

How Congressional Oversight May Shift In 2022 And Beyond

By **Aaron Cutler and Ari Fridman**

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In what has become a truism of U.S. politics over decades, a first-term president's political party typically does not fare well in the midterm elections.

With President Joe Biden's approval ratings at a nadir, his domestic agenda stuck, inflation rising, and Democrats clinging to extremely narrow majorities in both the U.S. House of Representatives and U.S. Senate, the 2022 midterm elections are likely to result in a political realignment.

If the generic ballot proves accurate, there is a very high likelihood that Republicans will secure a comfortable majority in the House of Representatives. There is also a realistic chance that Republicans secure a narrow majority in the Senate.

Beyond polling and the proclamations of pundits, the bevy of early retirements announced throughout the second half of 2021 by Democratic members of Congress, including committee chairs, underscores the pessimism shared by Democratic lawmakers about their expectations for the midterms.

The apparent collapse of the centerpiece of Biden's domestic agenda, the Build Back Better legislation, will likely cause another wave of Democratic lawmakers to announce their retirements in the first few months of 2022.

The poor showings by Democratic officeholders in the off-year elections in New Jersey and Virginia could prove to be a harbinger of things to come for the Democratic Party.

A change in control of either or both houses of Congress will have a significant impact on congressional oversight and investigations.

As has been the case in past cycles, the increasing expectation of a political realignment on Capitol Hill is likely to cause discernible changes in strategies being employed on both sides of the aisle — both in the immediate and longer term.

We address some of these foreseeable developments in the rest of this piece.



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2022: For Democrats, A Sense of Urgency in Advance of a Political Realignment

Concerned about losing their majorities in January 2023 and eager to put points on the board, we anticipate that congressional Democrats will prioritize existing investigations and inquiries.

Democrats well understand that, if they lose their majorities, they will not be able to issue subpoenas or call hearings. That privilege will shift to Republicans.

As such, we expect Democrats to aggressively seize upon oversight activities as a tool for bolstering their reelection prospects, seeking to drive up enthusiasm among the party's base.

We believe the prospect of a political realignment will cause Democratic committee chairs to expedite the completion of their current investigations. They may intensify existing inquiries into domestic energy companies, biopharmaceutical companies and the e-cigarette industry.

We would also expect that Democratic leaders on House panels whose mandates are unlikely to be renewed by Republicans during the 118th Congress will accelerate their activities. Most notably, this would likely apply to the House Select Subcommittee on the Coronavirus Crisis, which is investigating all aspects of the coronavirus pandemic.

It's challenging to predict precisely which ongoing inquiries conducted by these panels will be prioritized. Usually, congressional oversight panels do not telegraph publicly exactly which of their inquiries are their top priorities.

Nevertheless, a year-end staff report^[1] released by the Select Subcommittee on the Coronavirus Crisis offers some insight into the thinking of Chair James Clyburn, D-S.C. The staff report identified certain investigations that the panel intends to pursue further in 2022.

These investigations include probes into:

- Coronavirus infections and deaths in meatpacking plants;
- The review of government contracts to manufacture coronavirus vaccines and therapeutics following production errors and instances of contamination;
- The administration of the Economic Injury Disaster Loan program and the "adequacy of fraud controls within the program"; and
- A \$700 million loan to the trucking company Yellow Corp., formerly known as YRC Worldwide Inc., under the national security portion of the Coronavirus Aid, Relief and Economic Security Act loan program.

Companies that are already the subject of existing inquiries should expect a more aggressive Democratic majority in 2022. This means more regular communication from oversight panels regarding outstanding documents and information sought through interrogatories; more threats of subpoenas; and the issuance of more subpoenas.

From a timing perspective, we would expect Democrats to hold high-profile hearings and release reports with investigative findings prior to the August recess. From August forward, all House lawmakers, and

those senators who are in cycle, will hit the campaign trail in earnest.

2022: For Republicans, a Time for Stymieing Ongoing Investigations While Planning for a New Majority

Energized by the prospect of claiming new majorities, we anticipate that congressional Republicans will continue to oppose Democratic-led investigations the GOP sees as partisan in nature.

This includes much of the work of the House Select Subcommittee on the Coronavirus Crisis, which Republicans have panned as a distraction from the policy failures of the Biden administration.[2]

Republicans will seek to frustrate investigations they see as partisan in order to blunt any political gains that Democrats may seek to achieve.

