. House of Representatives v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013).

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