



GIBSON DUNN

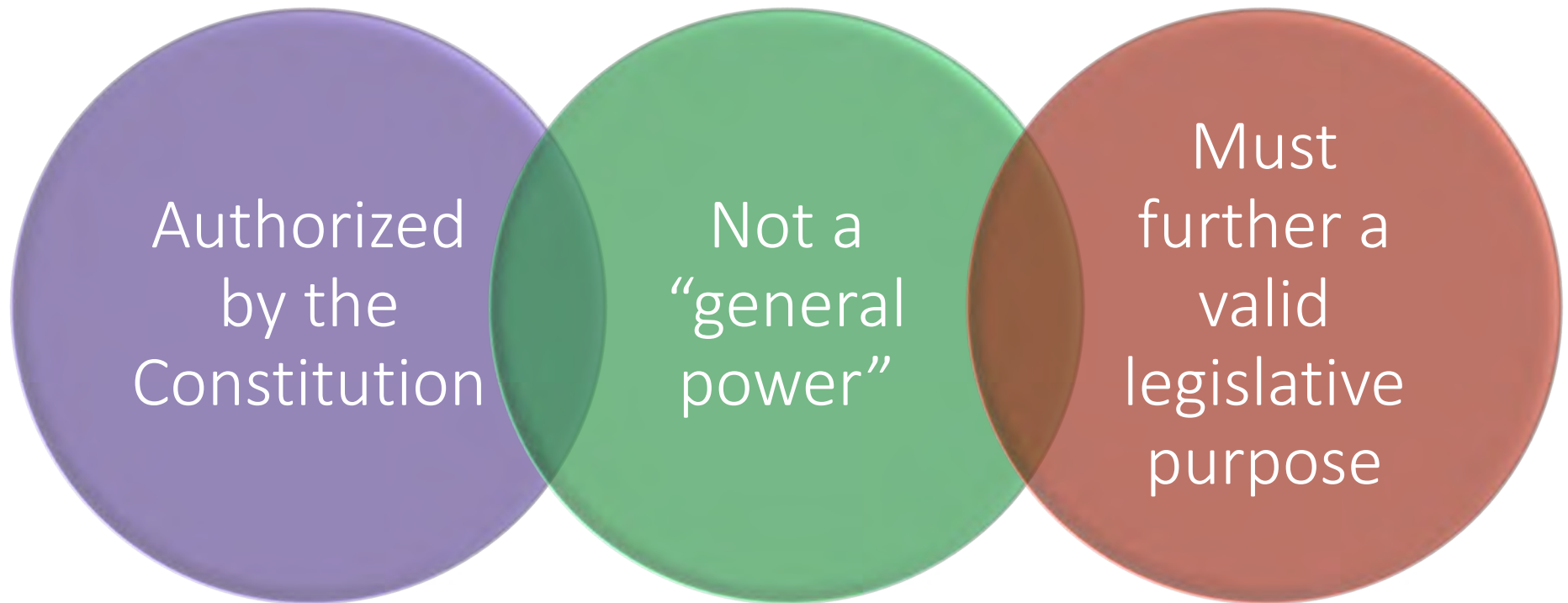
New Authorities/New Priorities:
Congressional Investigations in
the 116th Congress

March 1, 2019

Panelists

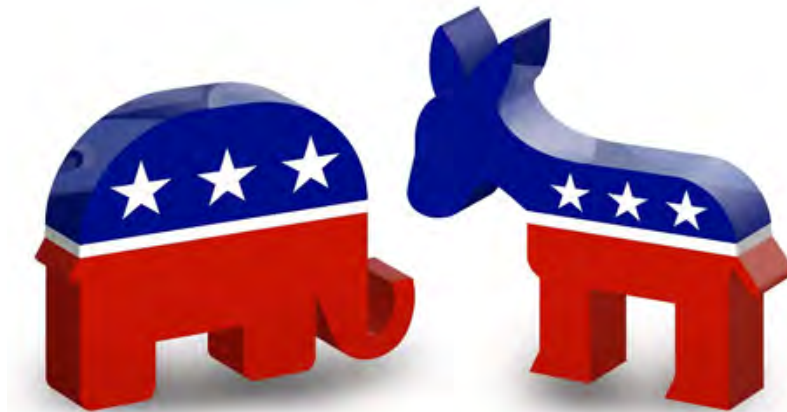
- **Jennifer Barblan** - Chief Republican Counsel, Oversight and Investigations, Committee on Energy and Commerce
- **David Brewer** - Deputy Republican Staff Director, House Oversight and Reform Committee
- **Douglas Pasternak** - Democratic Staff Director of Investigations & Oversight for the House Committee on Transportation & Infrastructure
- **Michael Bopp** - Partner and Chair, Gibson Dunn's Congressional Investigations Group

