

**Congressional Investigations 2010:
How to Prepare for the Investigative Agenda
and the Financial Crisis Inquiry Commission
in the New Year**

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Webcast

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Today's Panelists

Michael Bopp

Chairs Gibson Dunn's Financial Services Crisis Group and Co-Chair's firm's Public Policy practice group; 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, the Senate's principal investigative committee 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 dozens of investigations, conducted hundreds of depositions or witness interviews, managed dozens of subpoenas and massive document discovery efforts, and orchestrated more than 100 committee hearings.

Today's Panelists

John Williams

Chief Investigator of the U.S. Senate Committee on Commerce, Science and Transportation (Sen. Rockefeller, Chairman). Mr. Williams is responsible for all operations of the Committee's investigative staff. Specifically, he is the principal advisor to the Committee Chairman on investigative and oversight issues, manages the Committee's investigative staff, and directs investigations into a wide array of topics. Mr. Williams has led several investigations for the Commerce Committee's active investigative unit, which he stood up for Chairman Rockefeller at the beginning of this Congress. Prior to serving in his current role, Mr. Williams was Deputy Chief Investigative Counsel with the House Committee on Oversight and Government Reform under Chairman Waxman and helped lead several high profile investigations.

Today's Panelists

Mel Levine

Mel Levine is Co-Chair of GDC's Public Policy practice group and a member of the firm's Crisis Management practice group. Levine served as a Democratic member of the US Congress for ten years, and, during those years, was a member of the House Committees on Foreign Affairs, Judiciary, Natural Resources, and Oversight and Government Reform, as well as Co-Chair of the Military Reform Caucus and the Export Task Force. Levine participated, as a member of Congress, in Congressional investigations on a variety of subjects and, as a partner at GDC, has counseled diverse clients who have been the subjects of Congressional investigations.

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.

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).
- Investigations must be authorized and aimed at furthering a valid legislative purpose and raise questions that are relevant and capable of explanation to witnesses as to why they are relevant. Wilkinson v. United States, 365 U.S. 399, 408 (1961).
- As Congress receives its investigative authority from the Constitution, it is bound to uphold it when investigating.
- Potential to irritate committee by challenging jurisdiction.

Not Like Executive Branch Investigations

- Coercive authorities and investigative tools may look the same but in practice are not.
- Objections are generally either not recognized or not effective.
- 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.
- Goals are different (punishing/preventing crime versus informing legislation/garnering attention).
- Difference between hearings and trials.

Congressional Investigations – Subpoena Power

- 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 *inherent* (Senate and House), *criminal* (Senate and House), or *civil* (Senate and potentially House) contempt [more on contempt shortly].
- In practice, committees rarely need to resort to contempt.
- Committees may or may not recognize common-law doctrines such as attorney-client privilege.
- Many subpoenas are friendly.

Congressional Investigations – Other Investigative Methods

- Depositions
 - Some committees have staff deposition authority, most do not.
 - 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, ruled on by committee chairman.
- Document Requests
 - Usually begin with a letter then follow with subpoena if necessary.

Congressional Investigations – Other Investigative Methods

- Testimony
 - Can be voluntary or by subpoena; sometimes, by protective subpoena.
 - Role of counsel varies according to preferences of chairman.

Key Investigative Committees (111th Congress)

- Senate:
 - Homeland Security and Governmental Affairs (Lieberman/Collins)
 - Permanent Subcommittee on Investigations (Levin/Coburn)
 - Commerce, Science & Transportation (Rockefeller/Hutchison)
 - Finance (Baucus/Grassley)
 - Judiciary (Leahy/Sessions)
- House:
 - Energy & Commerce (Waxman/Barton)
 - Oversight and Government Reform (Towns/Issa)
 - Judiciary (Conyers/Smith)
 - Financial Services (Frank/Bachus)

Financial Crisis Inquiry Commission ("FCIC")

- Similar to the 9/11 Commission and the Pecora Commission, but with the goal of investigating the causes of the 2007 - 2009 financial crisis.
- Created with a broad investigative mandate.
 - Examine causes of economic and financial crisis in specific areas.
 - Investigate specific institutions.
- Refer individuals for possible criminal prosecution.
- Report findings to the President and Congress.

