

# Looking Forward: Congressional Investigations & Oversight in the 117th Congress

by Eric R. Nitz & Kenneth Notter

For the third time in as many presidencies, a new president has entered office with his political party in control of both Chambers of Congress. That shift to unified government—with Democrats in control of both Chambers of Congress as well as the presidency—will be a marked departure from the period of divided government that preceded it—where Democrats controlled the House but Republicans controlled the Senate and the White House. The move to unified government will surely impact both the nature and focus of congressional oversight. Here is what to expect.

## Why Congress's Investigative Focus Will Shift

As anyone who has ever watched CSPAN knows, Congress sometimes uses its investigatory power for political ends. As a result, congressional hearings and investigations necessarily have communicative, theatrical, and political elements.<sup>1</sup>

It should come as no surprise, then, that during periods of divided government, Congress is more likely to investigate the executive branch.<sup>2</sup> Recent experience bears out that reality. During much of the Obama Administration, Republicans controlled the House of Representatives. And investigations initiated by committees in the Republican-controlled House—led primarily by the powerful House Oversight & Government Reform Committee—overwhelmingly focused on allegations of misconduct and overreach by the executive branch.<sup>3</sup> To give just a few examples, House Republicans conducted lengthy investigations into the ATF's Fast & Furious Operation,<sup>4</sup> the terrorist attacks on the U.S. embassy in Benghazi, Libya,<sup>5</sup> and the IRS's consideration of tax-exempt status applications by tea-party groups.<sup>6</sup> Meanwhile, in the Senate, where Democrats reigned during the middle four years of the Obama Presidency, investigations focused on issues pertinent to the Democrats' policy agenda, such as regulation of Wall Street<sup>7</sup> and climate change.<sup>8</sup>

That pattern held, for the most part, during the Trump Administration. For the first two years, when Republicans controlled Congress, there were relatively few congressional investigations into the executive branch. Rather, other entities—the Office of the Special Prosecutor, private litigants, and state attorneys general—were the driving force behind investigations into the executive branch.

That all changed when Democrats won control of the House in the 2018 mid-term elections. Like House Republicans during the Obama Administration, House Democrats promised aggressive congressional investigations into the

Trump Administration. They delivered on that promise, initiating two impeachments and a score of other committee investigations scrutinizing executive-branch activities ranging from the 2016 election to the Trump Administration's actions on immigration and border enforcement.<sup>9</sup>

## Congressional Investigations on the Horizon

With President Biden in the White House and Democrats controlling both the Senate and the House, the focus of congressional oversight seems likely to move away from the executive branch. That does not mean, however, that congressional oversight and congressional investigative activity will wane.

To the contrary, the House passed a rules package<sup>10</sup> that strengthened its investigatory powers. For example, the new rules expand “the investigative jurisdiction of the Select Committee on the Climate Crisis.”<sup>11</sup> And, with the conclusion of the second impeachment trial early this year, passage of the COVID-19 stimulus package last month, and Senate confirmation of the first wave of major executive appointments, Congress now has additional time for investigative activity.

As with prior periods of unified government, that investigative activity is likely to focus on the private sector—in particular, industries and activities that align with the policy objectives of the Democrats now controlling both chambers of Congress.

The technology industry is likely to find itself subject to congressional investigations. Executives from some of the biggest tech companies—including Google, Facebook, and Twitter—recently testified before the House Energy and Commerce Committee on “Social Media's Role in Promoting Extremism and Misinformation.”<sup>12</sup> That hearing was just the latest of the series of hearings on and investigations of “Big Tech”—and it is unlikely to be the last, as both parties seem eager to consider a variety of reforms and regulations. Of note, Senator Amy Klobuchar—the new Chairwoman of the Senate Antitrust Subcommittee—has proposed substantial changes to antitrust law designed to rein in Big Tech.<sup>13</sup> Republican lawmakers have expressed a willingness to consider similar proposals.<sup>14</sup>

With less bipartisan support, the current Congress will likely launch investigations into and hold more hearings on private industry's impacts

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on to climate change. Senator Sheldon Whitehouse, for example, recently sent a letter<sup>15</sup> to Attorney General Merrick Garland calling for a civil fraud investigation of the fossil fuel industry, perhaps foreshadowing a similar congressional investigation. And the House Select Committee on the Climate Crisis held a hearing<sup>16</sup> exploring the “Growing Risks and Costs of Inaction,” while another committee held a hearing<sup>17</sup> on “Restoring the Vital Mission of the EPA.”