Congressional Investigations Powers



Purposes of Congressional Investigations

- Expose actual criminal or civil wrongdoing
- Hold a company responsible for its actions
- Advance a policy preference
- Advance legislation
- Bolster a Member's or party's political agenda or position



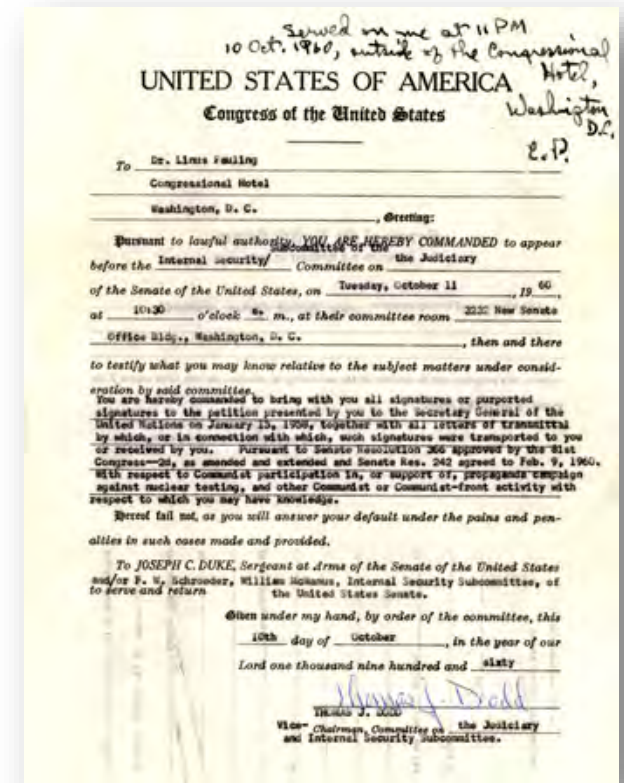
Congressional Investigatory Tools

- Requests for information
- Interviews and depositions
- Hearings
- Subpoenas
 - Generally no pre-enforcement review
- Referral to Executive Branch for criminal prosecution
 - Congress may refer, but Executive Branch may proceed regardless of Congress's views.
 - Prosecute false statements to Congress, obstruction, destruction of evidence, etc.



Subpoena Power

- Document requests usually begin with a letter and are followed by a subpoena, if necessary.
- Every standing committee has the authority to issue subpoenas. This is authorized under both House and Senate rules, but the specific procedures vary by committee.
- Some committees require that some minority members be present for the subpoena vote.
- Subpoenas can be friendly.



Congressional Contempt

- Although Congress does not frequently resort to its contempt power to enforce subpoenas, it generally has three sources of contempt authority.

