WITNESSES BEFORE LEGISLATIVE COMMITTEES: ISSUES AND LAW

by

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October 6, 2014

CAVEAT: One size does not fit all. Research always begins with the specific constitutional provisions, laws, legislative rules, and jurisprudence of your state.

I. Power of legislature to hold hearings and conduct investigations........................................2
II. "Open meetings" and public observation of legislative proceedings......................................8
III. "Political speech" and time, content, manner restrictions......................................................12
IV. Public comment - procedure and public record.................................................................17
V. Government employee as witness......................................................................................20
VI. Why is the witness testifying before a legislative committee?.............................................22
VII. Legislative privilege generally applicable to witness testimony..........................................23
VIII. Subpoenas to compel testimony and production of documents in legislative proceedings, and punishment for contempt..........................................................28
IX. Witness refusal to answer questions based upon constitutional or statutory claim of testimonial privilege or confidentiality.................................................................47
X. Options of a witness compelled to testify or produce documents........................................60
XI. Statutes authorizing legislative witness immunity..................................................................63
I. Power of legislature to hold hearings and conduct investigations.

A. *Inherent.* In the performance of its lawmaking function and other acts delegated to it by the constitution, the legislature and its components have broad inherent authority to conduct hearings and make investigations to ascertain pertinent facts. Such inherent authority includes the power to issue subpoenas and to punish for contempt.

"We start with several basic premises on which there is general agreement. The power of the Congress 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. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste. But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. This was freely conceded by the Solicitor General in his argument of this case. Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible.

It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged." - *Watkins v. United States*, 354 U.S. 178, 187-188 (1957). (footnotes omitted).

"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 property exercise of legislative power.........................The legislature has the power to investigate any subject regarding which it may desire information in connection with the proper discharge of its function to enact, amend or repeal statutes or to perform any other act delegated to it by the constitution.....................The inherent and auxiliary power reposed in legislative
bodies to conduct investigations in aid of prospective legislation carries with it the power in proper cases to compel the attendance of witnesses and the production of books and papers by means of legal process. Also, the 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. The legislature has power to investigate any subject where there is a legitimate use that the legislature can make of the information sought, and an ulterior purpose in the investigation or an improper use of the information cannot be imputed. An investigation into the management of the various institutions of the state and the departments of the state government is at all times a legitimate function of the legislature. The right to investigate any lawful matter is a right separate and distinct in each house and may be exercised through a committee." - Mason's Manual of Legislative Procedure (2010 edition), Sec. 795, footnotes omitted.

Concerning investigations and witness testimony, see also Secs. 562, 630-631, and 796-803. (hereinafter "Mason's Manual")

"It is universally recognized that with the power to legislate there is inherent in the Legislature the power to conduct investigations, and that these investigations should be conducted solely as an aid to its consideration and determination of prospective legislation. The right of inquiry and investigation may be exercised by it as a body of the whole legislature, or the Legislature may delegate its investigative powers to a committee of less than the whole of the Legislature.

In furtherance of the Legislature's right to investigate, the Legislature, or a committee designed by it, has the unquestionable right to require the attendance of anyone from whom it desires to obtain pertinent information. This right is exercised through the power of the subpoena and the subpoena duces tecum. In the exercise of the power of subpoena and subpoena duces tecum, the Legislature would be helpless and ineffective to command compliance with its order unless it has the power to punish for contempt or a method of instituting contempt proceedings. Equally inherent, then, with the power of subpoena is the power of the Legislature to punish for contempt." - Asp, Inc. v. Capital Bank & Trust Company, 174 So.2d 809 (La. App. 1 Cir. 1965), writ denied, 247 La. 724, 174 So.2d 133 (La. 1965), pages 813-814 (footnotes omitted).

Plenary power. Unlike the provisions of the federal constitution, the constitutional provisions in our state constitution "are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its legislature." - Radiofone, Inc. v. City of New Orleans, 630 So.2d 694 (La. 1994).
B. *Express.* State constitution, laws, and legislative rules. See, for example:

La. Const. Art. 3, Sec. 1, stating in part:

"The legislative power of the state is vested in a legislature, consisting of a Senate and a House of Representatives."

La. Const. Art. 3, Sec. 7(A) and (B):

"(A) Each house shall be the judge of the qualifications and elections of its members; shall determine its rules of procedure, not inconsistent with the provisions of this constitution; may punish its members for disorderly conduct or contempt; and may expel a member with concurrence of two-thirds of its elected members. Expulsion creates a vacancy in the office. (B) Subpoena Power; Contempt. Each house may compel the attendance and testimony of witnesses and the production of books and papers before it, before any committee thereof, or before joint committees of the houses and may punish those in willful disobedience of its orders for contempt."

La. Const. Art 3., Sec. 8:

"A member of the legislature shall be privileged from arrest, except for felony, during his attendance at sessions and committee meetings of his house and while going to and from them. No member shall be questioned elsewhere for any speech in either house."

La. R.S. 24:511, et seq, setting forth powers and duties of Legislative Auditor and Legislative Audit Advisory Council, including subpoena powers and power to examine certain records otherwise confidential.