Banking and other financial services companies are also likely to come under renewed congressional scrutiny. In March, the Senate Committee on Banking, Housing, and Urban Affairs questioned the surge in so-called “retail trading”—where individual investors execute trades through online brokerage firms—and the corresponding market instability exemplified by the wild swings in the price of GameStop stock.<sup>18</sup> Similar hearings and investigations may also come from the newly formed<sup>19</sup> House Select Committee on Economic Disparity and Fairness in Growth.

And, of course, a slew of investigations related to the ongoing COVID-19 global health crisis seems inevitable. The House Select Subcommittee on the Coronavirus Crisis appears poised to continue its investigations into for-profit nursing homes and their handling of the pandemic.<sup>20</sup> The Senate Committee on Finance also recently held a hearing on “COVID-19 in the Nation’s Nursing Homes.”<sup>21</sup> Issues arising from development and distribution of the various COVID-19 vaccines also seem likely targets of congressional scrutiny, with the House Select Subcommittee on the Coronavirus Crisis launching investigations into one concierge medical provider’s administration of the vaccine<sup>22</sup> and issues concerning vaccine manufacture.<sup>23</sup> Beyond investigations into companies in the healthcare industry, expect Congress to continue probing potential fraud or misuse of the nearly \$1 trillion in economic aid delivered to businesses through the Paycheck Protection Program and the Economic Injury Disaster Loan Program.<sup>24</sup> Indeed, the CARES Act created a congressional oversight panel to monitor such abuses.<sup>25</sup>

### Conclusion

Like so much in Washington, the tenor and scope of congressional oversight activity depends on who is in power. And with one party in control of the House, the Senate, and the White House, we can expect that the focus of congressional oversight and investigations will be trained on the private sector and focus heavily on advancing the policy priorities of the Democrats controlling those three levers of power.



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### Endnotes

<sup>1</sup>See Josh Chafetz, *Articles Congressional Overspeech*, 89 *FORDHAM L. REV.* 529, 536 (2020), available at <http://fordhamlawreview.org/wp-content/uploads/2020/11/Chafetz-November-7.pdf>.

<sup>2</sup>Douglas Kriner & Liam Schwartz, *Divided Government and Congressional Investigations*, 33 *Legislative Studies Quarterly*, 314 (2011).

<sup>3</sup>Philip Bump, *The Many Investigations into the Administrative of Barack Obama*, *WASHINGTON POST* (Feb. 7, 2019, 4:47 PM), <https://www.washingtonpost.com/politics/2019/02/07/many-investigations-into-administration-barack-obama/>.

<sup>4</sup>See *Fast and Furious: Obstruction of Congress by the Department of Justice*, [https://republicans-oversight.house.gov/wp-content/uploads/2017/06/FINAL\\_REPORT\\_2017.pdf](https://republicans-oversight.house.gov/wp-content/uploads/2017/06/FINAL_REPORT_2017.pdf).

<sup>5</sup>*Final Report of the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi*, <https://www.congress.gov/114/crpt/hrpt848/CRPT-114hrpt848.pdf>.

<sup>6</sup>*Report of the Committee on Oversight and Government Reform*, <https://www.congress.gov/113/crpt/hrpt415/CRPT-113hrpt415.pdf>.

<sup>7</sup>*Wall Street Bank Involvement with Physical Commodities Majority and Minority Staff Report*, [https://www.hsgac.senate.gov/imo/media/doc/REPORT-Wall%20Street%20Bank%20Involvement%20With%20Physical%20Commodities%20\(12-5-14\).pdf](https://www.hsgac.senate.gov/imo/media/doc/REPORT-Wall%20Street%20Bank%20Involvement%20With%20Physical%20Commodities%20(12-5-14).pdf).

<sup>8</sup>See U.S. Senate Committee on Environment and Public Works, Full Committee Hearing entitled, “Climate Change: It’s Happening Now” (July 18, 2013, 10:00 AM), <https://www.epw.senate.gov/public/index.cfm/2013/7/full-committee-hearing-entitled-climate-change-its-happening-now>.