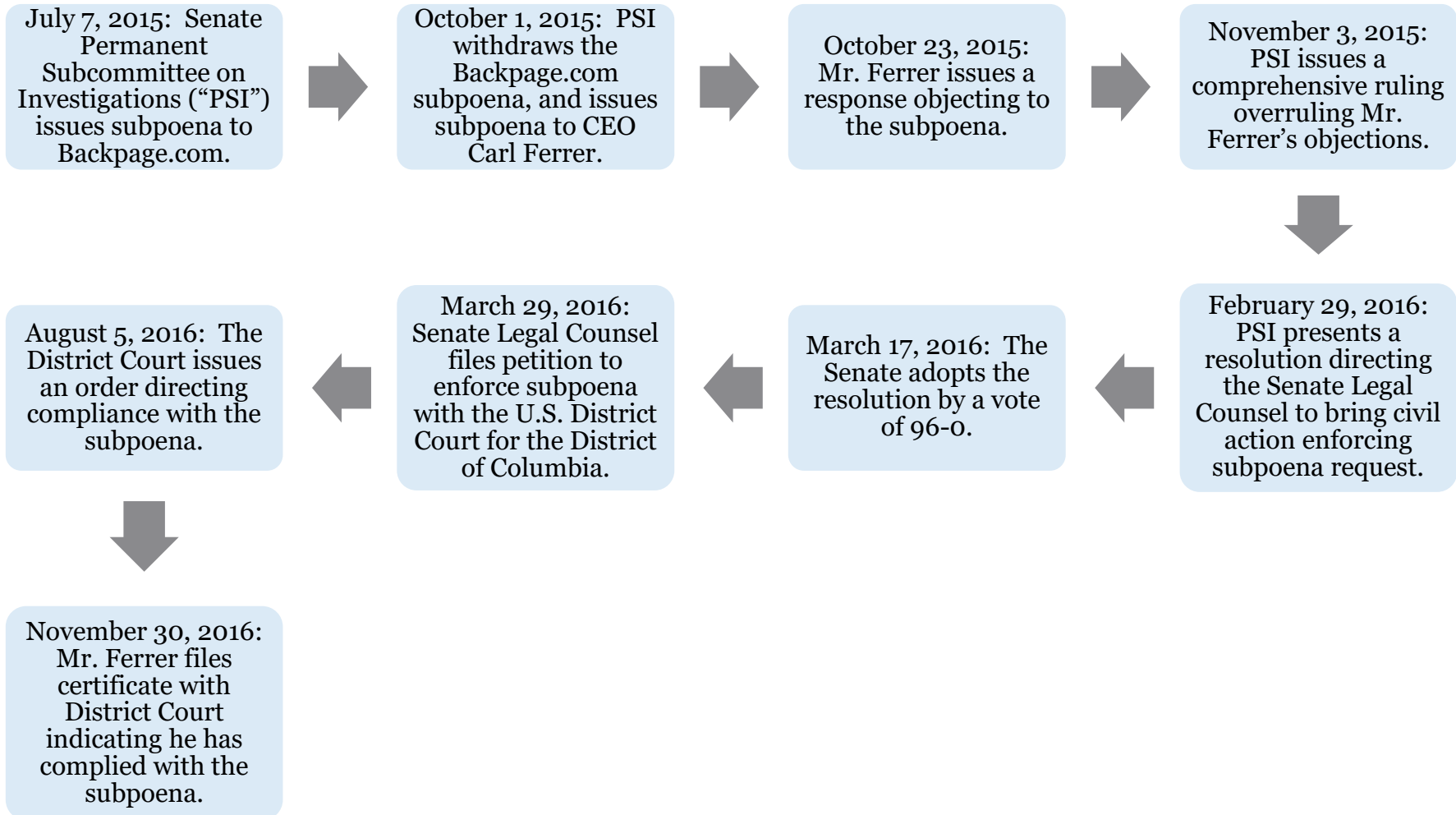
Inherent
(both House
and Senate)

Criminal
(both House
and Senate)

Civil
(Senate, and
if authorized
by resolution,
House)

