

# The Power to Investigate: Table of Authorities of House and Senate Committees for the 117th Congress

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For the sixth successive Congress, Gibson Dunn is pleased to release a table of authorities summarizing the investigative authorities of each House and Senate committee. Understanding the full extent of a committee's investigative arsenal is crucial to successfully navigating a congressional investigation.

Congressional committees have broad investigatory powers. These authorities include the power to issue subpoenas to compel witnesses to produce documents, testify at committee hearings, and, in some cases, appear for depositions. Committees generally may adopt their own procedural rules for issuing subpoenas, taking testimony, and conducting depositions; in the House, general deposition procedures applicable to all committees are subject to regulations issued by the Chair of the Committee on Rules. In addition to the rules included in our Table of Authorities, committees also are subject to the rules of the full House or Senate.

The failure to comply with a subpoena and adhere to committee rules during an investigation may have severe legal, strategic, and reputational consequences. Indeed, if a subpoena recipient refuses to comply with a subpoena adequately, committees may resort to additional demands, initiate contempt proceedings and/or generate negative press coverage of the noncompliant recipient. Although rarely utilized, criminal contempt prosecutions can also be brought in the event of willful refusals to comply with lawful congressional subpoenas. As we have detailed in a [prior client](#) alert this year, however, defenses exist to congressional subpoenas, including challenging a committee's jurisdiction, asserting attorney-client privilege and work product claims, and raising constitutional challenges.<sup>[1]</sup>

We have highlighted noteworthy changes in the committee rules below, which House and Senate Committees of the 117th Congress adopted earlier this year.

## **Some items of note:**

### **House:**

- Pursuant to the House Rules of the 117th Congress, every House committee chair of a standing committee, as well as the Chair of the Permanent Select Committee on Intelligence, is empowered to issue deposition subpoenas unilaterally, that is, without the Ranking Member's consent or a committee vote, after "consultation" with the Ranking Member.<sup>[2]</sup>
- In the 116th Congress, the House eliminated a prior requirement that one or more members of Congress be present during a deposition.<sup>[3]</sup> The House rules for the 117th Congress likewise do not require a member to be present for a deposition.<sup>[4]</sup> Without having to accommodate members' schedules, these provisions make taking depositions significantly easier.

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- The Rules of the 117th Congress have reauthorized two oversight select committees, the Select Committee on the Climate Crisis and the Select Subcommittee on the Coronavirus Crisis, which will proceed with the mandates they were provided in the prior Congress.<sup>[5]</sup> The Rules also created the bipartisan Select Committee on Economic Disparity and Fairness in Growth, established by House Democrats to “investigate, study, make findings, and develop recommendations on policies, strategies, and innovations to make our economy work for everyone, empowering American economic growth while ensuring that no one is left out or behind in the 21st Century Economy.”<sup>[6]</sup> Recently, House Democrats also established the Select Committee to Investigate the January 6th Attack on the United States Capitol, which is directed “[t]o investigate and report upon the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol Complex . . . and relating to the interference with the peaceful transfer of power.”<sup>[7]</sup>
  - Note that while the Select Committee on Economic Disparity and Fairness in Growth lacks independent subpoena power, it may request standing committees with appropriate jurisdiction to issue them. The Select Committee on the Coronavirus Crisis and the Select Committee to Investigate the January 6th Attack on the United States Capitol have subpoena power; staff deposition authority, enforceable by subpoena; and the authority to issue interrogatories enforceable by subpoena. Hence, they have more investigative tools at their disposal than do standing House committees.
- The House Rules Committee has reissued regulations instituted in the 116th Congress governing depositions by committee counsel. Of note, these rules allow for the immediate overruling of objections raised by a witness’s counsel and immediate instructions to answer, on pain of contempt.<sup>[8]</sup> As a result, this procedure seemingly eliminates the witness’s right to appeal rulings on objections to the full committee without risking contempt (although committee members may still appeal). This procedure was intended to streamline the deposition process, as prior to the 116th Congress, the staff deposition regulations required a recess before the Chair could rule on an objection. The Rules Committee’s deposition regulations also expressly allow for depositions to continue from day-to-day<sup>[9]</sup> and permit, with notice from the Chair, questioning by members and staff of more than one committee.<sup>[10]</sup> Objections from staff counsel or members are also permitted, not just by the witness and his or her lawyer.<sup>[11]</sup>
- As the COVID pandemic continues, the House Rules Committee has adopted special regulations governing remote hearings, which were first authorized in the prior Congress.<sup>[12]</sup> The regulations address several practical considerations, including a mandate that members “must be visible on the [remote] software platform’s video function to be considered in attendance and to participate unless connectivity issues or other technical problems render the member unable to fully participate on camera” and that “[m]embers and witnesses participating remotely should appear before a nonpolitical, professionally appropriate background that is minimally distracting to other members and witnesses, to the greatest extent possible.” The rules also require committee chairs to “respect members’ disparate time zones when scheduling committee proceedings,” meaning few remote hearings will be scheduled before midday, Eastern Standard Time. The regulations also authorize remote depositions in accordance with the same rules and procedures as required for in-person depositions.<sup>[13]</sup>

## Senate:

- In contrast to the House, where virtually every chair has unilateral subpoena authority, only the Chair of the Permanent Subcommittee on Investigations (“PSI”) can issue a subpoena without the consent of the Ranking Member. With the exception of PSI, the rules of the remaining Senate Committees allow for the

Ranking Member to object to a subpoena issuance within a specified timeframe of receiving notice from the Chair, requiring a majority vote to issue a subpoena. In prior Congresses, the minority at times used the majority vote requirement as a delaying tactic, but rarely ever prevented a subpoena issuance since the vote would proceed along party lines. However, the majority vote requirement assumes greater significance this Congress given the Senate's 50-50 split and power-sharing agreement between the parties. The agreement provides that each Committee must be equally composed of Democrats and Republicans, meaning a party-line vote on a subpoena issuance would result in a deadlock. Senate procedure permits a motion to discharge a "measure or matter," which we believe would include a subpoena, but we think this procedure would be employed only in extraordinary cases. Hence, investigations that require the issuance of subpoenas likely will need to be bipartisan.

