

Congressional Investigations 2017: What to Expect in the 115th Congress

March 30, 2017

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Today's Panelists

F. Joseph Warin

Mr. Warin chairs the Washington, D.C. Litigation Department of Gibson Dunn and co-chairs 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 include 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 D. Bopp

Mr. Bopp chairs Gibson Dunn's Congressional Investigations Group and co-chairs the firm's Public Policy practice group. He 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, as well as four special investigations. In these capacities, he has developed the strategy and set the agenda for dozens of investigations, conducted hundreds of depositions and witness interviews, managed dozens of subpoenas and massive document discovery efforts, and orchestrated more than 100 committee hearings.

Today's Panelists

Trent J. Benishek

A senior associate in the Washington, D.C. office and a member of the firm's Litigation Department, Mr. Benishek has represented clients in a variety of complex litigation matters before state and federal courts, as well as in investigations by various congressional committees. He currently serves on the firm's global Associates Committee. Prior to joining Gibson Dunn, Mr. Benishek served as the press secretary on a successful campaign for the U.S. House of Representatives, where he focused on earned media and messaging strategy, debate preparation, and policy development. He also previously worked as a legal intern for the Office of Management and Budget's Office of the General Counsel.

Today's Panelists

Matt Owen

Staff Director and Chief Counsel of the U.S. Senate Permanent Subcommittee on Investigations (PSI), chaired by Senator Rob Portman. Prior to joining the PSI, he served as Chief Counsel to Senator Mike Lee, chairman of the Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy, and Consumer Rights. Mr. Owen is a former law clerk to Judge Neil M. Gorsuch of the U.S. Court of Appeals for the Tenth Circuit and Justice Antonin Scalia of the U.S. Supreme Court. He also served as a Bristow Fellow in the Office of the Solicitor General in the U.S. Department of Justice.

Congressional Investigations

- Authorized by the Constitution. Because the congressional power of inquiry is a power of Congress provided by necessary implication in Article I, generally speaking, it cannot be limited by mere legislation.
- 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).
- Challenges to a committee’s jurisdiction almost always fail and generally raise the committee’s ire.



Congressional Investigations Differ From Executive Branch Investigations

- Coercive authorities and investigative tools may look the same, but in practice are not.
- Objections to congressional compulsory process are generally either not recognized or not effective.
- Rules are different and vary significantly from committee to committee.
- The chairman of the committee generally holds almost all the cards.
- Committee enforcement is more often before court of public opinion than court of law. That said, Congress may seek to have individuals prosecuted for contempt, perjury, lying to investigators, or obstruction.
- Goals in congressional investigations are often different (punishing/preventing crime v. informing legislation/garnering attention).
- Difference between hearings and trials.
- Attorney-client privilege and the attorney work product doctrine are not always recognized, but it remains important to protect privileged communications and documents.

Purposes of Congressional Investigations

- Expose actual criminal or civil wrongdoing
- Embarrass a company for “immoral” practices
- Advance a policy preference
- Advance legislation
- Bolster a member’s or party’s political agenda or position



Congressional Investigations: Subpoena Power

- Document requests usually begin with a letter and are followed by a subpoena, if necessary.
- Every standing committee has the authority to issue subpoenas. This is authorized under both House and Senate rules, but the specific procedures vary by committee.
- For example, subpoenas may be authorized:
 - By the chairman unilaterally, with notice to the ranking member (e.g., Senate Permanent Subcommittee on Investigations);
 - By the chairman unilaterally (e.g., House Committee on Oversight & Government Reform);
 - By the chairman, with approval of the ranking member, but if the ranking member objects, upon committee approval (e.g., Senate Finance); or
 - By a majority vote of the committee.
- Some committees require that some minority members be present for the vote.
- In the 114th Congress, six additional House committees empowered their chairman to unilaterally issue subpoenas.
- Subpoenas can be friendly.

Served on me at 11 PM
10 Oct. 1960, outside of the Congressional Hotel,
Washington, D.C.

UNITED STATES OF AMERICA
Congress of the United States

To: Dr. Linus Pauling
Congressional Hotel
Washington, D. C.

Meeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to appear before the Internal Security Committee on the Judiciary of the Senate of the United States, on Tuesday, October 11, 1960, at 10:30 o'clock a.m., at their committee room 3232 New Senate Office Bldg., Washington, D. C., then and there to testify what you may know relative to the subject matters under consideration by said committee.

