

# Big Change For Witness Privilege In House Investigations

By **Sam Dewey and Llewelyn Engel** (February 12, 2019)

On Jan. 25, 2019, U.S. House of Representatives Rules Committee Chairman James P. McGovern, D-Mass., issued regulations governing staff deposition authority in the 116th Congress, pursuant to his authority under H. Res. 6.[1] In passing H. Res. 6, the newly empowered House Democratic majority drastically increased House committees' investigative power by allowing committee staff to conduct depositions without members present — a stark departure from precedent.[2] This change was a dramatic first step in the House Democratic majority's efforts to ramp up oversight of both the executive branch and the private sector.[3]



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The newly issued regulations redouble this effort by making it considerably easier for committees to overrule privilege objections during depositions. As a result, deponents asserting privilege are more likely to be confronted with the choice of either answering the committees' questions or standing in contempt.[4] The import of this move is clear. With oversight now in hyperdrive, the House intends to aggressively assert its long claimed prerogative to both overrule executive branch claims of privilege and to refuse to honor private parties' assertions of the attorney-client privilege and other common law privileges.[5]



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When the 114th Congress first expanded staff deposition authority, the regulations governing the taking of depositions contained an unwieldy procedure that prevented a committee chairman from contemporaneously ruling on objections and ordering and directing a witness to answer.[6]

Specifically: (1) all objections were held in abeyance until the deposition recessed; (2) a chairman could only rule on an objection during the recess and only in writing; and (3) the deposition had to remain in recess for an additional three days following the chairman providing the ruling to the witness and the committee, and only then could the deposition reconvene and the witness be ordered and directed to answer the committee's questions.[7] Additionally, the witness had the right to appeal the chairman's ruling to the committee and force the committee to take a roll-call vote on the objection prior to initiating the mark-up of a contempt citation.[8] This procedure stood in sharp contrast to the rules governing the few Senate committees in the 114th Congress that possessed staff deposition authority.

Under the Senate committees' rules, a chairman could rule on objections and order and direct a witness to answer contemporaneously.[9] A witness's failure to then answer could be met with an immediate committee citation for contempt.[10] The Senate regulations remained in substantially the same form during the 115th Congress.[11]

As a practical matter, the former House deposition regulations imposed serious logistical costs on overruling privilege objections (particularly when combined with the then extant member presence requirement).[12] First, as a scheduling matter, it is decidedly inconvenient to recess a deposition, process a written ruling, and then reconvene a deposition. Second, a recalcitrant witness could force the committee to repeatedly go through this time-consuming procedure by narrowly asserting privilege to one set of questions at a time, causing a delay between each question. By this mechanism, objections could be stacked on objections, allowing the witness to essentially filibuster the committee.

These restraints on the process were intentional — the prior rules were designed make overruling an objection an exceedingly rare event.[13]

Because the regulation's rules now grant the chairman the power to contemporaneously overrule objections and order and direct witnesses to answer — be it by telephone, written order or personal presence — there is no delay and no ability to game the system.[14] A witness who stands by an objection that is overruled may be immediately held in contempt and forced to face the legal consequences.[15] Additionally, only a member is now permitted to appeal a chairman's ruling.[16]

This change will have its greatest impact on executive branch witnesses seeking to assert privileges unique to the executive branch. Undoubtedly, the House Democratic majority enacted the change to facilitate aggressive oversight of the administration. The change could place executive branch witnesses in the incredibly uncomfortable position of facing personal criminal liability for following directions from the administration to assert privilege. Historically, this position is often an unsustainable state of affairs and has often resulted in the administration providing the requested information.[17]

While the greatest impact of the change will undoubtedly be on executive branch witnesses, it would be a mistake to view this change as agnostic to the private sector. Congress has long taken the position that it need not honor common law privileges, and Democratic chairmen in the past have repeatedly overruled claims of attorney-client privilege by private sector actors.[18]

As the House probes a variety of issue targeting the private sector, we fully expect to see House committees demand information that would normally be protected by the attorney-client privilege in judicial settings. The rule change now makes it significantly easier for the Democratic chairman to overrule privilege claims made by senior executives and compel them to reveal information that would undoubtedly be protected by a common law privilege in a judicial forum. The change may even lead to private corporate counsel being forced to testify in detail regarding advice they gave their client.

