

What's New in Washington

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The 116th Congress officially convened amid a continued partial government shutdown that began at 12:01 am on December 22. On January 3, new members were sworn into office in both chambers, kicking off the new legislative session. The House returned to Democratic control for the first time since losing the 2010 midterm elections. The change in the majority marks a return to divided government, which was last seen under President Obama when Republicans controlled the House from 2011-2016. This marks the first time a House Democratic Majority has been paired with a Republican president since President George W. Bush's term ended in early 2009.

The partial government shutdown has set the record for the longest-running shutdown. At the heart of the battle over funding is President Trump's request for funding to build a southern border wall. Democrats have used their newfound House majority power to deny the President's request for \$5.7 billion and have offered to provide \$1.3 billion in funding.

In September 2018, President Trump signed into law full-year appropriations for Defense, Energy and Water, Labor/Health and Human Services/Education, the legislative branch and Military Construction/Veterans Affairs, funding nearly 75 percent of the federal government. Funds for the departments and agencies covered under these bills will run until September 30, 2019. However, lawmakers were unable to reach an agreement on the remaining seven appropriations bills: Agriculture, Commerce/Justice/Science, Financial Services, Homeland Security, Interior and Environment, State and Foreign Operations and Transportation/Housing and Urban Development. Thus, at 12:01 am on December 22, the partial shutdown began affecting several key agencies, including Homeland Security, the Internal Revenue Service and the Federal Emergency Management Agency.

Looking forward, in addition to eventually resolving the partial government shutdown, legislators will also need to handle other critical time-sensitive items in 2019. This includes addressing the debt limit, the suspension of which is set to end on March 1, and sequestration, which will come back into force on October 1 absent congressional action.

House Democrats, newly emboldened by their majority status, will pursue an agenda that emphasizes Democratic policies and oversight of the Trump administration, including legislation to stabilize and expand the Affordable Care Act (ACA) and other progressive priorities, like gun control and campaign finance reform. Republicans in the Senate will have their own priorities, including confirming judges and executive branch appointees, protecting the 2017 tax reform law and limiting policy riders in appropriations bills.

Though the Democratic House and Republican Senate are likely to be at odds on many agenda items, there are a few issues where lawmakers in both chambers have a greater likelihood of being able to work together. This includes fiscal year 2020 appropriations, infrastructure and transportation, drug pricing and trade, with the United States-Mexico-Canada Agreement remaining a top-tier issue.

For an outlook of the 116th Congress, please refer to our [2018 Midterm Elections: Analysis and Outlook for the 116th Congress](#).

IN THIS ISSUE

- [The Practical Impact of the Government Shutdown for Private Parties](#)

- [First Order of Business: House Democrats Introduce Comprehensive Electoral Reform Legislation](#)
- [How the ACA Ruling Will Impact Congress](#)
- [New Committee Leadership](#)
- [Congress Amends the Lobbying Disclosure Act in Lane Duck Session](#)
- [House Rules Change](#)

THE PRACTICAL IMPACT OF THE GOVERNMENT SHUTDOWN FOR PRIVATE PARTIES

The Practical Impact of the Government Shutdown for Private Parties

The new 116th Congress convened on Thursday, January 3, 2019 as the partial government shutdown, carrying over from the prior Congress, continued into the new year and has now outlasted previous shutdowns. Although the private sector is getting back to business this month, the shutdown has slowed—and in some cases halted—business with the government. Click [here](#) to read more about practical considerations for private parties with proceedings in our federal courts and pending or contemplated capital markets, mergers and acquisitions and regulatory approvals that seek to do business with a range of federal regulatory bodies including the Securities and Exchange Commission (SEC), the Federal antitrust agencies, the Committee on Foreign Investment in the United States (CFIUS), the Federal Communications Commission (FCC) and the Food and Drug Administration (FDA).

