

Beyond the 2022 Midterm Election Headlines: Key Developments to Watch for in the Months to Come

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On November 8, 2022, Americans headed to the polls for the United States' 2022 midterm elections, with Democrats upsetting projections of a "Red Wave" and bucking historical trends to hew closely to the status quo. While the ultimate balance of power in Congress remains to be seen, Republicans appear likely to assume control of the House of Representatives by a very narrow margin—although there is still a slim possibility that Democrats retain control. On the Senate side, Democrats seem poised to hold their control of the chamber, although final results may remain obscured until December, when Republican Herschel Walker and Democratic incumbent Senator Raphael Warnock go head-to-head in a runoff election in Georgia.

Despite uncertainty surrounding the final elections results, Jenner & Block attorneys are closely monitoring a number of future developments that often escape headlines but are nonetheless critical to in-house counsel should they find themselves on the receiving end of a congressional inquiry.

1. House Leadership Elections. The Speaker of the House of Representatives is elected by the full House on the first day of a new Congress in a roll call vote. However, the caucus or conference of each major party first elects a candidate at early organizational meetings through secret ballot.

a. House Republicans. The House GOP has set a tentative date of next Tuesday, November 15, 2022 to elect its leadership. It had been assumed that Majority Leader Kevin McCarthy (R-CA) is slated to take the gavel for the first time, with Representative Steve Scalise (R-LA) taking over the number-two spot. Nevertheless, there remains some uncertainty surrounding the outcome given the surprising results this week. Although McCarthy is still likely to assume the role of Speaker, members of the hyper-conservative House Freedom Caucus (HFC) are looking to extract concessions from him to ensure their support given the expected tight margins in the House. In addition, an open race for Majority Whip has presented a contest between Reps. Tom Emmer (R-MN) and Jim Banks (R-IN), with Drew Ferguson (R-GA) mounting a challenge as a distant third.

b. House Democrats. At this point in time, much remains uncertain regarding the leadership of the House Democrats in the next Congress. Their elections have tentatively been set for November 30. Speaker Nancy Pelosi (D-CA) and her long-time deputies Majority Leader Steny Hoyer (D-MD) and Majority Whip Jim Clyburn (D-SC) have been tight-lipped about the future, although Speaker Pelosi has previously vowed that the 117th Congress would be her last stint in leadership—a promise neither Hoyer nor Clyburn have made. If Speaker Pelosi does indeed relinquish the reigns of her caucus, the question will be whether Reps. Hoyer and Clyburn also step aside. If they do, the role of House Minority Leader is shaping up as a race between Reps. Hakeem Jeffries (D-NY) and Adam Schiff (D-NY), with Jeffries snagging the title of top contender. The Minority Whip slot is coalescing into a contest between Reps. Katherine Clark (D-MA), and Pramila Jayapal (D-WA), chair of the Congressional Progressive Caucus.

c. Senate. Senate leadership is likely to remain in place as it was in the prior Congress, with Sens. Mitch McConnell (R-KY) and John Thune (R-SD), and Sens. Chuck Schumer (D-NY) and Dick Durbin (D-IL), expected to maintain their number one and two slots, respectively, for each of their parties in the chamber.

2. Committee Leadership. House rules provide that each party caucus or conference determines its members' committee assignments, and both House Democrats and Republicans compose steering committees that help guide the legislative process and assign caucus members to committees. However, committee leadership is a product of each party's idiosyncratic process, with cascading effects on the operation of the legislative branch. Chairing a committee allows a Member to exercise important powers such as holding hearings, and, most notably for some committees, issuing subpoenas.

a. House Republicans. We will be watching for any unexpected moves atop committees as Republicans shift from occupying the Ranking Member's post to wielding the Chair's gavel. The expectation is that Rep. Jim Jordan (R-OH)—easily the most influential Republican figure outside of the leadership ranks—will assume control of the powerful House Judiciary Committee. Rep. Jim Comer (R-KY) is expected to assume the gavel of the House Committee on Oversight and Reform (“House Oversight”), thereby wielding the Committee's power to investigate anything within its immense jurisdiction. And Rep. Cathy McMorris Rogers (R-WA) is slated to lead the powerful Energy and Commerce Committee.