The rule change foretells the more aggressive oversight role the new House Democratic majority will take this Congress. Private sector executives and executive branch officials can no longer rely on common law privilege to protect confidential information and must prepare for faster moving and more combative oversight proceedings.

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[1] 116th Congress Regulations for Use of Deposition Authority, 165 Cong. Rec. H.1216 (daily ed. Jan. 25, 2019) (statement of Rep. McGovern).

[2] See Special Report, U.S. House of Representative Rules Change Will See Corporate Clients Being Deposed Under Oath, at 4 (Jan. 2019).

[3] *Id.*

[4] As a general proposition, a Committee cannot legally proceed against a witness for contempt when the witness raises a legitimate privilege objection unless the Committee: (1) overrules that objection; (2) orders and directs the witness to answer the question; and (3) makes clear on order and direction that the witness' choices are to comply with the order and direction and answer the question put or to stand in contempt. See, e.g., *Quinn v. United States*, 349 U.S. 155, 165–66 (1955).

[5] In what appears to be a deliberate move, the Regulations also removed language that had appeared in the 115th Congress regulations that limited the right to object to a question to only “the witness or the witness’s personal counsel.” Compare 115th Congress Staff Deposition Authority Procedures, 163 Cong. Rec. H536–H537 (daily ed. Jan. 12, 2017) (statement of Rep. Sessions), with 116th Congress Regulations for Use of Deposition Authority, 165 Cong. Rec. H.1216 (daily ed. Jan. 25, 2019) (statement of Rep. McGovern). In so doing, the Regulations restored the language from the 114th Congress regulations, which did not contain this language. Compare 116th Congress Regulations for Use of Deposition Authority, 165 Cong. Rec. H.1216 (daily ed. Jan. 25, 2019) (statement of Rep. McGovern), with 114th Congress Staff Deposition Authority Procedures, 161 Cong. Rec. E21 (daily ed. Jan 2, 2015). This change appears to expand objection authority to Members and Staff. This raises the specter that Minority Members may voluntarily appear at depositions of Administration witnesses in order to interpose defensive objections. But it also raises the intriguing possibility that this change, combined with the change making it much easier for the Chairman to unilaterally rule on objections, is intended to allow Majority Members to object to—and the Chairman to then block—Minority lines of inquiry. How this will play out remains to be seen.

[6] 114th Congress Staff Deposition Authority Procedures, 161 Cong. Rec. E21 (daily ed. Jan 2, 2015) (statement of Rep. Sessions). See Special Report, U.S. House of Representative Rules Change Will See Corporate Clients Being Deposed Under Oath, at 4–5 (Jan. 2019).

[7] 114th Congress Staff Deposition Authority Procedures, 161 Cong. Rec. E21 (daily ed. Jan 2, 2015) (statement of Rep. Sessions)

[8] *Id.*

[9] See, e.g., U.S. Senate Special Committee on Aging Rules, Rule VII, 114th Cong. In the experience of the authors, this method of proceeding was decidedly efficient and extremely effective in obtaining information from a witness.

[10] *Id.*

[11] 115th Congress Staff Deposition Authority Procedures, 163 Cong. Rec. H536–H537 (daily ed. Jan. 12, 2017) (statement of Rep. Sessions).

[12] Personal experience of authors.

[13] Personal knowledge of authors.

[14] 116th Congress Regulations for Use of Deposition Authority, 165 Cong. Rec. H.1216 (daily ed. Jan. 25, 2019) (statement of Rep. McGovern).

[15] Id.

[16] Id.

[17] Personal knowledge of authors.

[18] See, e.g., 98th Cong., 1st Sess. H. Comm. on Commerce, Attorney Client Privilege, Comm. Print 98-I, (June 1983).