[Back to top](#)

FIRST ORDER OF BUSINESS: HOUSE DEMOCRATS INTRODUCE COMPREHENSIVE ELECTORAL REFORM LEGISLATION

First Order of Business: House Democrats Introduce Comprehensive Electoral Reform Legislation

As one of the first orders of business under the new House Democratic majority, Rep. John Sarbanes (D-MD), chair of the Democracy Reform Task Force, introduced H.R. 1, the For the People Act. The legislation, which already has over 200 co-sponsors, is an ambitious effort to safeguard our election system, increase voter participation, reform campaign finance, and strengthen ethics rules for all three branches of government. According to Rep. Sarbanes, the legislation aims to “strengthen our democracy and return political power to the people.”

The first portion of the legislation addresses measures to increase voter participation by designating Election Day as a national holiday and allowing for same-day voter registration. Additional provisions mandate that states offer early voting, implement national automatic voter registration with the ability to opt-out, simplify absentee voting, prevent the purging of voter rolls, and prohibit states from denying convicted felons the right to vote. The bill also seeks to bolster election security by reauthorizing the Election Assistance Commission to conduct security assessments, improve election systems, sets standards for vendors and requires the use of paper ballots for federal elections.

Among other campaign finance reforms included in the second section of the bill, H.R. 1 contains an updated version of The Democracy is Strengthened by Casting Light On Spending In Elections Act (DISCLOSE Act), a bill that was originally introduced in 2010. Provisions in this bill seek to expand public disclosure by requiring that 501(c)(4) social welfare organizations disclose contributor information and to establish a public database for online entities to report political ad purchase requests of more than \$500. There is also a provision that would prohibit corporations with significant foreign ownership or control from making contributions or expenditures which could have a major impact U.S. subsidiaries of foreign corporations. H.R. 1 also creates a public financing mechanism to promote small dollar contributions to federal candidates. On the enforcement side, the

package includes reforms to the Federal Election Commission (FEC) to strengthen campaign finance oversight.

The final section of the bill addresses matters of ethics within all three branches of government by expanding conflict-of-interest requirements for members of Congress and the administration, and requiring the establishment of a code of ethics for the Supreme Court. There are also measures to tighten reporting requirements for lobbying—including under the Foreign Agents Registration Act (FARA)—and to mandate the release of tax returns by presidential and vice presidential candidates (or sitting presidents or vice presidents).

In terms of legislative process, there will be hearings and markups of H.R. 1 in multiple committees, including House Administration, Judiciary, and Oversight and Reform. We also expect Rep. Zoe Lofgren (D-CA), who is taking the helm of the House Administration Committee, to prioritize these issues as demonstrated by the creation of a new subcommittee on elections, which will be chaired by Rep. Marcia Fudge (D-OH). While Senate Majority Leader Mitch McConnell (R-KY) has already stated that he does not plan to bring the legislation up for consideration in the Senate, this effort is likely to serve as the basis for future legislation in this area should outside events create the necessary momentum.

[Back to top](#)

HOW THE ACA RULING WILL IMPACT CONGRESS

How the ACA Ruling Will Impact Congress

On December 14, 2018, a federal district judge ruled in *Texas v. United States* that the individual mandate included in the ACA is unconstitutional, because Congress essentially repealed the penalty for noncompliance with the mandate in the 2017 tax reform law by changing the penalty amount to \$0. Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas reasoned that, because the 2012 Supreme Court ruling upholding the individual mandate's constitutionality (*NFIB v. Sebelius*) hinged on it being a valid exercise of Congress' taxation authority, the zeroing out of the "tax" (i.e., the penalty for noncompliance) left no constitutional leg on which the mandate could stand.

Judge O'Connor further concluded that the individual mandate is "essential" to, and therefore inseparable from, the ACA and declared the entire statute invalid. The White House issued a statement shortly after the decision was released indicating that the law will remain in place pending appeal. The Centers for Medicare and Medicaid Services also said that the agency will continue to implement the ACA, and IT specifically noted that the work of the Center for Medicare & Medicaid Innovation, which was authorized and funded by the ACA, would not be affected. To remove all doubt, on December 30, 2018, Judge O'Connor issued an order staying the effect of the prior order pending appeal.

