

# Congressional Investigations: A View from the Inside

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*Webcast*  
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**GIBSON, DUNN & CRUTCHER LLP**

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# Today's Panelists

## **F. Joseph Warin**

Chairs Washington, D.C. Litigation Department of Gibson Dunn and also serves as co-chair of the firm's White Collar Defense and Investigations Practice Group. Mr. Warin served as Assistant United States Attorney in Washington, D.C. for seven years. His areas of expertise includes white collar crime, securities enforcement – including Foreign Corrupt Practices Act investigations, False Claims Act cases, special committee representations, compliance counseling and complex civil litigation. His representations have involved Congressional hearings, federal regulatory inquiries and criminal investigations.

# Today's Panelists

## **Michael Bopp**

Chairs Gibson Dunn's Financial Services Crisis Team; Practices within the firm's White Collar Defense and Investigations and Crisis Management practice groups. Mr. Bopp is a former Staff Director and Chief Counsel of the Committee of Homeland Security and Governmental Affairs, one of the Senate's largest committees and most expansive in terms of jurisdiction. He has led or played a key role in major investigations in both the Senate and House of Representatives. In these capacities, he has developed the strategy and set the agenda for several investigations, conducted more than 100 depositions or witness interviews, managed dozens of subpoenas and massive document discovery efforts, and orchestrated more than 100 committee hearings.

# Today's Panelists

## **Mark L. Greenblatt**

Chief Counsel & Staff Director to the Minority of the U.S. Senate Permanent Subcommittee on Investigations (PSI). Mr. Greenblatt is responsible for all operations of the Subcommittee's Minority staff. Specifically, he is the principal advisor to the Subcommittee's Ranking Minority Member, manages the Subcommittee's Minority staff, and directs investigations into a wide array of topics. Mr. Greenblatt has testified at Subcommittee hearings and is the principal author of several Subcommittee reports. One highlight of his tenure with the Subcommittee is leading its two-year investigation into international misconduct associated with the United Nations Oil-for-Food Program.

# Today's Panelists

## **Alan Slobodin**

Republican Chief Counsel for Oversight and Investigations at the House Energy and Commerce Committee. Mr. Slobodin leads a team of counsels and professional staff responsible for working in bipartisan Committee investigations and producing independent oversight work. He is responsible for oversight and investigations involving energy, environment, health care, telecommunications and the Internet, public health, and consumer protection issues. Among the investigations he has spearheaded are ones involving: FDA's policies on home drug-testing, FDA's foreign-drug inspection program, patient access to experimental drugs, blood safety, counterfeit drugs and the NIH ethics program.

# Congressional Investigations

- Authorized by the Constitution.
- George Mason: Members of Congress “are not only Legislators but they possess inquisitorial powers.”
- Not a “general power” to delve into private affairs and compel disclosures. Rather, “the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function.” McGrain V. Daugherty, 273 U.S. 135, 173-74 (1927).

# Not Like Executive Branch Investigations

- Coercive authorities and investigative tools may look the same but in practice are not.
- Rules are different and vary significantly from committee to committee.
- Chairman of committee generally holds almost all the cards.
- Committee enforcement is more often before court of public opinion than court of law.

# Subpoenas

- Authorized under both House and Senate rules, but rules for issuing vary by committee
- For authorized investigations, subpoena issuance is protected by the Speech or Debate Clause
- Enforceable through criminal (Senate and House) or civil (Senate and potentially House) contempt, after vote of full House and Senate

# Depositions

- Some committees have authority, most do not
  - Committee rules can be deceiving
  - Even when not being deposed, witness subject to 18 U.S.C. § 1001
- Objections to form of questions or type or source of information sought are generally unavailing
- Objections are ruled on by committee chairman

# Document Requests

- Usually begin with a letter then follow with subpoena if necessary
- Generally no magic to return date
- Attorney-client privilege, work product doctrine, trade secrets – all up to committee as to whether to honor