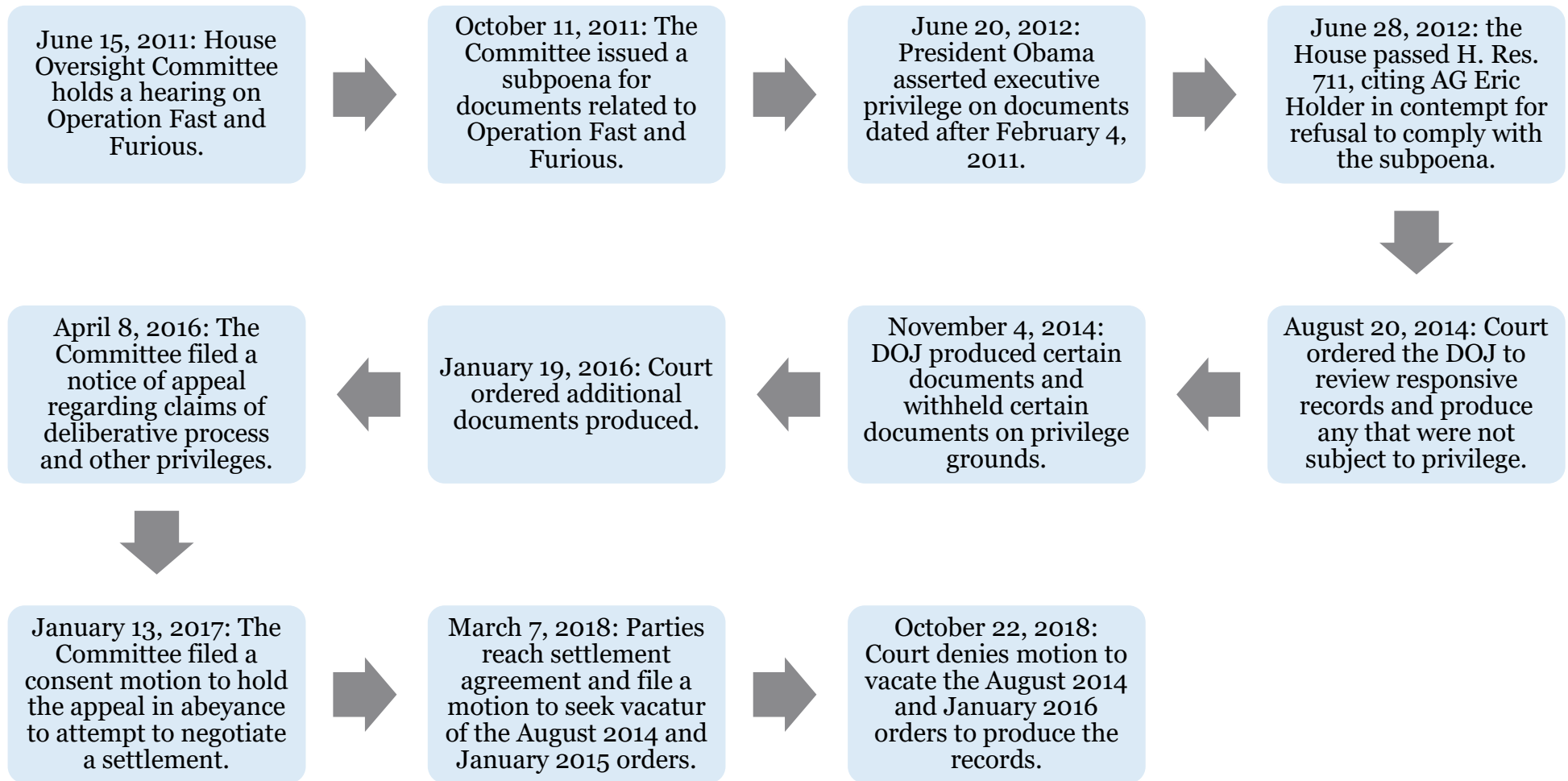


Backpage.com Subpoena Timeline



The entire process took approximately **17 months**.

Fast and Furious Subpoena Timeline



After more than **7 years**, the litigation is still pending.

Congressional Investigation Defenses

Committee
Jurisdiction
(Legislative
Purpose)

First
Amendment

Fourth
Amendment

Fifth
Amendment

Attorney-
Client
Privilege &
Attorney
Work
Product

Committee Jurisdiction

- Investigation must relate to a legislative purpose.
 - But courts interpret “legislative purpose” broadly.
- Questions must be pertinent to subject matter of inquiry.
- The subject matter of an inquiry must be within the scope of jurisdiction clearly delegated to the committee by Congress.



