

Government Controversies and Public Policy Litigation

Congressional Investigations in the 117th Congress

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On January 3, 2021, the 117th Congress was sworn in expecting to begin its work with a divided Democratic-controlled House and Republican-controlled Senate. But January 5th changed everything—Reverend Raphael Warnock and Jon Ossoff each pulled off improbable victories in the Georgia Senate runoff elections, giving Democrats (who count two Independents among their caucus) 50 seats and, with Vice President Elect Kamala Harris as the tiebreaking vote, the Senate majority. With Joe Biden as President, Nancy Pelosi as House Speaker, and Chuck Schumer as the Democratic Leader of a tied Senate, the Democrats have unified control of the executive and legislative branches for the first time since 2011, although the slim margins will undoubtedly be a challenge for the leadership of each Chamber.

The 116th Congress saw increased scrutiny from the House of Representatives on major corporations of all stripes, and both the House and Senate were especially focused on oversight and legislative activity surrounding tech companies. With unified Democratic control, the business community is likely to face heightened scrutiny, especially in the wake of the COVID-19 pandemic.

Here's a look at the committee chairs in the House and the likely committee chairs in the Senate:

House Committee Chairs^[1]

- Appropriations: Rosa DeLauro (CT-03)
- Budget: John Yarmuth (KY-03)
- Education & Labor: Bobby Scott (VA-03)
- Energy & Commerce: Frank Pallone (NJ-06)
- Financial Services: Maxine Waters (CA-43)
- Judiciary: Jerrold Nadler (NY-10)
- Natural Resources: Raúl Grijalva (AZ-03)
- Oversight & Reform: Carolyn Maloney (NY-12)
- Science, Space & Technology: Eddie Bernice Johnson (TX-30)
- Small Business: Nydia Velázquez (NY-07)
- Transportation & Infrastructure: Peter DeFazio (OR-04)
- Ways & Means: Richard Neal (MA-01)

Senate Committee Chairs (likely)^[2]

- Appropriations: Patrick Leahy (VT)
- Armed Services: Jack Reed (RI)
- Banking: Sherrod Brown (OH)
- Budget: Bernie Sanders (VT)
- Commerce: Maria Cantwell (WA)
- Finance: Ron Wyden (OR)
- Foreign Relations: Bob Menendez (NJ)
- Health & Education: Patty Murray (WA)
- Homeland Security: Gary Peters (MI)
- Intelligence: Mark Warner (VA)

- Judiciary: Dick Durbin (IL)

Below we summarize some principles in-house counsel should consider when a House or Senate congressional committee comes calling.

