

Committee Subpoenas Purpose, Use, and Practice

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11/2/2018

Sources

- Mason's Manual of Legislative Procedure (NCSL, 2010 ed.)(hereinafter *Mason's*).
- When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry, Morton Rosenberg, Constitution Project Fellow, The Constitution Project (2nd ed. 2017) (hereinafter "When Congress Comes Calling") <http://thecre.com/forum8/wp-content/uploads/2017/05/WhenCongressComescalling.pdf>
- 2018 NCSL materials on Legislative Subpoenas by Frank Arey and Legislative Subpoena Issues by Jerry G. Jones – see NCSL website.
http://www.ncsl.org/Portals/1/Documents/relacs/2018_PDS/Committee_Sub_Jones.pdf
http://www.ncsl.org/Portals/1/Documents/relacs/2018_PDS/Committee_Sub_Arey.pdf

Purpose

- Legislative oversight of the executive is designed to fulfill a number of important purposes and goals, including to:
 - Ensure executive compliance with legislative intent.
 - Improve the efficiency, effectiveness, and economy of governmental operations.
 - Evaluate program performance.
 - Prevent executive encroachment on legislative powers and prerogatives.
 - Investigate alleged instances of poor administration, arbitrary and capricious behavior, abuse, waste, fraud, and dishonesty.
 - Assess agencies' or officials' ability to manage and carry out program objectives.
 - Assess the need for new legislation.
 - Review and determine financial priorities.
 - Protect individual rights and liberties.
 - Inform the public about how its government is performing its public duties.

A fundamental and inherent component of the legislative function is the power to investigate.

- “[T]he power to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.” *Watkins v. United States*, 354 U.S. 178, 187 (1957)(Regarding the powers of Congress).
- “The right of a legislative body to make investigations in order to assist it in the preparation of wise and timely laws must exist as an indispensable incident and auxiliary to the proper exercise of legislative power.” *Mason’s*, Sec. 795(1).

Limitations on investigative power

- “But, broad as is this power of inquiry, it is not unlimited...No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the [legislative body].” *Watkins*, at 178.
- “The legislature has no right to conduct an investigation for the purpose of laying a foundation for the institution of criminal proceedings.” *Mason’s*, Sec. 797(2).
- “An investigation...not connected with intended legislation or with any of the matters upon which a house should act is not a proper legislative proceeding and is beyond the authority of the house or legislature.” *Mason’s*, Sec. 797(4).
- “Moreover, an investigating committee has only the power to inquire into matters within the scope of the authority delegated to it by the [legislative body].” *United States v. Rumely*, 345 U.S. 41, 42, 44 (1953); *Watkins*, at 198.

Subpoenas as essential tool for securing information

- “A legislative body cannot legislate wisely or effectively in the absence of information ...; and where the legislative body does not itself possess the requisite information...recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion as essential to obtain what is needed.” *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).
- “A legislative body or a committee, when acting within the scope of its authority to conduct an investigation, may summon and examine witnesses, and require the production and examination of books, records and papers.” *Mason’s*, Sec. 802(1)

Source of Authority to Issue Subpoenas

- Express
 - Constitutional
 - "Each house shall have power to determine the rules of its proceedings; and ... enforce obedience to its process." Ark. Const. art. 5, Sec. 12
 - "The process by which the Committee procures the attendance of witnesses is a matter of procedure. [The Florida constitution] requires that 'each house shall determine its rules of procedure.'" *Hagaman v. Andrews*, 232 So. 2d 1, 6 (Fla. 1970).
 - Statutory
 - Parts of Articles 5 and 5A of Chapter 120 of the North Carolina General Statutes
- Implied
 - "The state courts quite generally have held that the power to legislative carries with it by necessary implication ample authority to obtain information needed in the rightful exercise of that power, and to employ compulsory process for the purpose." *McGrain*, at 165.

Limitations on Legislative Subpoena Power

- Substantive
 - Supremacy Clause deprives state legislatures the power to investigate federal agencies.
 - No legislative purpose or not pertinent to a legislative purpose.
 - Information sought is outside the committee's jurisdiction.
 - All or part of subpoena is seeking constitutionally protected information.
 - Testimonial or evidentiary privileges or other confidentiality requirements apply.
- Procedural
 - Failure to follow procedural requirements for issuance, form, and service.

Pertinency Requirement

- In deciding whether a subpoena is pertinent, the courts have required only that the specific inquiries be reasonably related to the subject matter under investigation. *Rumely*, at 41, 43, 45; *Watkins*, at 200 n.3.
- "A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress A judicial inquiry relates to a *case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates *all possible cases* which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry which generally is very broad." *Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938), *cert. denied*, 303 U.S. 665 (1938) (emphasis added).

Pertinency Requirement

- Witnesses are entitled to receive a description of the investigation's scope "with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense." *Watkins*, at 209.
- An inquiry is *not* pertinent where "the question under inquiry had not been disclosed in any illuminating matter; and the questions asked ... were not only amorphous on their face, but in some instances clearly foreign to the alleged subject matter of the investigation," whereas an inquiry *is* pertinent when "[t]he subject matter of the inquiry had been identified at the commencement of the investigation." *Barenblatt v. United States*, 360 U.S. 109 (1959).

Pertinency Requirement

- The Supreme Court has stated that the subpoena is to be enforced 'unless ... there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the investigation.'" *Senate Select Comm. On Ethics v. Packwood*, 845 F.Supp. 17, 21 (D.D.C. 1994).
- The court may only inquire as whether the documents sought are "not plainly incompetent or irrelevant to any lawful purpose [of the Committee] in the discharge of [its] duties. *Id.* at 20-21.
- The burden of showing that the request is unreasonable is on the subpoenaed party. *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C.Cir. 1977).

Constitutional Challenges

- Fifth Amendment - State Courts have applied the privilege against self-incrimination to legislative proceedings. *In re Doyle*, 177 N.D. 489, 490-91, 496 (N.Y. 1931); *In re Joint Legislative Committee*, 196 S.E. 164, 167 (S.C. 1938).
- First Amendment – "Where First Amendment rights are asserted [by a witness] to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." *Watkins* at 128.
- Fourth Amendment - Protects a legislative witness against a subpoena that is unreasonably broad or burdensome. *McPhaul v. United States*, 364 U.S. 374, 381 (1960)

Procedural and Other Considerations

- Carefully review the particular requirements of authorizing law, chamber or committee rules, and any other applicable authorities.
- What is the legislative purpose for the subpoena?
- What information is being sought?
- How does the legislative body go about issuing a subpoena?
- Is there a prescribed form and who signs the subpoena?
- Who will serve the subpoena?
- Who will represent the legislative body if the subpoena is challenged?

Enforcement of Subpoenas

- [T]he legislature has the power to institute and carry to the extent of punishment, contempt proceedings in order to compel the attendance of such witnesses and the production of such documentary evidence as may be legally called for in the course of such proceedings, whether conducted by the legislative body or a branch thereof, directly or through its properly constituted committees. *Mason's Sec. 795(5)*.
- G.S. 120-19.4(a).