Composition of Commission

- **Phil Angelides**, jointly appointed by House Speaker Pelosi and Senate Majority Leader Harry Reid, will chair the Commission. Mr. Angelides served formerly as California's State Treasurer from 1999 to 2007.
- **Bill Thomas**, jointly appointed by House Minority Leader John Boehner and Senate Minority Leader Mitch McConnell will serve as the Commission's vice-chair. Mr. Thomas is a former House Ways & Means Committee Chairman.
- **Brooksley Born**, former Chair of the Commodities Futures Trading Commission during the Clinton administration.
- **Byron Georgiou**, Las Vegas-based businessman and attorney who serves on the advisory board of the Harvard Law School Program on Corporate Governance. He is an experienced plaintiffs' lawyer, particularly in the field of securities class actions.
- **Senator Bob Graham**, former U.S. Senator and Chair of the Senate Intelligence Committee and former Governor of Florida.
- **Heather Murren**, retired Managing Director for Global Securities Research and Economics at Merrill Lynch.
- **John Thompson**, Chairman of the Board of Directors of Symantec Corporation.
- **Doug Holtz-Eakin**, former Director of the Congressional Budget Office and former Chief Economist of the President's Council of Economic Advisers.
- **Keith Hennessey**, former Director of the National Economic Council during the George W. Bush administration.
- **Peter Wallison**, Co-Director for Financial Policy Studies at the American Enterprise Institute and former Counsel to President Ronald Reagan. Mr. Wallison is a retired former partner of Gibson, Dunn & Crutcher.

FCIC Investigative Responsibilities

- Examine 22 enumerated possible causes of the crisis, including:
 - Fraud and abuse in the financial sector, including fraud and abuse towards consumers in the mortgage sector.
 - Capital requirements and regulations on leverage and liquidity, including the capital structures of regulated and non-regulated financial entities.
 - The concept that certain institutions are ‘too-big-to-fail’ and its impact on market expectations.
 - Compensation structures.
 - Derivatives and unregulated financial products and practices, including credit default swaps.
 - The quality of due diligence undertaken by financial institutions.
- Examine the causes of the collapse of each major financial institution that failed (including institutions that were acquired to prevent their failure and institutions likely to have failed if not for government assistance).

FCIC Reporting Duty

- Report general findings and conclusions on causes of the crisis.
 - Submit to the President and Congress.
 - Due December 15, 2010.
- Specific institutions.
 - May *produce reports* or make specific findings about any financial institution Commission examines.

FCIC Investigative Tools

- Hold hearings, take testimony, receive evidence, and administer oaths.
- Subpoenas, by:
 - Agreement of Chair and Vice Chair; or
 - Majority vote, including at least one Republican commissioner.
- Likely staff deposition authority.

“Significant Participants”

(B) OTHER ENTITIES.—It is the sense of the Congress that the Commission should seek testimony or information from principals and other representatives of government agencies and private entities that were significant participants in the United States and global financial and housing markets during the time period examined by the Commission.

January 13, 2010: FCIC Holds First Public Hearing

- Opening panel: Top investment bank CEOs:
 - Lloyd Blankfein, Goldman Sachs; Jamie Dimon, JPMorgan Chase; John Mack, Morgan Stanley; Brian Moynihan, Bank of America
- Commissioners' Key Areas of Focus:
 - Risk Management
 - Potential negligence by banks
 - Promotion of new financial products while at the same time shorting those products
 - Executive Compensation
 - Regulatory Framework
 - OTC Derivatives
 - AIG Counterparty Payments
- Angelides: "We'll use our subpoena power as needed."

