

116TH CONGRESS PREVIEW, JUDICIARY AND IMMIGRATION

By: [Mark Disler](#)

HOUSE

Veteran Congressman Jerrold Nadler (D-NY) ascends to the chair of the House Judiciary Committee (HJC). His leadership of the HJC represents a sharp break with the outlook and focus of his Republican predecessors in a committee whose jurisdiction includes many contentious issues. The Ranking Member will be Congressman Doug Collins (R-GA). He is a strong conservative leading a conservative Committee minority, which loses several veteran Members to retirement. He has, however, a record of reaching across the aisle to see where common ground can be found. Such ground may be elusive in the next Congress, and partisan division will be on full display in the Committee.

There is a virtual cornucopia of issues for the Committee to pursue, as a pent-up Democratic Committee agenda now has an opportunity to unfold. Moreover, the Committee's Democratic majority will undertake rigorous oversight of the Trump Administration.

NAMES TO KNOW IN JUDICIARY

House



Jerrold Nadler
*Incoming Chairman,
Judiciary Committee*



Doug Collins
*Incoming Ranking
Member, Judiciary
Committee*

OVERSIGHT

It is important to keep in mind the impact of congressional oversight on Federal agencies, such as the Department of Justice (DOJ). The time spent by political appointees responding to congressional document requests and preparing, rehearsing, and delivering congressional testimony is time *not* spent on advancing the agency's agenda. The timing of discretionary actions, proposed regulations, and similar activity can be affected by the greater scrutiny such oversight

portends. This is not to suggest that major decisions will ever necessarily be altered. Federal agencies, however, engage in a wide range of activities across the breadth of their jurisdiction, and congressional oversight potentially can affect not just the timing, but the substance of some decisions.

Congressman Nadler wrote to Acting Attorney General Matthew Whitaker and FBI Director Christopher Wray on November 13, 2018, noting that HJC Democrats have written over 100 unanswered letters to the Trump Administration. Undoubtedly, Trump Administration officials will be invited to answer some of these letters in HJC hearings.

Under the rubric of the fair administration of justice, HJC can choose from a variety of subjects for oversight, including: whether President Trump sought favorable treatment for former National Security Advisor Michael Flynn and other allegations put forward by former FBI Director James Comey; the circumstances of an alleged outing of an undercover asset who had been used to collect information for the FBI in the early stages of the Russia investigation; other instances where Democrats have questioned whether DOJ is sufficiently insulated from undue White House influence; and whether the President benefits from business interests that in turn receive remuneration from foreign governments in potential violation of the Emoluments Clause of the Constitution.

Oversight hearings will likely explore the manner and extent of DOJ's efforts to counter hate crimes and violence, right-wing extremism, and violent anti-semitism, as well as DOJ's surveillance of Muslim-Americans. The status and impact of family separation at America's borders is another Trump policy that will likely be reviewed.

While shying away from talk of impeachment proceedings, Chairman Nadler will be faced with renewed calls for such proceedings following the release of the Mueller report.

ANTITRUST

The Democratic blueprint for their legislative priorities, "A Better Deal," has a section entitled "Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power."

Democratic concerns about corporate influence and consolidation will be fully aired in the next Congress. The blueprint names the following industries, as examples of concern: airlines; cable/telecommunications; beer; agriculture; and eyeglasses – while also noting there are many more industries meriting scrutiny. The committee can be expected to closely review specific proposed mergers, and with a more skeptical eye than the business community has recently met in the Committee.

The Committee is expected to consider new merger standards that look at broader, longer-term effects of mergers, and that incorporate a presumption that the largest mergers would be anticompetitive and blocked unless the merging firms demonstrate the merger's benefits. Moreover, the Committee will seek to provide regulators with tools and resources for frequent post-merger reviews, to ensure commitments made by merging companies are kept. The Committee will also likely pass legislation creating a competition advocate empowered to receive and pursue complaints concerning anticompetitive behavior, research market activity, and recommend investigations to the DOJ and the Federal Trade Commission (FTC). Both the Senate and President will stand in the way of these proposals becoming law.

CIVIL RIGHTS

The Committee will not only scrutinize DOJ's response to hate crimes, but also examine the underlying causes of racial and religious violence, and violent right-wing extremism.

DOJ's enforcement of the Voting Rights Act (VRA) is likely to be reviewed. HJC will also likely consider whether the VRA needs to be updated in light of the 2013 Supreme Court decision in *Shelby County v. Holder*. This decision, while not declaring Section 5's preclearance requirement unconstitutional, voided Section 4(b)'s formula for which jurisdictions need to seek preclearance. The preclearance process required covered jurisdictions to obtain the prior approval of the DOJ before implementing changes affecting the voting process.

CRIMINAL JUSTICE

Should the First Step Act fail in the lame duck session of the 115th Congress, it will be a priority in the new Congress. The bill seeks to foster rehabilitation and workforce re-entry for those incarcerated in federal prisons. It also softens some criminal penalties. The HJC will consider various gun control measures. These are likely to include regulation of the size of ammunition clips; banning assault-style rifles; and closing the gun show "loophole."

REGULATORY REFORM, PRIVACY

The Committee majority will revisit the issue of banning mandatory arbitration clauses in various contracts, including employment contracts. Consumer privacy will be examined in the context of the policies of internet companies.

IMMIGRATION

No issue is more identified with President Trump than restrictive immigration policy, including tough measures to secure the border. In the new HJC majority, he will find vigorous pushback. A range of administration policies will be reviewed, such as family separation, use of force at the border, the definition of public charge, and asylum policy.

