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NEWS

 **An Office Transformed: How the Role of House General Counsel**
 **Has Evolved**

 Veterans of the office argue that Matthew Berry is inheriting a unique role impacted by the office's legacy work.

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 Federal Government



Brad Kutner



As Matthew Berry takes the reins as the new House general counsel under Speaker Kevin McCarthy, R-California, those who have been Congress' top lawyer, dating back to the first to hold the post in the 70s, argue he's inheriting a unique role impacted by the office's legacy work.

With the Republican majority set on investigating President Joe Biden and Democrats for what they perceive as an overreach from the Jan. 6 committee and beyond, Berry, as [new House general counsel](#), will be tasked with authoring subpoenas and briefs executing their requests if negotiations fail. But the office itself has humble beginnings, and while its nonpartisan nature was arguably tested over the last several years, questions remain as to how much power Congress, via House general counsel action, will wield.

"I think the [Jan 6.] committee acted more like a law enforcement agency or a grand jury than a committee," said attorney Stan Brand, the first-ever House general counsel who was appointed by then-House Speaker Tip O'Neill in 1976, about the last four years of Congress' legal fights, led by then-House General Counsel Doug Letter.

Letter, meanwhile, suggested the confrontational posture the body took was due to former President Donald Trump's "completely out of control and uninformed" actions, which "set a brand new precedent which, to my knowledge, no prior president has ever said."

The early days of the House general counsel post met a few needs. For one, a regular House lawyer could handle the nuances of the political institution, navigating the mix of law and politics. It also provides a degree of consistency for House members: they've always got a lawyer.

“We delved into the minutia of House statutes and resolutions that define the administrative powers of the house,” Brand said of the institutional knowledge of how the chamber’s sometimes-medieval canons work, differentiating the office from other congressional attorneys like committee counsels.

That institutional knowledge is key, says former acting House General Counsel Charles Tiefer.

Tiefer served as assistant House general counsel for two years, but his tenure in the office itself had started almost a decade earlier with a key role in one of Congress’ largest investigations into the executive: the Iran Contra investigation.

“I wrote more subpoenas than in the history of the House of Representative before then,” Tiefer, now a partner at the plaintiffs firm Cuneo Gilbert & LaDuca, said of his time helping Congress investigate the international scandal.

But the willingness for bipartisan cooperation back in those days was different, Tiefer said. At one point he went to minority chair Dick Cheney, R-Wyoming, for support on a House resolution at the request of the Democratic majority related to an EPA Superfund scandal in the 80s. He agreed, bringing a large swath of the party with him.

“You would think Cheney’s name would be a byword for polarization, but he in fact got along with the chair, Lee Hamilton, [D-Indiana] and the two of them could negotiate with Ronald Reagan’s White House in a way that just doesn’t happen today,” Tiefer said.

But as time passed, the partisan divide widened and questions of Congress’ authority got bigger.

“We did the best we could to accommodate the minority, or at least keep them informed,” said former House General Counsel Thomas J. Spulak, who served after Tiefer in the mid-90s and is now a partner with King & Spalding. “At least if you told somebody before doing something, opening an investigation or cause the House to take a position that might be viewed as partisan, you’d get some points.”

That partisanship may have peaked when Trump took office, but Thomas Hungar, House general counsel under former Speaker Paul Ryan, R-Wisconsin, took the job just months before that would come to pass.

And while a politically unified executive and Congress may hypothetically lead to some reduction in tensions, Hungar, now a partner with Gibson, Dunn & Crutcher, said there was a fight over the GOP’s effort to investigate the Obama-era operation Fast and Furious. The scandal, which involved the sale—and then loss of—firearms to Mexican gangs left lingering wounds, and appeals.

After the chamber voted along party lines in 2012 to hold then-Attorney General Eric Holder in contempt for claiming executive privilege over documents related to the gun walking controversy, a suit seeking his testimony was filed by then-House General Counsel Kerry W. Kircher. The suit lasted years, but a district judge sided with the House in 2016 just before Hungar came in. While the two parties worked towards a settlement, it was eventually tossed in 2019 after Democrats regained control.

That dismissal was something Hungar was disappointed to see.

“I thought, from an institutional lens, it was unfortunate,” he said.

When Democrats took over following the middle of Trump’s term, the House General Counsel’s Office hit the ground running with Letter, now the chief legal officer at the Brady Campaign, leading to what many view as a new era for the House General Counsel’s Office.

By the time Letter stepped down at the end of 2022, he'd gotten rulings on Congress' authority to get the president's—and almost anyone's—tax returns, narrowed presidential immunity, and clarified the authority of the incoming executive over the previous executive's working papers.

"We made the position of the House stronger vis a vis the Executive Branch," he said of his office's impact on the body.

Tiefer pointed to the fight over Trump lawyer John Eastman's phone history, another Letter win, combined with the fight over the former president's tax documents in particular.

"You put the two of those together and you have the potential to go after anyone's phone records and tax records," he said.

But Brand thought differently about House authority in the wake of Letter's term. He argued the wins against Trump and for the Jan. 6 committee did more to limit the body's power because they created tests and precedent for when it can and can't be used.

"Their enforceability is weakened," he said. "They can huff and puff, but I don't know how they can enforce it."

But both Letter and Brand acknowledged the real limit on Congress was time.

Brand pointed to former White House Counsel Don McGahn and the two and a half year legal fight that yielded an appeals win for Letter, but ended in a settlement with DOJ after Biden took office.

Brand said the amount of time spent on the legal fight could have been spent negotiating between parties, like before the current age of intense polarization.

"Congresses and majorities come and go, in the meantime you're litigating and you're not getting the material," he said. "There was such a fever over Jan. 6 that the normal controls or inhibitions vanished."

But Letter said the unique stance of the Trump White House, and its unwillingness to budge on any requests, made battles between Congress and the executive as unique as every other part of the former president's term.

"If other House general counsel had been faced with a president saying 'no' to everything, they undoubtedly would have done the exact same thing I did," he said.

Still, the House general counsel's job is ensuring the authority granted by the Constitution to Congress is upheld, and Spulak said the inevitability of these fights isn't a good or bad thing, it's just part of the process.

"Just because the parties change that doesn't change the issue," he said. "If any president tells the House they have absolute privilege, I'd be the first one to stand up and say that's wrong—you have to ask, otherwise it's absolute."

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