1. **When the 117th Congress convenes again, each committee will adopt rules governing its proceedings, and understanding these rules and each committee's jurisdiction is important.** Each committee in the House and Senate 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 the House Committee on Oversight and Reform is essentially unlimited.^[3] In addition, both the House of Representatives as a whole, and each of the individual House congressional committees, have their own set of rules, which are adopted at the outset of each new session.^[4] The House of Representatives adopted a new rules package on January 4, 2021, and committees will adopt rules shortly after Congress reconvenes (likely after inauguration).^[5] The Senate committees will likewise adopt rules upon convening for the first time.^[6] Because committee rules are both complex and subject to change, when interacting with any committee, it is imperative to closely scrutinize the applicable House or Senate rules as well as the specific jurisdiction and rules governing the committee.
2. **The House of Representatives will likely continue to empower Committee chairs with the unilateral authority to issue subpoenas.** In 2015, toward the end of President Obama's second term, House Republicans granted unprecedented unilateral subpoena power to many committee chairs.^[7] Those committee chairs could, without a vote or consultation with the minority party, issue subpoenas. Before this change, only the House Oversight Committee regularly exercised unilateral subpoena power; afterward, 14 separate committees were granted some version of this power, and many began to use it liberally.^[8] In the 116th Congress, Democrats maintained unilateral subpoena power for 13 committees, but each typically required the chair to give notice to the ranking member of the committee before issuing the subpoena.^[9] In practice, even with unilateral subpoena power, the committee chairs in the 116th Congress very rarely issued subpoenas without a committee vote. Although we will not know for certain until the committees adopt their respective rules, we do not expect major changes in the rules governing subpoenas from the 116th to the 117th Congress. As adopted for the 117th Congress, House Rule II.8(c) provides authority for committee chairs to immediately reissue subpoenas for purposes of continuing litigation, and the House Oversight Committee and the Subcommittee on the Coronavirus Crisis have been specifically authorized to reissue subpoenas related to investigations continuing from the 116th Congress even before the Committees come together to organize.^[10]
3. **Senate Committee rules typically require both the Chair and Ranking Members to sign off on subpoenas or that subpoenas be authorized by a vote of the Committee.** The Senate rules do not give chairs unilateral authority to issue subpoenas—that responsibility typically falls to the committee chair and ranking member acting together.^[11] There is some uncertainty about how the rules will operate because of the 50-50 split, but it is a near-certainty that Democrats will control all committee chairs.
4. **The Supreme Court's decision in the *Mazars* case brought renewed focus on the potential limits of the congressional subpoena power, which may mean that private parties will be more willing to test those bounds in the future.** Congress's power to investigate is derived from the Constitution and therefore must generally be grounded in its legislative or other congressional functions, including oversight and impeachment.^[12] This authority is broad but not unlimited; it cannot extend into matters over which Congress cannot otherwise lawfully act,^[13] and it is not tantamount to authority to conduct a "legislative trial."^[14] In

Trump v. Mazars, the Supreme Court reaffirmed that congressional subpoenas must be “related to, and in furtherance of, a legitimate task of the Congress” and established a 4-part (but non-exclusive) test in the special case of congressional subpoenas for presidential information held by third parties.^[15] Although *Mazars* grappled with the separation-of-powers issues inherent in subpoenas for executive branch information, a 6-3 Conservative Supreme Court could more carefully scrutinize—or even narrow—the scope of what constitutes a “legitimate task of the Congress.”^[16] These issues are rarely litigated—especially by private parties—but this case may incentivize private parties to challenge congressional authority more aggressively.

5. **Nevertheless, in most cases, cooperation is critical.** Before subpoenas are considered, committee staff typically reaches out with a request to appear before or provide information to the committee voluntarily. 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 committee’s request. 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. Cooperation may also offer an opportunity for an investigative target or witness to offer information to the committee in a less public way. In addition to public hearings, committees often hear from individuals in more informal sessions, including staff briefings, interviews, or congressional depositions.
6. **Entities should try to seek confidentiality agreements if public disclosure is a concern, but the information may become public anyway.** It is a good strategy to attempt 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. Before making a disclosure, entities should carefully review whether, and if so how, committee and chamber rules provide for confidentiality, along with any procedural rights afforded to witnesses under such rules. For example, Senate Rule XXVI.5(b) provides for procedures to protect certain types of confidential information.
7. **Entities facing scrutiny from a committee should liaise with their congressional representatives.** Members who represent a 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.
8. **In most committees, subpoenas are often a last resort.** And, even if a subpoena is issued, entities are often successful in negotiating over the scope and deadlines contained within the subpoena—or negotiating back to a voluntary posture.
9. **Subpoena enforcement actions are rare.** To enforce a subpoena, the House must go through an onerous process, which has meant that civil enforcement actions are unusual.^[17] Ultimately, “[t]he full House may 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 against the contumacious witness.”^[18] Although this process is rare, there are some recent examples of the House taking this approach. During the Obama Administration, the House Oversight and Reform Committee 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,^[19] and the process was employed to initiate litigation against former White House Counsel Don McGahn in the 116th Congress.^[20] Enforcement actions in the Senate are even rarer, although—unlike the House—the Senate may rely on a statutory provision that expressly grants federal courts jurisdiction over its enforcement actions.^[21]

10. **Expect a focus on COVID-19-related investigations:** The House of Representatives has provided for the continuing operation of the Select Subcommittee on the Coronavirus Crisis, and the Senate is likely to be active in this area as well. Companies that contracted with the government for goods or services related to the COVID-19 response or that manufacture personal protective equipment or other essential materials, as well as companies who have received coronavirus aid through the CARES Act, should be mindful that investigations into these matters are likely.^[22]

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[1] Press Release, *Pelosi Announces Committee Chairs Approved by Democratic Caucus for the*

117th Congress, <https://www.speaker.gov/newsroom/12320-1>.