You are hereby commanded to bring with you all signatures or purported signatures to the petition presented by you to the Secretary General of the United Nations on January 15, 1959, together with all letters of transmittal by which, or in connection with which, such signatures were transported to you or received by you. Pursuant to Senate Resolution 365 approved by the 86th Congress—2d, as amended and extended and Senate Res. 242 passed Feb. 9, 1960, with respect to Communist participation in, or support of, propaganda campaign against nuclear testing, and other Communist or Communist-front activity with respect to which you may have knowledge.

Heretofore fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To: JOSEPH C. DUKE, Sergeant at Arms of the Senate of the United States and/or F. H. Schroeder, William Holloman, Internal Security Subcommittee, of the United States Senate.

Given under my hand, by order of the committee, this 10th day of October, in the year of our Lord one thousand nine hundred and sixty

THOMAS J. DODD
Vice-Chairman, Committee on the Judiciary and Internal Security Subcommittee.

Congressional Investigations: Other Investigative Methods

- Depositions:
 - In the 115th Congress, the House granted staff deposition authority to all committees (except the Committee on Administration and Committee on Rules). H. Res. 5 § 3(b).
 - However, at least one member of the committee must be present unless (1) the witness agrees to waive the requirement or (2) the committee authorizes the deposition without the presence of a member, provided that the House is not in session.
 - Individual committee rules may impose additional conditions or requirements.
 - In the Senate, deposition authority is dictated by each committee's rules.
 - For example, Senate Judiciary Committee Rule X provides that any subpoena for a deposition taken by staff shall be accompanied by notice identifying the staff designated to take the deposition. Majority and minority staff will have the opportunity to participate on equal terms.
- Interviews:
 - Typically conducted by staff.
 - Some committees will transcribe interviews in the same manner in which a deposition would be transcribed.
 - Even when not being deposed, witnesses are subject to 18 U.S.C. §§ 1001 and 1505.

Enforcing Subpoenas in Congressional Investigations: Contempt Overview

- For authorized investigations, subpoena issuance is protected from judicial interference by the Speech or Debate Clause. *See, e.g., Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 505 (1975).
- 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, if authorized by resolution, House)



Enforcing Subpoenas in Congressional Investigations: Inherent Contempt

- Recognized by the Supreme Court as inherent congressional power necessary for legislation and investigation. *See, e.g., McGrain v. Daugherty*, 273 U.S. 135 (1927); *Anderson v. Dunn*, 19 U.S. 204 (1821).
- Sergeant at Arms brings the individual before full House or Senate for trial, which can result in imprisonment for a specified time (punitive) or until compliance (coercive), but not beyond the end of legislative session.
- Has not been used since 1935, when an attorney refused to produce papers subpoenaed by a Senate investigating committee. *See Journey v. MacCracken*, 294 U.S. 125 (1935).
- Many commentators consider the procedure too cumbersome and time-consuming.
- Nonetheless, inherent contempt is the only mechanism by which Congress *itself* can enforce its compulsory process.
 - An administration may refuse to prosecute criminal contempt citations directed at Administration officials.
 - In the case of Lois Lerner, the Obama Administration refused to prosecute a contempt citation directed against a private citizen, despite no assertion of Executive Privilege.

Enforcing Subpoenas in Congressional Investigations: Criminal Contempt

- As an alternative to inherent contempt, Congress created a criminal contempt statute, now codified at 2 U.S.C. §§ 192 and 194.
- The criminal contempt statute is punitive in nature.
- A contempt citation must be approved by the full committee (and subcommittee if applicable), then the 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).
- The Department of Justice has long taken the position that it is proper for the Department to direct the U.S. Attorney to refuse to proceed on the contempt citation. *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 122 (1984).
 - In 2012, the House voted to hold Attorney General Eric Holder in criminal and civil contempt in connection with an investigation into Operation Fast and Furious. The Department of Justice refused to refer the matter to a grand jury.
- Full host of defenses and procedural safeguards.