b. House Democrats. The most important open slot that we will be watching closely is who takes over for House Democrats atop House Oversight. Rep. Carolyn Maloney (D-NY) lost reelection in a Member-on-Member primary earlier this year (to Rep. Jerry Nadler) and will not be returning to Congress—leaving this critical position vacant. After managing the (second) impeachment of former President Donald Trump and participating on the January 6th Select Committee, Rep. Jamie Raskin (D-MD) launched a bid months ago, promising an update to oversight tactics to “defend strong democracy and effective government in America.” His principal challengers are Reps. Stephen Lynch (D-MA) and Gerry Connolly (D-VA).

c. Senate. Seniority generally dictates the selection of committee leadership. Once committee ratios have been determined (based on the ratio of each party in the full Senate), Senators provide committee preferences to their leadership, which then makes committee assignments with an attempt to accommodate preferences to the extent possible.

3. Potential Rule Changes. At the beginning of the new Congress, the House adopts a package of new rules to govern the business of the House and its committees. As previewed above, HFC members have already expressed interest in a number of key changes to the chamber as a condition for their support of McCarthy's Speaker bid, including immediately ending proxy voting, removing magnetometers from around the House chamber, forcing committees to meet in person, and banning the use of the so-called Gephardt Rule, which largely permits the House to raise the debt limit without a direct vote. However, in recent years, the rules package has often included provisions imbuing certain House committees with greater flexibility or power in the conduct of their investigations. Although subject to less media attention, even small rules changes can have an outsized impact on the subjects of congressional investigations. For example, as Jenner & Block noted when Democrats assumed control of the House in 2019, the House removed the requirement that Members of Congress attend depositions, paving the way to an increased use of that tool by congressional staff. We will be closely watching the rules package to identify other impactful changes to committee investigation powers.

It is clear that—regardless of which party is in power—Congress's increased scrutiny of private enterprise will continue in the 118th Congress. Should you hear from a congressional committee or a Member of Congress, it is wise to engage experienced counsel as soon as possible. Jenner & Block continues to monitor developments in House leadership, procedure and congressional prerogatives, and our attorneys stand at the ready to help you navigate the 118th Congress.

Footnotes

[1] See Barbara Sprunt, *Biden cheers Democrats for avoid a 'red wave' in the midterm elections*, NPR (Nov. 9, 2022), <https://www.npr.org/2022/11/09/1135574613/biden-midterms-election-results-press-conference-live>

[2] John T. Wooly, *The 2022 Midterm Elections: What the Historical Data Suggest*, The American Presidency Project (Aug. 30, 2022), <https://www.presidency.ucsb.edu/analyses/the-2022-midterm-elections-what-the-historical-data-suggest> (describing average loss of 28 House seats and 4 Senate seats for the President's party in the midterm elections since 1934).

[3] Elena Schneider and Andrew Desiderio, *Warner and Walker leap into Georgia's Senate runoff*, Politico (Nov. 9, 2022), <https://www.politico.com/news/2022/11/09/herschel-walker-raphael-warnock-georgia-senate-race-results-2022-00064771>.

[4] See Sarah Ferris, *House Dems' leadership landscape frozen by their pleasant midterm surprise*, Politico (Nov. 9, 2022), <https://www.politico.com/news/2022/11/09/house-leadership-democrats-nancy-pelosi-midterm-elections-2022-00065989>.

[5] See Rules of the House of Representatives, 117th Congress, R. X, cl. 5.

[6] Andrew Solender, *Raskin vies for top spot on oversight committee*, Axios (Aug. 26, 2022), <https://www.axios.com/2022/08/26/jamie-raskin-house-oversight-panel>

[7] Cong. Res. Serv., *Debt Limit Legislation: The House "Gephardt Rule"*, No. RL31913 (Feb. 13, 2019), available at <https://sgp.fas.org/crs/misc/RL31913.pdf>?

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[8] Historically, Senate investigative rules have not changed as substantially over time as in the House. In particular, most Senate committee chairs do not possess the authority to issue subpoenas unilaterally, and that is unlikely to change in the next Congress.

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