There are two groups of immigrants that will especially draw early attention from HJC. The “Dreamers,” who were brought to the U.S. as children without documents, and those whose Temporary Protected Status (TPS) was not renewed by the Trump Administration. The latter group, who are designated pursuant to statute, is largely made up of Central Americans and Haitians who were granted temporary legal status and work authorization in the U.S. as a result of disasters or armed conflict in their native lands, or other catastrophic circumstance. Many have been in the US for several years or longer and now have American-born children.

Both the Dreamers and TPS holders have a measure of Republican support. While the President has expressed sympathy for the Dreamers while revoking Obama actions that protected their stay in the U.S., no agreement has been reached providing them with permanent authority to remain. A potential deal for substantial funding for a wall on the southern border in exchange for permanent status for the Dreamers has proven difficult to reach. Judicial decisions have blocked the Trump Administration’s revocation of the Obama protections, but it is unclear whether the Supreme Court will uphold these decisions.

The House will likely send separate stand-alone bills protecting the Dreamers and the TPS holders to the Senate. If the Senate passed such a stand-alone Dreamer bill, even with wall funding as part of the package, whether the President would sign it is uncertain at best. With respect to TPS holders, he has never expressed a favorable view of protecting them.

Because of the high priority Democrats place on these two components of the immigration agenda, and a degree of support among Republicans, they could become bargaining chips in year-end appropriations negotiations in the next Congress and theoretically become a condition of funding the government.

While the House may send comprehensive immigration reform legislation to the Senate as a marker for the 2020 election, it will stand no chance of enactment.

SENATE

Senator Lindsay Graham (R-SC) is expected to take the chair of the Senate Judiciary Committee (SJC), replacing Senator Chuck Grassley (R-IA) who moves to the helm of the Finance Committee.

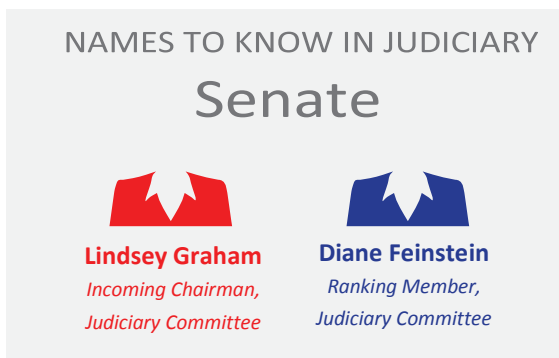
NOMINATIONS

The new chairman will continue to prioritize the confirmation of judicial nominees. Current Senate rules render the Senate minority powerless to do more than delay, rather than defeat, these

nominees. Previous unwritten understandings that the confirmation process slows to a virtual halt at some point in a presidential election year may not be maintained under these rules, which render these previous understandings unenforceable by a Senate minority. The SJC will take up the nomination of William Barr to be Attorney General, and other Executive Branch nominations as they are proposed by the President.

OVERSIGHT

Senator Graham has made clear his displeasure with the FBI handling of the investigation of the Trump campaign. Moreover, Senator Grassley is raising concerns that Glenn Simpson of Fusion GPS provided “extremely misleading” testimony in a SJC staff interview concerning his company’s involvement in dossier work on the Trump campaign after the 2016 election. He expressed the hope that DOJ treats all instances of false statements to Congress as seriously as it has treated Michael Cohen’s. Thus, there is a range of potential oversight matters the SJC may look into at the FBI and DOJ under the new Chairman.



IMMIGRATION

Incoming Chairman Graham has been a longtime supporter of comprehensive immigration reform. He has also been a supporter of relief for the Dreamers and TPS holders. He will continue to seek advancement of these causes. With the political environment unfavorable to comprehensive reform under President Trump, the most likely areas of potential successful action are the latter two.

Senator Graham has also expressed opposition to granting citizenship to children of undocumented aliens born on American soil. He may seek to move a constitutional amendment prohibiting such citizenship. While such an amendment has no chance of ultimately succeeding, as Chairman of the Committee, he can inject the issue onto the national stage with hearings and a committee vote.

CRIMINAL JUSTICE

If the First Step Act is not enacted in the lame duck session, it will be a priority for Chairman Graham in the 116th, where it commands a majority in the SJC. He will also mount a vigorous defense of the Second Amendment.

ANTITRUST

Chairman Graham will aggressively examine several issues involving technology companies. These include privacy protection for consumers and internet users; extremist and hate content on various platforms and what might be done to contain or counter it; as well as algorithm transparency.

Senator Mike Lee (R-UT), chairman of the subcommittee on Antitrust, Competition Policy and Consumer Rights, will continue to pursue his Reforming Board Immunity Act (RBI Act). This bill is a response to the 2015 Supreme Court decision in *North Carolina State Board of Dental Examiners v. FTC*. It is intended to incentivize states to reform their occupational licensing regulations with the goal of reducing state barriers to entry to occupations.

There is a possibility of collaboration between Senator Lee and subcommittee Ranking Member, Senator Amy Klobuchar (D-MN) on changes to Hart-Scott-Rodino fees, as well as harmonization of the processes and standards by which DOJ and FTC review proposed mergers.

Moreover, Senator Lee will continue with oversight hearings aimed at examining broad questions of antitrust policy. One such hearing will likely consider whether America has a monopoly problem. Subsequent hearings may consider that question in the context of specific industries. Further, significant proposed mergers will continue to be reviewed by the Committee.