Enforcing Subpoenas in Congressional Investigations: Statutory 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.
 - Sections 288b(b) and 288d expressly do not apply to contempt proceedings brought against a current or former Executive Branch Officer for actions taken under color of law. 28 U.S.C. § 1365(a).
 - Committee seeking contempt must report to the full Senate a resolution directing the Senate Legal Counsel to file the suit. The Senate must then pass the resolution.
 - Committee may “ask a court to directly order compliance with [a] subpoena or order, or it may merely seek a declaration concerning the validity of [the] subpoena or order.” The target is then subject to contempt citation by the court.
- Subpoenaed party can raise full range of defenses in court.
- PSI recently used this statute in connection with a subpoena it issued to Backpage.com.

Enforcing Subpoenas in Congressional Investigations: Civil Contempt Proceedings in the House

- The House does not have a civil contempt statute.
- The Department of Justice has consistently resisted the authority of the House to bring a civil action seeking to compel the Executive Branch to comply with a congressional subpoena.
- There are several high-profile cases in which the House has initiated civil contempt proceedings.
 - In 1987, the House authorized a select committee to investigate Iran-Contra that had the power to “make any applications to court.”
 - A civil enforcement action was initiated by the House in 2008 after White House Counsel Harriet Miers refused to testify in connection with the resignations of nine U.S. Attorneys. The U.S. District Court for the District of Columbia found that “there can be no question that Congress has a right—derived from its Article I legislative function—to issue and enforce subpoenas.” *Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53, 84, 108 (D.D.C. 2008).
 - In June 2012, the House passed H. Res. 711, citing Attorney General Eric Holder in contempt for refusal to comply with an OGR subpoena and submit documents regarding Operation Fast and Furious. In the resulting civil action, the U.S. District Court for the District of Columbia found that the subpoena was enforceable (while noting that certain privileges may apply, depending on the circumstances). *Comm. on Oversight and Gov’t Reform v. Lynch*, 156 F. Supp. 3d 101, 120-21 (D.D.C. 2016).
- Because courts are institutionally reluctant to mediate disputes between sister branches of Government, civil proceedings to enforce subpoenas often move slowly, dragging on for years, with frequent judge-initiated diversions to mediation and compromise.

Congressional Investigation Defenses

- **Investigation must relate to a legislative purpose.** *See, e.g., Kilbourn v. Thompson*, 103 U.S. 168, 190–97. (1880). However, courts interpret legislative purpose broadly. *See, e.g., McGrain*, 273 U.S. at 177–79.
- Questions must be pertinent to subject matter of inquiry. *Id.* at 176.
- The subject matter of an inquiry must be within the scope of jurisdiction clearly delegated to the committee by Congress. *U.S. v. Rumely*, 345 U.S. 41, 44 (1953).
- Procedural irregularities:
 - **First Amendment.** Balance the interest in privacy against the need for disclosure (has never succeeded in court). *See, e.g., Barenblatt v. United States*, 360 U.S. 109, 126, 134 (1959).
 - **Fourth Amendment.** Reasonableness varies depending upon the “nature, purposes, and scope of the inquiry.” *See, e.g., McPhaul v. United States*, 364 U.S. 372, 382 (1960).
 - Overly broad demands for documents that lack congruence and proportionality to the scope of the investigation may violate protection against search and seizure. *See, e.g., FTC v. American Tobacco Co.*, 264 U.S. 298, 306–07 (1924) (refusing to read Senate resolution authorizing FTC to investigate tobacco trade as granting power “to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.”).
 - Other cases challenge this argument. *See, e.g., Eastland*, 421 U.S. at 509 (an investigation may lead “up some ‘blind alleys’ and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result.”).
 - **Fifth Amendment.**
 - *Individuals* can invoke right against self-incrimination. *See, e.g., Watkins v. United States*, 354 U.S. 178, 195–96, 215 (1957). Corporations cannot. *See, e.g., Hale v. Henkel*, 201 U.S. 43, 69 (1906), *overruled in part on other grounds, Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52 (1964).
 - Generally, the privilege applies only to testimony, although in certain circumstances it applies to the act of producing documents (when the documents amount to “Testimonial Communications”). *See, e.g., Fisher v. United States*, 425 U.S. 391, 410–13 (1976).
 - Congress can compel testimony by granting transactions immunity or use and derivative use immunity.