Absent the stay, millions of Americans could have been impacted by the decision. In dismantling the ACA's restructuring of the individual and small-group health insurance markets, *Texas v. United States* (if upheld) would have far-reaching implications across many sectors of the U.S. health care system. From protections for coverage of preexisting conditions, to closing the Part D "donut hole" for Medicare beneficiaries, to expanding Medicaid eligibility, to eliminating lifetime coverage limits for most group health plans and insurers, the ACA includes many significant provisions that are unrelated to the individual mandate.

The appeal to the 5th Circuit Court of Appeals is being led by California Attorney General Xavier Becerra and several other state Democratic Attorneys General.

In the 5th Circuit, the typical time from the filing of a notice of appeal to issuance of an opinion is about 10 months. Cases are randomly assigned to three-judge panels for oral argument, but the identities of the judges hearing the appeal are not released until seven days before the oral-argument session. Such sessions are scheduled during the first week of each month. Given the makeup of the 5th Circuit (11 of 17 judges are Republican appointees, including five appointed by President Trump), there is a strong chance that the case will be assigned to a conservative-leaning panel.

Whatever the 5th Circuit decides, the case ultimately could make its way to the U.S. Supreme Court, raising the possibility of a ruling in 2020 during the presidential campaign. The Court's rulings often apply a presumption of severability, meaning that, when the Court finds a portion of a law unconstitutional, it tries to preserve the rest of the law as much as possible. In applying the severability doctrine, the Court will seek to determine whether Congress would have intended the remaining portions of the law to stand. Critics of *Texas v. United States* argue that Congress chose in December 2017 to zero out the mandate penalty and leave the rest of the ACA intact; therefore, its intent was clear, and the mandate provision should be severable from the remainder of the ACA.

The outlook for legislative action in the 116th Congress is unclear at present. The President was quick to declare victory soon after the decision, describing the ACA as an "unconstitutional disaster" and calling for Congress to pass a new health care law to replace it. Senate Minority Leader Chuck Schumer (D-NY), meanwhile, said that the ruling was "based on faulty legal reasoning," while Speaker Nancy Pelosi has called the district court's "absurd ruling" an "assault on people with preexisting conditions and Americans' access to affordable health care." After the 116th Congress convened, the House adopted a new Rules package that specifically authorizes the Speaker to intervene in the *Texas v. United States* case and in any other case involving the ACA to "protect the institutional interests of the House and to defend such act ... including the provisions ensuring affordable health coverage for those with preexisting conditions." On January 9, 2019, the House voted to authorize its general counsel to intervene to defend the ACA in the Texas case and in any other cases involving the ACA. Republican Reps. Brian Fitzpatrick (R-PA), John Katko (R-NY) and Tom Reed (R-NY) joined with Democrats to support the measure, which passed by a vote of 235-192.

New Senate Finance Committee Chairman Charles Grassley (R-IA) has committed to holding hearings on what he called the "fatally flawed" ACA. The Chairmen of the House Ways and Means, Energy and Commerce, and Education and the Workforce committees (Congressmen Richard Neal (D-MA), Frank Pallone, Jr. (D-NJ), and Bobby Scott (D-VA), respectively) previously stated, "We will take immediate action in the new Congress to intervene in this case and appeal this decision. House Democrats will do whatever it takes to make sure the protections enshrined in the Affordable Care Act endure." Congressmen Kevin Brady (R-TX) and Greg Walden (R-OR), the Ranking Members of the Ways and Means and Energy and Commerce Committees, respectively, have expressed support for preserving the ACA's preexisting condition protections and have urged action on bipartisan health care reform legislation.

