

Client Alert: Their House, Their Rules: New Republican Majority Adopts New Framework for Hearings, Committees, Depositions, and More

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On January 6, 2023, Rep. Kevin McCarthy (R-CA) was elected Speaker of the US House of Representatives on the fifteenth ballot after a week of dramatic negotiations with the right flank of his party, finally inaugurating a new era of Republican control of the chamber. The new majority followed the speakership election by enacting a rules package which will govern how the House does business in 2023 and 2024.

While much of the news coverage of these rules has centered on procedural changes negotiated between Speaker McCarthy and the House Freedom Caucus, many of which transfer substantial power to the conservative bloc, several other important parts of the package provide insight into both the Republican majority's priorities in the 118th Congress and how it will implement those goals. These rules will impact how private companies and individuals will interact with the House for the next two years.

Hearing and Deposition Rules

In keeping with the new majority's desire to phase out pandemic-era procedures, the rules no longer permit witnesses appearing before House committees to participate remotely at their discretion.^[1] Instead, the rules prohibit remote witness appearances unless they have been specifically authorized by the committee chair—and even then, they can be permitted only for private, nongovernmental witnesses. Individuals testifying in their capacity as officers of the United States will be required to appear in person in all cases.^[2] Witnesses who have become accustomed to testifying remotely over the last several years will have to prepare to return to Capitol Hill beginning in 2023.

The rules also limit who can attend House committee depositions of nongovernmental witnesses.^[3] Any witness testifying in a deposition may now be accompanied by no more than two personal, nongovernmental attorneys. While prior House leadership imposed some of these restrictions in the

chamber's standing deposition regulations (albeit not in the House rules themselves), the two-attorney limit is new.^[4] Witnesses attempting to bring three or more attorneys to a deposition should be prepared to have excess counsel turned away. These rules do not apply in the more informal, voluntary, interview setting.

The rules also prohibit counsel for federal agencies from attending any House depositions. However, the executive branch has deemed previous House attempts to bar agency counsel from the deposition room to be unconstitutional (including in an opinion from the Office of Legal Counsel at the Department of Justice), arguing that they impair the President's ability to assert executive privilege.^[5] The Justice Department has deemed subpoenas which incorporate this requirement to be unenforceable.

New Directions and New Committees

The House rules also set the stage for three key committees that are poised to play an outsized role in the 118th Congress.

First, the majority intends to set a new direction for the existing **Select Subcommittee on the Coronavirus Crisis**, which continues to operate under the umbrella of the newly-rebranded Committee on Oversight and Accountability (previously called the Committee on Oversight and Reform).^[6] The rules make clear that the Subcommittee will be pursuing expansive investigations into a variety of COVID-related issues, including (but not limited to) the origins of the virus, the National Institutes of Health's gain-of-function research, the development of the mRNA vaccines and implementation of vaccine mandates, the economic impact of governmental restrictions imposed on businesses and individuals, the impact of school closures on the nation's children, and the executive branch's decisions and communications concerning the pandemic.^[7] The Subcommittee will also continue its existing work overseeing the government's pandemic-era economic support programs.^[8] and Rep. James Comer (R-KY), the new chair of the Oversight Committee, has already announced that the full committee's first hearing will focus on fraud in COVID relief spending.^[9]

A substantial number of businesses are likely to come under increased scrutiny from the Coronavirus Subcommittee under this new direction. Businesses operating in the healthcare sector, those that cooperated with the White House during the pandemic, and any business that received funding from pandemic relief programs will want to pay close attention to the Subcommittee's activities.

Second, the majority plans to establish under the Judiciary Committee a new **Subcommittee on the Weaponization of the Federal Government**.^[10] This subcommittee has sometimes been described in popular media as a "Church" Committee, referring to the Senate's 1975 probe into potential abuses of power by the intelligence community.^[11] Like the Judiciary Committee itself, the subcommittee will be chaired by Rep. Jim Jordan (R-OH).^[12]

The subcommittee has been tasked with investigating (1) the “expansive role” of the Executive Branch to collect information about and investigate US citizens, (2) “how executive branch agencies work with, obtain information from, and provide information to the private sector, non-profit entities, or other government agencies to facilitate action against American citizens,” (3) “how executive branch agencies collect, compile, analyze, use, or disseminate information about” US citizens, and (4) data collection practices within the federal government, specifically as they relate to violations of civil liberties.^[13] The subcommittee’s organic resolution envisions that this investigation will conclude with a final report.^[14]

Notably, the subcommittee’s second goal—examining how executive branch agencies work with private entities—may cause it to examine any number of private sector corporations that regularly interface with the federal government.