Attorney-Client Privilege in Congressional Investigations

- **Elements of privilege.** (1) communication, (2) made in confidence, (3) to an attorney, (4) by or to a client, (5) for purposes of seeking or obtaining legal advice.
- Both the House and Senate have taken the position that they are not required to recognize privilege.
 - Committees have discretion and may refuse to recognize privilege, but in practice, they generally observe it.
 - Committees often balance the harm to the witness of disclosure against the legislative need, public policy, and congressional duty.
- Committees often require that claims of privilege be categorized and logged per normal procedures applicable to civil litigation.
 - One court recently held that, when responding to a congressional subpoena, a party must “properly invoke any common law privilege to refuse production of responsive materials” in order to avoid waiver. *PSI v. Ferrer*, No. 16-mc-621 (D.D.C. Sept. 16, 2016).



Attorney-Client Privilege in Congressional Investigations (cont'd)

- Selective Waiver Doctrine: The weight of authority suggests that compelled production of a privileged communication to Congress generally will waive the privilege in other forums.
 - In 2008, the Judicial Conference Committee on Rules of Practice and Procedure amended the Federal Rules of Evidence to address inadvertent waivers of the attorney-client privilege and work product doctrine. Then-House Judiciary Committee Chairman Sensenbrenner requested that the conference committee consider a rule that would allow persons to cooperate with government agencies and disclose privileged information without waiving the right to assert privilege as to other parties in subsequent litigation. The Conference Committee declined to adopt such a rule. Michael D. Bopp & DeLisa Lay, *The Availability of Common Law Privileges for Witnesses in Congressional Investigations*, 35 Harv. J. Law & Pub. Policy 897, 927 (Summer 2012) (“*Common Law Privileges*”).

Work-Product Doctrine in Congressional Investigations

- Doctrine that protects documents prepared in anticipation of litigation.
- Protection is waived if disclosure substantially increases the opportunity for potential adversaries to obtain the information.
- Not clear whether the privilege applies to congressional investigations, but there is substantial authority that they are not “adversarial proceedings.” *Common Law Privileges* at 918–19.
 - *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 924 (8th Cir. 1997) (responding to an assertion of the work product doctrine made by Hillary Clinton during the Whitewater Scandal, the court found—in dicta—*no authority* for the proposition that documents prepared in anticipation of a congressional investigation are entitled to work product protection).
 - *But see* Restatement (Third) of the Law Governing Lawyers § 136 cmt. h (noting that litigation includes, among other things, “an investigative legislative hearing”).

Waiver of Attorney-Client Privilege or the Work Product Doctrine by Production to a Congressional Committee

- Compelled production of privileged documents in a congressional investigation likely will waive the privilege in other forums. *Common Law Privileges* at 928–31.
 - See *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70, 77–78 (N.D.N.Y. 2000) (finding that defendant’s production of documents to the House Commerce Committee in response to a subpoena waived privilege); *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, 35 F. Supp. 2d 582, 595 (N.D. Ohio 1999) (same).
 - As a general proposition, production under subpoena to Congress constitutes waiver. The only sure way to render the production truly involuntary and hence not an act of waiver is to be cited for contempt of Congress. *Common Law Privileges* at 929–30.
 - That said, there is authority for the proposition that standing in contempt of Congress is not required to render production compulsory; rather the subpoenaed entity must have vigorously contested the issue and obtained a definitive ruling on the claim of privilege from the committee. *Id.*

Status of Third-Party Consultants in Congressional Investigations

- Generally speaking, sharing information protected by the attorney-client privilege or work product doctrine with a third party vitiates the privilege. *Common Law Privileges* at 908.
- In certain circumstances, however, a third party working under the direction of counsel and for the client's benefit will be considered an extension of the party itself and, accordingly, revealing attorney-client communications or work product to that third party will not vitiate the privilege. *Id.*
 - Courts have designed two tests to determine when the presence of a third-party consultant waives attorney-client privilege: the “functional equivalent test” and the “agency test.” *Id.* at 909–13.
 - The functional equivalent test examines how practically integrated the consultant is with the party in question, while the agency test considers the nature of the consultant's relationship to the lawyer and the rendering of legal services. *Id.*
 - In the context of a congressional investigation, courts may extend the attorney-client privilege and work product doctrine to third-party public relations and government affairs consultants in narrow circumstances. For example, in *In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321, 324–31 (S.D.N.Y. 2003), the Southern District of New York held that communications between Martha Stewart, her attorneys, and her PR consultants were protected because the PR consultants were hired not to provide normal PR relations advice, but rather to act under direction of counsel in attempting to sway public opinion so as to influence the Department of Justice's decision to prosecute.