[Back to top](#)

NEW COMMITTEE LEADERSHIP

New Committee Leadership

The change in control of the House, retirements and other leadership changes has resulted in a change in the cast of characters in committee leadership. We highlight below committee chairs and ranking members who are new to their roles. A full list of House and Senate committee assignments for the 116th Congress is forthcoming, once the positions are all finalized.

Senate Committee Leadership

- Senate Finance Committee
 - Chairman: Sen. Chuck Grassley (R-IA)
- Senate Judiciary Committee
 - Chairman: Sen. Lindsay Graham (R-SC)
- Senate Commerce, Science and Transportation Committee
 - Chairman: Sen. Roger Wicker (R-MS)
 - Ranking Member: Sen. Maria Cantwell (D-WA)
- Senate Energy and Natural Resources Committee
 - Ranking Member: Sen. Joe Manchin (D-WV)

House Committee Leadership

- House Appropriations Committee
 - Chairwoman: Rep. Nita Lowey (D-NY)
 - Ranking Member: Rep. Kay Granger (R-TX)
- House Financial Services Committee
 - Chairwoman: Rep. Maxine Waters (D-CA)
 - Ranking Member: Rep. Patrick McHenry (R-NC)
- House Transportation and Infrastructure Committee
 - Ranking Member: Rep. Sam Graves (R-MO)
- House Judiciary Committee
 - Ranking Member: Rep. Doug Collins (R-GA)
- House Oversight and Government Reform Committee
 - Ranking Member: Rep. Jim Jordan (R-OH)

Senate and House Leadership

Mitch McConnell (R-KY) continues his role as the Senate Majority Leader, and serving alongside him in the number two leadership spot as Senate Majority Whip is Sen. John Thune (R-SD). Sen. Thune relinquishes his previous role as Senate Republican Conference Chair to replace Sen. John Cornyn (R-TX), who is term-limited from continuing to fill the position. Senate Republican leadership experienced a reshuffling ahead of the 116th Congress; several ambitious Senate leaders ascended the leadership ladder from junior roles to positions that are more senior. For instance, elected to a promotion in leadership is Sen. John Barrasso (R-WY), who now serves as the Senate Republican Conference Chair. Notable in the reorganization of leadership is the naming of Sen. Joni Ernst (R-IA) as Vice Chairwoman of the Senate Republican Conference. It is the first time that a woman has been elected to serve in a Senate Republican leadership position since 2010. In addition, since the retirement of Sen. Orrin Hatch (R-UT), Senate Finance Committee Chairman Chuck Grassley (R-IA) is the new Senate President Pro Tempore, the second highest-ranking official in the Chamber.

Sen. Chuck Schumer (D-NY) was re-elected to continue his top leadership role alongside his previous deputy, Democratic Whip Dick Durbin (D-IL). There is merely one Democratic leadership change from the previous Congress, which is the noteworthy election of first-term Sen. Catherine Cortez Masto (D-NV) to serve as chairwoman of the Democratic Senatorial Campaign Committee. The reorganized role, which replaces Sen. Chris Van Hollen (D-MD), helps Sen. Cortez Masto make history as the first Latina to lead the committee and only the second woman to hold the position.

Speaker Pelosi (D-CA) clinched the nomination from her Democratic colleagues to regain her role as Speaker of the House, despite the viewpoint that she may not have had enough support to proceed as the leader of the new Democratic majority. Serving alongside Speaker Pelosi as House Majority Leader is her longtime colleague and deputy Steny Hoyer (D-MD). The newly elected House Democratic leadership of the 116th Congress is more progressive, more diverse and younger compared to the 115th Congress. Five elected Democratic leaders are women, and two African American lawmakers make history by holding top leadership positions at the same time. Additionally, Rep. Ben Ray Lujan's (D-NM) ascension to the role of Assistant Democratic Leader makes him the highest-ranking Latino ever in the House. Moreover, Rep. David Cicilline (D-RI) won the support of his colleagues for the newly created top position of Chair of the Democratic Policy Communications Committee, the messaging arm of House Democrats. The pivot to more progressive leadership echoes the request of the Democratic Party; the Congressional Progressive Caucus will have nine members in the elected leadership ranks during the 116th Congress.