We also anticipate that Republicans could cooperate with Democrats on select items — admittedly, a very select group of items — that offer a bipartisan basis for investigation during the next Congress.

For example, there is the potential for bipartisan cooperation into investigating social media companies, albeit on different grounds. Republicans have alleged that social media companies manipulate their platforms to reduce exposure to conservative viewpoints, while Democrats have argued that the large social media companies may be engaged in antitrust violations.

Already, House Republicans are preparing their oversight agenda for the 118th Congress.

According to an Axios report,[3] House Minority Leader Kevin McCarthy, who is very likely to be the next speaker, laid out an oversight agenda tied to the wedge issues that have become entangled in the nation's culture wars.

In particular, House Republicans reportedly intend to focus on:

- The National Security Agency's alleged surveillance of television host Tucker Carlson;
- Public schools' use of critical race theory in educational curricula;
- Illegal immigration across the southern border;
- The origins of the coronavirus;
- Centers for Disease Control and Prevention communications about school closures and mask mandates;
- The withdrawal of U.S. troops from Afghanistan; and
- A disputed U.S. Department of Defense cloud computing contract known as the Joint Enterprise Defense Infrastructure, or JEDI.

The JEDI matter could involve companies that submitted bids on the DOD contract.

2023: For Republicans, a Chance to Frame a Coming Presidential Election

As a practical matter, standing up a new majority takes time. If they gain the majority, Republicans will spend the first quarter of 2023 getting organized.

First, the House Republican Conference will hold leadership elections within weeks after the midterms. While McCarthy is the front-runner to be speaker, he will still need to secure 218 votes on Jan. 3, 2023.

Beyond leadership elections, the powerful steering committee will convene to select the chairs of standing committees after the speakership vote is held.

Then, flush with larger budgets, these committee chairmen will hire investigative staff to conduct their work.

Once the House Republican majority has become organized, Republicans will likely prioritize targets that generally escape close scrutiny from the 117th Congress, when they lack the ability to compel cooperation.

Individuals and companies that receive interrogatories or other requests from Republican lawmakers when they are in the minority should expect renewed engagement from Republicans if they gain the ability to compel cooperation.

As such, these subjects may consider whether enhanced cooperation with the Republican minority in 2022 could help reduce exposure to closer scrutiny from a likely Republican majority in 2023.

As discussed above, Republicans are signaling that they will focus on the Biden administration's conduct. This is not unlike the strategy employed by House Democrats after the 2018 midterms during former President Donald Trump's first term.

Republicans will seek to frame the national political conversation in a manner advantageous to the GOP in advance of the 2024 presidential election. They will focus on issues that not only energize the Republican base, but also appeal to a cross-section of voters.

We would expect the Biden administration to hire additional attorneys at executive agencies in order to handle the escalation of oversight activities from Republicans.

The chaotic U.S. withdrawal from Afghanistan will be a major focus of a new Republican majority, potentially meriting the impaneling of a select committee.

The border crisis, rising and persistent inflation, supply chain challenges, the Biden administration's coronavirus response, and critical race theory in public schools will also be a focus of a Republican majority. These are all issues that Americans care about, according to polling.

Republicans will point to perceived policy failures by the Biden administration. A shift to Republican-led oversight is likely to take the pressure off of many companies that were under active investigation by congressional Democrats.

To be sure, there are risks for Republicans if they gain the majority. Targeting Biden's son, Hunter, as

some Republicans seem inclined to do, and other family members with subpoenas could turn public opinion against the GOP.

There is also the potential for Trump to petition his congressional Republican allies to relitigate grievances over the outcome of the 2020 election.

It may be difficult for Republican leaders in Congress to keep the party's oversight agenda disciplined and on message.

Increased volatility will force companies and their oversight counsel to be nimble.

Like his predecessors, former Speakers Paul Ryan and John Boehner, McCarthy may find that rank-and-file Republicans are quite comfortable eschewing the preferences of Republican leaders.

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Disclosure: The authors represent a client in the meatpacking investigation mentioned in this article.

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[1] <https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/SSCCInterimReportDec2021V1.pdf>.

[2] Scalise: Democrats' Sham Subcommittee Politicizes the Pandemic - United States House Committee on Oversight and Government Reform, available here: <https://republicans-oversight.house.gov/release/scalise-democrats-sham-subcommittee-politicizes-the-pandemic/>.

[3] <https://www.axios.com/republicans-biden-probes-house-majority-25bc5f7a-269e-44c8-94dc-4700574112ca.html>.