Congressional Investigations: Gibson Dunn Table of Authorities

- The Gibson Dunn table of authorities describes each committee's rules related to investigative authority and procedure and is a helpful resource in navigating complex congressional investigations.
- The table describes each House and Senate committee's subpoena and deposition authority, as well as the source of that authority.
- The table for the 114th Congress can be found on Gibson Dunn's website:
<http://gibsondunn.com/publications/Documents/HouseSenateCommitteeRulesChart-2015.pdf>
- Once all committee rules are published in the Congressional Record, the table will be updated to reflect any rule changes in the 115th Congress.

Key Investigative Committees (115th Congress)

- **Senate:**

- Homeland Security and Governmental Affairs (Johnson/McCaskill)
 - Permanent Subcommittee on Investigations (Portman/Carper)
 - Subcommittee on Federal Spending Oversight (Paul/Peters)
 - Subcommittee on Regulatory Affairs and Federal Management (Lankford/Heitkamp)
- Commerce, Science & Transportation (Thune/Nelson)
- Finance (Hatch/Wyden)
- Judiciary (Grassley/Feinstein)
- Health, Education, Labor, and Pensions (Alexander/Murray)
- Aging (Collins/Casey)
- Banking, Housing & Urban Affairs (Crapo/Brown)



- **House:**

- Energy & Commerce (Walden/Pallone)
- Oversight and Government Reform (Chaffetz/Cummings)
 - Subcommittee on Health Care, Benefits, and Administrative Rules (Jordan/Krishnamoorthi)
 - Subcommittee on Government Operations (Meadows/Connolly)
 - Subcommittee on Information Technology (Hurd/Kelly)
 - Subcommittee on National Security (DeSantis/Lynch)
- Judiciary (Goodlatte/Conyers)
- Financial Services (Hensarling/Waters)
- Homeland Security (McCaul/Thompson)
- Ways & Means (Brady/Neal)
- Science, Space, and Technology (Smith/Johnson)



Investigations in the 115th Congress – What to Expect

- **Currency Manipulation**
- **Consumer Issues**
 - CFPB Oversight and Reform
- **Drug Policy, Pricing, and Safety**
- **Government Contracting**
- **Hacking and Cybersecurity**
 - Russian Data Hacking
- **Health Insurance**
 - ACA
- **Immigration and Border Security**
- **Information Technology Management**
- **National Security and Foreign Operations**
- **Open Government & Transparency**
- **Privacy in the Digital Age**
- **Security Clearances/Background Investigations**
- **Trade and Cross-Border Issues**
- **Transportation and Infrastructure**
- **Waste, Fraud, Abuse, and Mismanagement**
- **Whistleblower Protection**



When Congressional and Executive Branch Investigations Collide

- It remains to be seen how aggressive this Congress will be in investigating the Administration.
 - On March 22, 2017, Chairman Chaffetz and Ranking Member Cummings of the House Oversight and Government Reform Committee sent letters to White House Chief of Staff Reince Priebus, FBI Director James Comey, Department of Defense Secretary James Mattis, and Director of National Intelligence Daniel Coats requesting information about Lt. Gen. Michael Flynn's communications with and payments from Russian, Turkish, or other foreign sources.
- Congressional Republicans and Democrats may look for opportunities to pursue bipartisan investigations.
- As discussed above, there are limits on Congress's power to fully investigate and pursue contempt proceedings against the Executive Branch.

Closing Thoughts: Top Mistakes

1. **Facts:** Failure to identify them or double-check them
2. **Corporate Messages:** Not having them or having messages that are unclear or lacking detail
3. **Internal Communications:** Not taking steps to educate employees regarding professional communications
4. **Context:** Not adapting to the type of investigation
5. **Care and Concern:** Not shown or not expressed from a high level
6. **Legal:** Not working with lawyers closely, including where third-party consultants are involved, or letting legalese dominate communications
7. **Knowing the Rules:** Failure to consider members' and committees' roles and enforcement authority
8. **Big Picture:** Not considering how a congressional investigation could lead to an Executive Branch investigation and/or severe reputational damage
9. **Time and Attention:** Not taking a congressional investigation seriously

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