<sup>9</sup>See Alex Moe, *House Investigations of Trump and His Administration: The Full List*, NBC News (Mar. 27, 2019, 12:02 PM), <https://www.nbcnews.com/politics/donald-trump/house-investigations-trump-his-administration-full-list-n1010131>.

<sup>10</sup>Available at <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117hresPIH-hres7.pdf>.

<sup>11</sup>See *id.* at 38.

<sup>12</sup>See House Committee on Energy & Commerce, Hearing on: “*Disinformation Nation: Social Media’s Role in Promoting Extremism and Misinformation*” (Mar. 25, 2021, 12:00 PM) <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-disinformation-nation-social-medias-role-in-promoting>.

<sup>13</sup>See *Big Tech in Crosshairs as Congress Takes up Antitrust Reform*, <https://www.forbes.com/advisor/investing/big-tech-antitrust-reform/> (last updated Mar. 15, 2021).

<sup>14</sup>See *Big Tech Faces Antitrust Scrutiny* (Aug. 26, 2020), <https://www.rpc.senate.gov/policy-papers/big-tech-faces-antitrust-scrutiny>.

<sup>15</sup>Available at <https://www.whitehouse.senate.gov/imo/media/doc/Ltr%20to%20AG%20Garland.pdf>

<sup>16</sup>See House Select Committee on the Climate Crisis, Hearing titled: “*Making the Case for Climate Action: The Growing Risks and Costs of Inaction*” (April 15, 2021, 12:00 PM), <https://climatecrisis.house.gov/committee-activity/hearings/making-case-climate-action-growing-risks-and-costs-inaction>.

<sup>17</sup>See House Committee on Energy & Commerce, Hearing on: “*The Path Forward: Restoring the Vital Mission of EPA*” (Mar. 10, 2021, 10:30 AM), <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-the-path-forward-restoring-the-vital-mission-of-epa>.

<sup>18</sup>See United States Senate Committee on Banking, Housing, & Urban Affairs, Hearing on: “*Who Wins on Wall Street? GameStop, Robinhood, and the State of Retail Investing*” (Mar. 9, 2021, 10:00 AM), <https://www.banking.senate.gov/hearings/who-wins-on-wall-street-gamestop-robinhood-and-the-state-of-retail-investing>.

<sup>19</sup>See Pelosi Announces Creation of Select Committee on Economic Disparity & Fairness in Growth (Dec. 30, 2020), <https://www.speaker.gov/newsroom/123020>.

<sup>20</sup>See Kyle Cheny & Rachel Roubein, *House Coronavirus Task Force Launches Probe into Nursing Homes*, POLITICO (last updated June 16, 2020, 2:26 PM), <https://www.politico.com/news/2020/06/16/house-coronavirus-task-force-nursing-homes-probe-322616>.

<sup>21</sup>United States Senate Committee on Finance, Hearing on: “*A National Tragedy: COVID-19 in the Nation’s Nursing Homes*” (Mar. 17, 2021, 10:00 AM), <https://www.finance.senate.gov/hearings/a-national-tragedy-covid-19-in-the-nations-nursing-homes>.

<sup>22</sup>See Tim Mak, *One Medical’s Coronavirus Vaccine Practices Spark Congressional Investigation*, NPR (Mar. 2, 2021, 5:04 AM), <https://www.npr.org/2021/03/02/972534630/one-medicals-coronavirus-vaccine-practices-spark-congressional-investigation>.

<sup>23</sup>House Committee on Oversight and Reform, *Maloney and Clyburn Launch Investigation into Emergent BioSolutions’ Profits and Performance Under Federal Vaccine Contracts* (April 19, 2021), <https://oversight.house.gov/news/press-releases/maloney-and-clyburn-launch-investigation-into-emergent-biosolutions-profits-and>.

<sup>24</sup>See, e.g., Select Subcommittee on the Coronavirus Crisis, *Select Subcommittee Launches Investigation into Disbursement of PPP Funds* (June 15, 2020), <https://coronavirus.house.gov/news/press-releases/select-subcommittee-launches-investigation-disbursement-ppp-funds>; *Select Subcommittee on the Coronavirus Crisis, Select Subcommittee Releases New Findings on Trump Administration’s Failure to Prevent Billions in Small Business Fraud* (Mar. 25, 2021), <https://coronavirus.house.gov/news/press-releases/select-subcommittee-releases-new-findings-trump-administration-s-failure-prevent>.

<sup>25</sup>Available at <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf#page=206>.