# Testimony

- Can be voluntary or by subpoena; sometimes, by protective subpoena
  - Most committees have power only to compel appearance at hearings; not at depositions
- Role of counsel varies according to preferences of chairman
- Practice varies as to whether 5<sup>th</sup> Amendment right need be invoked in person

# Key Investigative Committees

- Senate
  - Homeland Security and Governmental Affairs (Lieberman/Collins)
    - Permanent Subcommittee on Investigations (Levin/Coleman)
  - Finance (Baucus/Grassley)
  - Judiciary (Leahy/Specter)
  - Banking, Housing & Urban Affairs (Dodd/Shelby)
- House
  - Energy & Commerce (Waxman/Barton)
  - Oversight and Government Reform (Towns/Issa)
  - Judiciary (Conyers/Smith)
  - Financial Services (Frank/Bachus)

# Investigations in the 110<sup>th</sup> Congress

- Financial markets crisis.
  - Executive compensation (OGR, Sen. Banking)
  - The how and why behind the collapse of financial institutions (OGR, Sen. Banking, House Fin. Services)
- Credit markets.
  - Credit availability, lending practices, and foreclosure crisis (House Fin. Services, Sen. Banking)
  - Credit card practices and consumer protection in general (House Fin. Services, Sen. PSI, Sen. Banking)

# Investigations in the 110<sup>th</sup> Congress (cont.)

- Health and insurance.
  - Medicare/Medicaid fraud and “ghostwriting” (Energy & Commerce, Sen. PSI)
  - Health insurance practices (Energy & Commerce, OGR)
- Government contracting.
  - Decisions as to contracting out services (OGR)
  - Allegations of contractor abuses (OGR)

# Investigations in the 110<sup>th</sup> Congress (cont.)

- Tax Abuse.
  - Dividend tax avoidance by foreign firms (PSI)
  - Stock option tax abuse (PSI)
  - Taxation of tax-exempt organizations (Sen. Finance)

# Likely and Possible Topics of Investigations in the Coming Congress

- Financial markets crisis.
  - Scrum of actual and potential investigative committee/bodies (GAO, Special Inspector General for TARP, Congressional Oversight Panel, E&C, OGR, Financial Services, HSGAC/PSI, Banking)
  - Examining both causes of financial crisis and government response
  - Executive compensation
  - Credit rating agencies

# Likely and Possible Topics of Investigations in the Coming Congress (cont.)

- Tax havens and tax loopholes.
- Government contracting, especially allegations of contractor inefficiency or fraud.
- Consumer protection, especially focused on the financial services industry.
- Health care and Medicare/Medicaid reform.
  - Medical “ghostwriting.”
  - Insurance industry practices.
  - Pharmaceutical industry.

# Do's and Don't's

- *Don't* assume that a guns-blazing, adversarial approach designed to intimidate is always the most effective.
- *Don't* assume that investigations before one committee are pretty much the same as investigations before another.
- *Don't* assume that, because a committee has done things one way in the past that it will continue the practice, particularly if it has a new chairman.
- *Don't* be in a hurry. Over time, investigations can shift course or lose steam.
- *Don't* treat staff with disdain or lack of respect, and don't assume that going over their heads to the staff director or member is a winning strategy.

## Do's and Don't's (cont.)

- *Do* understand the committee's rules and jurisdiction as well as the scope of the investigation and legislative undertaking on which it is based.
- *Do* give full consideration to the implications of testifying on a parallel executive branch investigation.
- *Do* negotiate the terms of a document production or a witness interview, deposition, or testimony.
- *Do* consider whether other members of Congress could assist you in the course of the investigation.
- *Do* develop a plan, as early in the process as possible, to handle public relations aspects of the investigation.

# Thank You

Thank you for joining us for today's program on Congressional Investigations.

Please don't hesitate to contact our presenters if you have additional questions.

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