Constitutional Defenses

- **First Amendment.** Balance the interest in privacy against the need for disclosure (has never succeeded in court).
- **Fourth Amendment.** Reasonableness varies depending upon the “nature, purposes, and scope of the inquiry.”
 - Overly broad demands for documents that lack congruence and proportionality to the scope of the investigation may violate protection against search and seizure, but some cases challenge this argument.
- **Fifth Amendment.** Individuals can invoke right against self-incrimination. Corporations cannot.
 - Generally applies only to testimony, although in certain circumstances the privilege applies to the act of producing documents (when the documents amount to “Testimonial Communications”).
 - Congress can compel testimony by granting transactional immunity or use and derivative use immunity.
 - Choose your words carefully, so as not to waive the privilege.
 - In 2013, Lois Lerner invoked the privilege before the House Committee on Oversight and Reform, but also stated that she had done nothing wrong.
 - Chairman Darrell Issa claimed her statement waived the privilege, and Congress referred the matter to the U.S. Attorney for the District of Columbia for criminal contempt charges when Lerner refused to testify.

Attorney-Client Privilege

- Elements of Attorney-Client Privilege: (1) communication, (2) made in confidence, (3) to an attorney, (4) by or to a client, (5) for purposes of seeking or obtaining legal advice.
- Both the House and Senate have taken the position that they are **not** required to recognize privilege.
- Committees often require that claims of privilege be logged per normal procedures applicable to civil litigation.



Work Product Doctrine

- The Doctrine protects documents prepared in anticipation of litigation.
- The protection is waived if disclosure substantially increases the opportunity for potential adversaries to obtain the information.
- It is not clear whether the privilege applies to congressional investigations, but there is substantial authority that they are not “adversarial proceedings.”



Top Mistakes

- **Facts:** failure to identify and verify
- **Corporate message:** unclear or undetailed
- **Internal communications:** understanding the risks and settling on a strategy
- **Context:** failure to adapt to type of investigation
- **Care and concern:** inadequate attention
- **Legal:** preserving privilege and assessing collateral consequences
- **Knowing the rules:** vary by committee
- **Big picture:** anticipating what might come next



Lay of the Land in the 116th Congress (Senate)

Homeland Security & Gov. Affairs



Ron Johnson (R-WI) Gary Peters (D-MI)

Health, Education, Labor & Pensions



Lamar Alexander (R-TN) Patty Murray (D-WA)

Commerce, Science & Transportation



Roger Wicker (R-MS) Maria Cantwell (D-WA)

Judiciary



Lindsey Graham (R-SC) Diane Feinstein (D-CA)

Finance



Charles Grassley (R-IA) Ron Wyden (D-OR)

Banking, Housing & Urban Affairs



Mike Crapo (R-ID) Sherrod Brown (D-OH)

Aging



Susan Collins (R-ME) Bob Casey (D-PA)

Lay of the Land in the 116th Congress (House)

Labor and Education



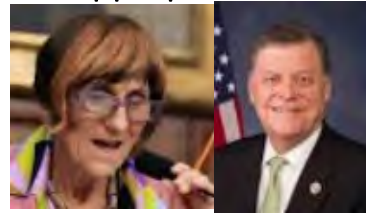
Bobby Scott (D-VA) Virginia Foxx (R-NC)

Veterans Affairs



Mark Takano (D-CA) Phil Roe (R-TN)

Appropriations



Rosa DeLauro (D-CT) Tom Cole (R-OK)

Energy and Commerce



Frank Pallone (D-NJ) Greg Walden (R-OR)

Financial Services



Maxine Waters (D-CA) Patrick McHenry (R-NC)

Oversight & Government Reform



Elijah Cummings (D-MD) Jim Jordan (R-OH)

Homeland Security



Bennie Thompson (D-MS) Mike Rogers (R-AL)

Judiciary



Jerrold Nadler (D-NY) Doug Collins (R-GA)

Ways & Means



Richard Neal (D-MA) Kevin Brady (R-TX)

Science, Space & Technology



Eddie Bernice Johnson (D-TX) Frank Lucas (R-OK)