While it has no independent subpoena power, Chairman Jordan and/or the Judiciary Committee as a whole can authorize the subcommittee’s subpoenas.^[15] The subcommittee is also authorized to access any and all information provided to the House Permanent Select Committee on Intelligence.^[16]

Third and finally, the majority plans to establish a new **Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party**, which will likely be chaired by Rep. Mike Gallagher (R-WI).^[17] Rep. Gallagher has previously explained that the committee plans to focus on (1) restoring supply chains and ending critical economic dependencies on China, (2) strengthening the military, (3) ending the CCP’s theft of American personal data and intellectual property, and (4) contrasting the CCP’s techno-totalitarian state with the values of the Free World.^[18] While the committee has no legislative function or jurisdiction, its official role is to “investigate and submit policy recommendations on the status of the Chinese Communist Party’s economic, technological, and security progress and its competition with the United States,” which will likely involve public hearings.^[19] The committee will be instructed to investigate the sources and methods used by various US intelligence agencies and may be provided with intelligence information.^[20] The resolution contemplates that the committee will issue a public report summarizing its findings.^[21]

Centralizing Control of the Seven Member Rule

The rules attempt to impose new restrictions on the ability of rank and file Members of the Oversight Committee to invoke 5 U.S.C. § 2954, sometimes referred to as the “Seven Member Rule,” which permits seven members of the House Oversight Committee—less than a majority—to demand the production of records within the committee’s jurisdiction from any executive branch agency.^[22] This rule was invoked by Democratic representatives in the minority in 2017 in an attempt to obtain records regarding the Trump Organization’s lease of the Old Post Office as a hotel

from the GSA.^[23] The new rule requires any Section 2954 request to include the Oversight Committee chair as one of the requesting members.

It is not entirely clear that this new rule comports with Section 2954, which allows “any” seven members to make a request, and it might not stand up in court if challenged. Biden Administration officials receiving requests from seven or more Democratic members of the Oversight Committee could determine the statutory mandate applies, and release information to them on request. But, if heeded, the new rule would grant the Chair of the Committee an effective veto over Democratic attempts to seek records from the executive branch, including records from or relating to the Trump Administration.

Probing the January 6th Probe

The rules also transfer all records of the Select Committee to Investigate the January 6th Attack on the United States Capitol to the Committee on House Administration.^[24] That committee may dive into those records, including the unredacted transcripts of depositions and interviews, as well as the Committee’s work product, for their own investigation. This is not unexpected, given House Republican promises to examine the work of the January 6th Committee.^[25] Any individuals or corporations that appear in the January 6th Committee’s files should prepare to have those files closely reexamined by a new majority.

Going Forward

The House of Representatives is poised to be very active on the oversight front—including through increased oversight of private enterprises, in the contexts highlighted above and otherwise. Jenner & Block’s Government Controversies and Congressional Investigations practices are staffed with attorneys who stand ready to help you navigate these congressional challenges.

Footnotes

[1] H.R. Res 5, 118th Cong. § 3(j)(1) (2023).

[2] *Id.* § 3(j)(2).

[3] *Id.* § 3(k)(3).

[4] *See* 167 Cong. Rec. H41 (daily ed. Jan. 4, 2021).

[5] Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees, 43 Op. O.L.C. (May 23, 2019), available at <https://www.justice.gov/sites/default/files/opinions/attachments/2019/11/04/2019-05-23-agency-counsel-2.pdf>.

[6] H.R. Res. 5 § 4(a).

[7] *Id.* § 4(a)(2)(A).

[8] *Id.* § 4(a)(2)(A)(ii).

[9] James Comer (@RepJamesComer), Twitter (Jan. 9, 2023, 2:31 PM), <https://twitter.com/RepJamesComer/status/1612532509908307969>.

[10] H.R. Res 12, 118th Cong. (2023); *see also* H.R. Res 5 § 5(e)(2).

[11] *See* Charlie Savage & Luke Broadwater, *House Republicans Preparing Broad Inquiry Into F.B.I. and Security Agencies*, N.Y. Times (Jan. 8, 2023), <https://www.nytimes.com/2023/01/08/us/politics/house-republicans-fbi-investigation.html>.

[12] Sahil Kapur, *House GOP eyes new committee to probe 'weaponization' of federal government*, NBC News (Jan. 9, 2023), <https://www.nbcnews.com/politics/congress/house-gop-eyes-new-committee-probe-weaponization-federal-government-rcna64727>. [13] H.R. Res 12 § 1(b)(1).

[14] *Id.*

[15] *Id.* § 1(c)(1)(B).

[16] *Id.* § 1(c)(1)(C).

[17] H.R. Res 11, 118th Cong. (2023); *see also* H.R. Res 5 § 5(e)(1).

[18] Kevin McCarthy & Mike Gallagher, *China and the US are locked in a cold war. We must win it. Here's how we will*, Fox News (Dec. 8, 2022), <https://www.foxnews.com/opinion/america-locked-china-cold-war-win>.

[19] *See* H.R. Res 11 § 1(b)(2).

[20] *Id.* § 1(c)(1).

[21] *Id.* § 1(e).

[22] H.R. Res. 5 § 3(i).

[23] *See Maloney v. Murphy*, 984 F.3d 50, 56-57 (D.C. Cir. 2020).

[24] H.R. Res 5 § 3(y).

[25] Luke Broadwater, *McCarthy Warns Jan. 6 Committee Republicans Will Investigate Its Work*, N.Y. Times (Nov. 30, 2022), <https://www.nytimes.com/2022/11/30/us/politics/mccarthy-jan-6-committee.html>.

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