House Republicans elected Rep. Kevin McCarthy (R-CA) to serve as Republican Leader in the 116th Congress; former Speaker Paul Ryan (R-WI) announced his retirement in the previous Congress. Republicans elected Rep. Steve Scalise (R-LA) to continue to serve as the party's whip, and the Leader's deputy, in the new minority. Significantly, Rep. Liz Cheney (R-WY) is the new House Republican Conference Chairwoman. While she is not the first woman elected to serve in this capacity, she assumes the same role that her father, former Vice President Dick Cheney, once held when he served in the House.

Moreover, Rep. Gary Palmer (R-AL) replaces former Chairman of the Republican Policy Committee Luke Messer (R-IN), the fifth-ranking member in the House GOP leadership.

[Back to top](#)

CONGRESS AMENDS THE LOBBYING DISCLOSURE ACT IN LAME DUCK SESSION

Congress Amends the Lobbying Disclosure Act in Lame Duck Session

On January 3, 2019, President Donald Trump signed the Justice Against Corruption on K Street Act of 2018 (the “JACK Act”) into law. The JACK Act passed by unanimous consent in the Senate on August 23, and the measure cleared the House on December 20, with a vote of 391 in favor, and no members opposed.

The JACK Act amends the Lobbying Disclosure Act (LDA) to require an individual who is convicted of certain offenses in a federal or state court to disclose the date of any such conviction and a description of the corresponding offense when registering as a federal lobbyist. Applicable offenses include convictions involving bribery, extortion, embezzlement, an illegal kickback, tax evasion, fraud, a conflict of interest, false statements, perjury and money laundering.

As enacted, an individual who meets the definition of a lobbyist now must include the abovementioned information upon being listed on an LDA registration or when added as a new lobbyist on a quarterly activity report (LD-2). In contrast to the 20-year lookback for the requirement to disclose any covered positions that a new lobbyist held previously, the JACK Act does not include a limit to the covered period.

Sen. John Kennedy (R-LA) introduced the legislation with Sen. Joe Manchin (D-WV) in response to Jack Abramoff re-registering with the Department of Justice under FARA in 2017. In line with requirements under LDA, individuals registering under FARA are not required to disclose information that is related to criminal convictions. As such, Mr. Abramoff, who also inspired the name of the bill, was not required to disclose his convictions for tax fraud and bribery when he re-registered as an agent of a foreign principal.

Despite the genesis of this law, the JACK Act does not amend the disclosure requirements under FARA. Since Mr. Abramoff registered as an agent of a foreign principal under FARA and not as a lobbyist under LDA, the JACK Act would not affect his disclosure requirements. Even so, the JACK Act is the first substantive change to the LDA since 2007 when Congress passed, and President George W. Bush signed, the Honest Leadership and Open Government Act into law.

[Back to top](#)

HOUSE RULES CHANGE

House Rules Change

The House of Representatives has adopted a series of rules changes for the 116th Congress to implement a reform package that House Democrats developed after recapturing the House majority in the November 2018 midterm elections.¹ In a news release announcing the new rules, House Speaker Nancy Pelosi (D-CA) and Rules Committee Chairman James McGovern (D-MA) described them as “historic changes that will modernize Congress, restore regular order and bring integrity back to this institution.”² They emphasized that the rules changes would restore the people’s voice, the legislative process, oversight and ethics, budget rules, and inclusion and diversity.

The rules changes include three titles, which the House has adopted in separate votes to (1) change the standing rules of the House (by a 234-197 vote), (2) establish a Select Committee on Modernization of Congress (by a 418-12 vote), and (3) authorize the Speaker to intervene on behalf of the House in litigation involving the Patient Protection and ACA (by a 235-192 vote). Click [here](#) to read highlights of the rules changes.

[Back to top](#)

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