- As in the last Congress, seven Senate committees have received express authorization to take depositions. The Judiciary Committee and the Committee on Homeland Security and Governmental Affairs and its Permanent Subcommittee on Investigations receive the authority to do so each Congress from the Senate's funding resolution.<sup>[14]</sup> The Aging and Indian Affairs Committees are authorized to conduct depositions by S. Res. 4 in 1977. The Ethics Committee's deposition power is authorized by S. Res. 338 in 1964, which created the Committee and is incorporated into its rules each Congress. And the Intelligence Committee was authorized to take depositions by S. Res. 400 in 1976, which it too incorporates into its rules each Congress. Of these, staff is expressly authorized to take depositions except in the Indian Affairs and Intelligence Committees.<sup>[15]</sup> The Senate's view appears to be that Senate Rules do not authorize staff depositions pursuant to subpoena. Hence, Senate committees cannot delegate that authority to themselves through committee rules. It is thus understood that such authority can be conferred upon a committee only through a Senate resolution.<sup>[16]</sup>
- The Committees on Agriculture, Commerce, and Foreign Relations authorize depositions in their rules. However such deposition authority has not been expressly authorized by the Senate and, hence, it is not clear whether appearance at a deposition can be compelled.
- The Judiciary Committee remains the only committee to expressly require a member to be present for a deposition. This requirement may be waived by agreement of the Chair and Ranking Member. In addition, the Rules of the Select Committee on Intelligence require a quorum of one member for purposes of taking sworn testimony, but it is not specified whether this would include depositions.

Our table of authorities provides an overview of how individual committees can compel a witness to cooperate with their investigations. But each committee conducts congressional investigations in its own particular way, and investigations vary materially even within a particular committee. While our table of authorities provides a general overview of what rules apply in given circumstances, it is essential to look carefully at a committee's rules and be familiar with its practices to understand specifically how its authorities apply in a particular context.

Gibson Dunn lawyers have extensive experience defending targets of and witnesses in congressional investigations. They know how investigative committees operate and can anticipate strategies and moves in particular circumstances because they also ran or advised on congressional investigations when they worked on the Hill. If you have any questions about how a committee's rules apply in a given circumstance or the ways in which a particular committee tends to exercise its authorities, please feel free to contact us for assistance. We are available to assist should a congressional committee seek testimony, information or documents from you.

## **Table of Authorities of House and Senate Committees:**

<https://www.gibsondunn.com/wp-content/uploads/2021/08/Congressional-Investigations-Table-of-Authorities-117th-Congress-09.21.pdf>

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[1] See *Congressional Investigations in the 117th Congress: Choppy Waters Ahead for the Private*

*Sector?*, <https://www.gibsondunn.com/congressional-investigations-in-the-117th-congress-choppy-waters-ahead-for-the-private-sector/>.

[2] See H.R. Res. 8, 117th Cong. § 3(b)(1) (2021).

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

[4] See H.R. Res. 8, 117th Cong. § 3(b) (2021).

[5] *Id.* §§ 4(d), (f).

[6] *Id.* § 4(d)(g).

[7] See H. R. Res. 503, § 3(1), 117th Cong. (2021).

[8] See 167 Cong. Rec. H41 (Jan. 4, 2021) (117th Congress Regulations for Use of Deposition Authority).

[9] *Id.* The regulations provide that deposition questions “shall be propounded in rounds” and that the length of each round “shall not exceed 60 minutes per side” with equal time to the majority and minority. The regulations, however, do not expressly limit the number of rounds of questioning. In this manner, they differ from the Federal Rules of Civil Procedure which expressly limit the length of depositions. See Fed. R. Civ. P. 30(d)(1) (“Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours.”).

[10] See 167 Cong. Rec. H41.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] See S. Res. 70, § 13(e) (2019) (Judiciary); *id.* § 12(e)(3)(E) (Homeland Security).

[15] However, Rule 8.3 of the Rules of the Senate Intelligence Committee allows staff to question witnesses if authorized by the Chair, Vice Chair, or Presiding Member, though depositions are not specified.

[16] See Jay R. Shampansky, Cong. Research Serv., 95-949 A, Staff Depositions in Congressional Investigations 8 & n.24 (1999); 6 Op. O.L.C. 503, 506 n.3 (1982). The OLC memo relies heavily on the argument that the Senate Rules never mentioned depositions at that time and those rules still do not mention depositions today.

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The following Gibson Dunn attorneys assisted in preparing this client update: Michael D. Bopp, Thomas G. Hungar, Roscoe Jones, Jr., Tommy McCormac, and Amanda LeSavage.

Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work or the following lawyers in the firm's Congressional Investigations group

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## **Related Capabilities**

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