Enforcing Subpoenas in Congressional Investigations – Contempt

- Although Congress does not frequently resort to its contempt power to enforce subpoenas, it generally has three sources of contempt authority.
 - Inherent (both House and Senate)
 - Criminal (both House and Senate)
 - Civil (Senate and potentially House)

Contempt Proceedings in the House and Senate

- Inherent Contempt
 - Recognized by the Supreme Court as inherent Congressional power necessary for legislation and investigation. McGrain v. Daugherty, 273 U.S. 135 (1927); Anderson v. Dunn, 19 U.S. 204 (1821).
 - Sergeant-at-arms brings individual before full House or Senate for trial, can result in imprisonment for specified time (punitive) or until compliance (but not beyond the end of legislative session).
 - Has not been used since 1935, considered too cumbersome and time-consuming.

Contempt Proceedings in the House and Senate

- Criminal Contempt
 - As an alternative to inherent contempt, Congress created a criminal contempt statute, now codified at 2 U.S.C. §§ 192 and 194.
 - A contempt citation must be approved by full committee (and subcommittee if applicable), then full House or Senate, then certified by the Speaker of the House or President of the Senate, and then presented to the U.S. Attorney, who has a “duty” to bring the matter before a grand jury.
 - A misdemeanor crime punishable by fines up to \$ 100,000 and up to one year in prison (contemnor cannot be purged by compliance once found in contempt).
 - Since 1935, almost exclusive congressional vehicle for contempt proceedings.
 - Full host of defenses and procedural safeguards.
 - Applicable even if witness appears voluntarily but then refuses to testify. United States v. Rumely, 345 U.S. 41 (1953).

Contempt Proceedings in the House and Senate

- Civil Contempt
 - Statute authorizes the Senate (through Senate Legal Counsel) to file suit in U.S. District Court for the District of Columbia to enforce a subpoena. 2 U.S.C. §§ 288b(b) and 288d.
 - Suit may “ask a court to directly order compliance with [a] subpoena or order, or they may merely seek a declaration concerning the validity of [the] subpoena or order.” Target then subject to contempt citation by the court.
 - Subpoenaed party can raise full range of defenses in court.
 - The House does not have a civil contempt statute, but may pass a resolution creating a special investigatory panel with the power to seek judicial orders or granting such power to a standing committee (would be similar to Senate’s civil contempt authority).
 - In the 110th Congress, the House passed a resolution authorizing the House Judiciary Committee to file suit in federal district court to compel Harriet Miers and Joshua Bolten to comply with subpoenas regarding the U.S. Attorney firings. The district court ordered compliance, but the case settled with the change of presidential administrations.

FCIC Subpoena Enforcement Compared

- General Statutory Enforcement.
 - U.S. district court may issue order requiring subpoenaed person to:
 - Appear at any designated place to testify and;
 - Produce documentary or other evidence.
 - Failure to obey order can lead to contempt of the district court.
- Statutory Criminal Contempt.
 - Same procedure normally available to Congress under §§ 192 and 194.
- FCIC has both a civil and a criminal option.

Congressional Investigation Defenses

- Investigation must relate to a **legislative purpose**. Kilbourn v. Thompson.
 - But courts interpret legislative purpose broadly. Shelton v. United States.
- Questions must be **reasonably related** to subject matter of inquiry. Sinclair v. United States.
- Procedural irregularities.
- **First Amendment**. Barenblatt v. United States.
 - Balance the interest in privacy against the need for disclosure (has never succeeded in court).
- **Fourth Amendment**. McPhaul v. United States.
 - Overly broad demands for documents may violate protection against search and seizure. FTC v. American Tobacco Co.. But cases conflict over strength of this argument.
- **Fifth Amendment**. Watkins v. United States.
 - *Individuals* can invoke right against self-incrimination. McPhaul v. United States.
 - Generally applies only to testimony. Fisher v. United States.
 - Can compel testimony by granting full or partial immunity.

Attorney-Client Privilege in Congressional Investigations

- Elements of privilege: 1) communication, 2) made in confidence, 3) to an attorney, 4) by a client, 5) for purposes of seeking or obtaining legal advice.
- Committees often balance the harm to the witness against the legislative need, public policy, and congressional duty.
- Committees have discretion and could generally refuse to recognize the privilege, but in practice will generally observe the privilege.
 - One issue is whether courts recognize privilege when attorney-client communication made in presence of a third party. Generally recognized when presence of third party necessary to assist with the matter under discussion, but mixed case law as to specifics.
- Compelled production of a privileged communication to Congress generally will not waive the privilege in other forums (but need to be able to show that compulsion was resisted).
- Joint Defense Privilege: split in courts on standards of applicability (whether only a shared “common interest” is required or whether there must be actual or anticipated litigation).