Representative Democratic House Oversight Letters

- Payday Lenders and Conflicts of Interest (Jan. 31, 2018)
 - Maxine Waters (CA)
- Sexual Harassment at Private Institutions and Universities (Jan. 18, 2018 and Oct. 26, 2017)
 - Eddie Bernice Johnson (TX)
- EPA Regulations of Glider Engines (Sept. 26, 2018)
 - Eddie Bernice Johnson (TX)
- EPA Regulation of Oil and Gas Companies (June 27, 2018)
 - Diana DeGette (CO) and Raul Grijalva (AZ)
- Election Interference on Social Media Companies (Sept. 24, 2018)
 - Frank Pallone, Jr. (NJ)
- Counterfeit Merchandise on Internet Retailers (Oct. 10, 2018 and March 7, 2018)
 - Franke Pallone, Jr. (NJ)
- Opioid Epidemic (August 2, 2018)
 - Frank Pallone, Jr. (NJ) and Diana DeGette (CO)
- Media Companies: Misrepresentations to the FCC (August 27, 2018) and Mergers (April 30, 2018)
 - Frank Pallone, Jr. (NJ)
- Staffing Levels at Nursing Homes (July 31, 2018)
 - Jan Schakowsky (IL)
- Airline Company Wages (June 19, 2018)
 - Jan Schakowsky (IL) and Raul Grijalva (AZ)

Potential Committee Inquiries & Investigations

House of Representatives

- **House Oversight & Reform**

- Incoming Chairman Elijah Cummings has requested pricing and cost information from a dozen biopharma companies
- HOR held a hearing in January 2019 examining the actions of drug companies in raising prescription drug prices
- Cummings spoke out about the cost of Zinbryta in 2017



- **House Ways & Means**

- Chairman Richard Neal has said issues related to health care costs will be a top Committee priority and has criticized the GOP's "lack of effective strategy to bring down prescription prices."
- The committee held a hearing in early February 2019 on the cost of rising prescription drug prices



Potential Committee Inquiries & Investigations

House of Representatives

- **House Energy & Commerce**

- Rep. Diana DeGette, chair of the E&C subcommittee on Oversight & Investigations, is investigating the “skyrocketing” price of insulin, and wants to hold a hearing on the issue “soon”
- Rep. Jan Schakowsky, a senior Democrat on the Committee, sent a letter to AbbVie (signed by 17 other House Democrats) in October regarding pharmaceutical tax breaks and drug pricing



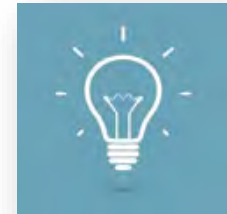
- **House Science, Space, and Technology**

- Rep. Eddie Bernice Johnson, the chair of the Committee, has vowed to “address the challenge of climate change, starting with acknowledging that it is real.”
- Democrats are also reportedly considering resurrecting the Select Committee on Energy Independence and Global Warming, which was dissolved by Republicans in 2011
- Though the Select Committee previously had subpoena power, Democratic leaders have stated that the new committee will likely not have such power



Potential Committee Inquiries & Investigations Senate

- **Commerce, Science, and Transportation**
 - Chairman John Thune and Ranking Member Maria Cantwell sent a letter to HHS in July expressing concern regarding “skyrocketing drug prices”
 - Rising prescription drug costs has been a focus of CST in previous congresses
- **Special Committee on Aging**
 - Chairwoman Collins has held numerous hearings concerning rising drug costs and is examining the link between rebates and drug prices
- **Health, Education, Labor and Pensions**
 - Chairman Lamar Alexander held a hearing on the cost of prescription drugs last year, during which the cost of Humira was discussed
 - A publication this year by HELP Minority Staff noted that Humira’s price increased “almost 19% last year” and reported that “AbbVie recently settled in court to keep biosimilar competitors off the market until 2023 at the earliest.”
- **Permanent Subcommittee on Investigations**
 - Majority and Minority staffs recently completed a two year investigation into the price of drug treatments to combat Opioid overdosing and are likely to continue to pursue the subject of drug pricing generally



US SENATE
COMMITTEE ON
HEALTH
EDUCATION
LABOR &
PENSIONS



What Will You Need to Do?

- Respond to committee subpoenas or document requests
- Negotiate the terms of, and conduct or object to, document production
- Prepare for interviews, depositions, and hearings
- Manage the public relations response
- Anticipate and neutralize collateral consequences



Questions

Please direct any follow-up questions to Michael Bopp:



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