[2] Atl. Journal Constitution, *Who Could Join Sanders as Committee Chairs in Dem-Controlled Senate*, <https://www.ajc.com/news/nation-world/who-could-join-sanders-as-committee-chairs-in-dem-controlled-senate/R55IU5IA3BA2RFPJ7IIXJNN7HM/>. The 107th Congress in 2001 was the last time the Senate was split 50-50, and the Republican and Democratic leaders worked out a power-sharing agreement that provided that all committees would have equal party representation but each committee would have a Republican chair (Vice President Dick Cheney gave Republicans a majority). Congressional Research Service, *The Senate Powersharing Agreement of the 107th Congress (2001-2003): Key Features* (Dec. 27, 2006), https://www.everycrsreport.com/files/20061227_RS20785_c2a33ed96b4cd522a2130c1b25f2bf6b7661eeab.pdf. While it remains to be seen whether a similar power-sharing agreement will be reached between Senators Schumer and McConnell, the committee chairs will almost certainly be held by members of the Democratic party.

[3] H.R. Doc. No. 114-192, at 476–479 (clause 1 of Rule X).

[4] 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>.

[5] Roll Call, *House Adopts Rules Package for 117th Congress*, <https://www.rollcall.com/2021/01/04/house-adopts-rules-package-for-117th-congress/>.

[6] See, e.g., Senate Judiciary Committee, *FAQ Committee Information*, <https://www.judiciary.senate.gov/about/faq#:~:text=The Judiciary Committee is responsible,Investigation as well as agencies>.

[7] Of the 21 House committees, 14 could 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>.

[8] 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.”).

[9] H.R. Res. 6, 116th Cong. § 103(a)(1) (2019).

[10] House of Representatives, *Section-By-Section Analysis of Rules for the 117th Congress*, <https://rules.house.gov/sites/democrats.rules.house.gov/files/117-HRes5-SxS.pdf>.

[11] 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] See, e.g., *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.”).

[13] *Watkins*, 354 U.S. at 187; see also *McGrain v. Daugherty*, 273 U.S. 135, 170 (1927).

[14] *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.”).

[15] *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031, 2035–36 (2020).

[16] See, e.g., *Mazars*, 140 S. Ct. at 2040 (“it is highly probative that no founding-era Congress issued a subpoena for private, nonofficial documents”) (Thomas, J., dissenting); *Nat’l Fed. Of Independent Business v. Sebelius*, 567 U.S. 519, 558 (2012) (holding that the “individual mandate” of the Affordable Care Act could not be upheld based on Congress’s power under the Commerce Clause).

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

[18] Alissa M. Dolan *et al.*, *Congressional Oversight Manual*, Congressional Research Service 35 (2020), <https://fas.org/sgp/crs/misc/RL30240.pdf>.

[19] 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).

[20] See *Comm. on Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020) (en banc).

[21] See 28 U.S.C. § 1365, 2 U.S.C. § 288d; see also *S. Perm. Subcomm. v. Ferrer*, 199 F. Supp. 3d 125, 128 (D.D.C. 2016), *vacated as moot*, 856 F.3d 1080 (D.C. Cir. 2017).

[22] See Jenner & Block, *Strings Attached: COVID-19 Funds and the New House Select Committee* (Apr. 7, 2020), [https://jenner.com/system/assets/publications/19776/original/Strings Attached COVID-19 Funds and the New House Select Committee - April 2020.pdf?1586298211](https://jenner.com/system/assets/publications/19776/original/Strings%20Attached%20COVID-19%20Funds%20and%20the%20New%20House%20Select%20Committee%20-%20April%202020.pdf?1586298211).