Work-Product Privilege in Congressional Investigations

- Doctrine that protects documents prepared in anticipation of litigation or trial.
- Not clear whether the privilege applies to congressional hearings or investigations.
- But, again, compelled production of privileged documents to Congress will not waive the privilege in other forums (if able to show that compulsion was resisted).

Investigations in the 111th Congress

- **Financial Markets Crisis** (HSGAC, OGR, H. Fin. Services)
 - **Regulatory Reform** (H. Fin. Services)
 - **Prosecution of Mortgage and Securities Fraud** (Sen. Judiciary)
 - **Foreclosure and Mortgage Modification** (H. Judiciary, H. Fin. Services)
 - **Consumer Credit** (Sen. PSI, Sen. Commerce, H. Energy and Commerce, H. Judiciary, H. Fin. Services)
 - **Executive Compensation** (OGR)
 - **Tax Evasion** (Sen. PSI)
 - **Bankruptcy Protections and Reform** (“too big to fail”) (Sen. Judiciary, H. Fin. Services, H. Judiciary)
- **FCIC** (first hearings were held this week)

Investigations in the 111th Congress (cont'd)

- **Stimulus Spending, Waste, and Fraud**
(OGR, HSGAC)
 - **TARP accountability** (Sen. Finance, H. Fin. Services, OGR)
 - Specifically corporate spending and executive compensation
 - Congressional Oversight Panel (“COP”)
 - Special Inspector General TARP (“SIGTARP”)

Investigations in the 111th Congress (cont'd)

- **Ponzi Fraud and Regulatory Reform** (e.g., Madoff) (H. Fin. Services, Sen. Banking)
- **Health Insurance Industry** (Sen. Commerce, OGR, H. Energy and Commerce)
- **Medicare / Medicaid Fraud** (Sen. PSI)
- **Federal Government Contracting** (HSGAC, OGR)
- **E-commerce and fraud** (Sen. Commerce)

Likely and Possible Topics of Investigations in the Coming Year

- Continuing investigation by the **FCIC**.
- **Financial Markets Crisis**
 - AIG Counterparty Payments
 - Specific Deals / Transactions
 - Regulatory Reform
 - Executive Compensation
 - Mortgage Reform
- **Stimulus Oversight**
 - COP, SIGTARP, and others
- **Consumer Issues**
 - Internet marketing
- **Tax**
 - Tax Shelters
 - IRS monitoring of tax preparers
- **Health Insurance**
 - Continual investigation of industry
- **Homeland / National Security**
 - Attempted Christmas Day airplane bombing
 - Management of recovery grant funds
- **Criminal Corporate Settlements**
 - Continued investigation of deferred prosecution agreements

Preparing for the Worst (Do's and Don't's)

- *Don't* assume that the investigation will be like an executive branch investigation.
- *Don't* ignore or be cavalier about deadlines. If you need an extension, ask for it.
- *Don't* treat staff with disdain or lack of respect, and don't assume that going over their heads to the staff director, member or commissioner is a winning strategy.
- *Don't* assume that a subpoena is without collateral consequences.
- *Don't* assume that compliance will forestall the need to testify or prevent a subpoena from being issued.
- *Don't* default to a guns-blazing, adversarial approach.
- *Don't* assume that investigations before one committee are pretty much the same as investigations before another, or before the FCIC.
- *Do* understand the committee's rules and jurisdiction as well as the scope of the investigation and legislative undertaking on which it is based (especially as to the FCIC).
- *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 members of Congress or others 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.
- *Do* be mindful of preserving attorney-client privilege whenever possible.
- *Do* make sure that, if you think you are going to need assistance, you secure it early enough to be effective.

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