La. R.S. 24:2:

"§2. Investigations by legislature; authority to compel attendance of persons and production of papers

Either house may send for persons and papers, and compel their attendance or production whenever necessary in the investigation of any matter before them. The chairman or acting chairman of any committee of the senate or house of representatives, or of any joint committee composed of members from both, may administer the oath to any witness who may be called before them to testify in relation to any subject referred to them for their consideration."
La. R.S. 24:4:

§4. Contempt of the legislature; penalties
   A. Whenever the legislature or either house of the legislature, or
      whenever any committee of either house or any joint committee of both
      houses or any sub-committee of any such committee, which committee,
      joint committee or sub-committee has been specifically and expressly
      granted the subpoena power, has summoned any person as a witness to
      give testimony or to produce papers or other evidence upon any matter
      under inquiry before such house, committee, joint committee or
      sub-committee, such person shall be guilty of contempt of the legislature if
      he or she
         (1) willfully defaults by failing to appear or to produce papers or
             other evidence, as ordered, or
         (2) having appeared, refuses to take the oath or affirmation of a
             witness, or
         (3) having appeared, refuses to answer any question pertinent to
             the question under inquiry.
   B. Whoever is found guilty of contempt of the legislature under
      the provisions of this section shall be punished by a fine of not more than
      one thousand dollars or by imprisonment for not more than six months, or
      both.
   C. The provisions of R.S. 24:4 through R.S. 24:6 are hereby
      declared to be supplemental to the powers of the legislature and of the
      senate and of the house of representatives to punish for contempt, and the
      legislature hereby reserves to itself and to the senate and to the house of
      representatives all inherent and all constitutional powers to punish for
      contempt."

La. R.S. 24:5:

§5. Certification of facts of contempt; prosecution
   Whenever a statement of facts alleged to constitute contempt under
   R.S. 24:4 is reported to either house of the legislature while the legislature
   is in session, or whenever, while the legislature is not in session, such
   statement is reported to and filed with the president of the senate or the
   speaker of the house of representatives, said president or speaker, as the
   case may be, shall certify the statement to the district attorney of a district
   where venue lies, as provided in the general laws governing venue or as
   provided by R.S. 24:6 in the case of offenses defined in R.S. 24:4(A), and
   the district attorney shall institute and prosecute a criminal proceeding
   against the accused for contempt of the legislature under the provisions of
   R.S. 24:4."
La. R.S. 24:6:

"§6. Contempt prosecution; venue

Any other provisions of law to the contrary notwithstanding, any offense defined by the provisions of R.S. 24:4(A) shall be deemed to have been committed (1) in the parish where the subpoena issued, (2) in the parish where the offender was served with the subpoena or (3) in the parish where the subpoena ordered the offender to give testimony or to produce papers or other evidence, and the trial of the offender for such offense may take place in any of such parishes."

[Note: see also discussion in VIII.]

Louisiana Senate Rule 13.15:

"Rule 13.15. Standing committees; subpoena power, punishment for contempt

Each standing committee established by Rule 13.1 and each joint committee established pursuant to the authority granted in Rule 13.12, and any subcommittee of either, is hereby specifically and expressly granted the power and authority, with the written approval of the President, to hold hearings, subpoena witnesses, administer oaths, require the production of books and records, and to do all other things necessary to accomplish the purposes of the study, hearing, or investigation assigned to it by the Senate or by the Legislature or by a majority of the members of the committee. However, if a study or investigation is undertaken during the interim between sessions, a subpoena or a subpoena duces tecum shall issue only upon the approval of a majority of all the members of the standing committee and of the President and upon the rendition of a special order of the Nineteenth Judicial District Court or of any other judicial district court, subject to general rules of venue, authorizing the committee to issue the subpoena or subpoena duces tecum, in which order the court may prescribe such requirements and conditions as it may consider just and reasonable. In the event a subpoena or subpoena duces tecum is not honored, the standing committee or joint committee also shall have the power to punish for contempt and to provide for the prosecution of any individual for refusal to testify, false swearing, or perjury before the committee or subcommittee in accordance with law."
Louisiana House of Representative Rule 14.51:

"Rule 14.51. Standing committees; subpoena power, punishment for contempt

Each standing committee established by House Rule 6.1, each joint committee established pursuant to the authority granted in House Rule 14.16, and any subcommittee of such standing or joint committee is hereby specifically and expressly granted the power and authority to hold hearings, subpoena witnesses, administer oaths, require the production of books and records, and to do all other things necessary to accomplish the purposes of the study or investigation assigned to it by the House or by the legislature or by a majority of the members of the committee. However, a subpoena or a subpoena duces tecum shall be issued only upon the approval of the Speaker upon the request of the chairman of the committee or upon the request of a majority of the members of the standing committee. The chairman of the committee or a majority of the members of the committee, as the case may be, shall submit sufficient information to the Speaker to justify the issuance of the subpoena or subpoena duces tecum which shall include a description in general terms of the proceeding for which the issuance of the subpoena is sought; in the case of process to secure the attendance and testimony of a witness, the reasons for believing that the testimony of the witness is relevant to the proceeding; in the case of process to secure the production of books or records, the reasons for believing such materials are relevant to the proceeding; in either such instance a subpoena is sought, the reasons why a subpoena is necessary to obtain such attendance, testimony, or materials; and any other information the Speaker deems necessary. In the event a subpoena or subpoena duces tecum is not honored, such committees shall have the power to punish for contempt. In addition, such committees shall have the power to provide for the prosecution of any individual for refusal to testify, false swearing, or perjury before the committee in accordance with the laws of this state."
II. "Open meetings" and public observation of legislative proceedings.

Question: What are the constitutional provisions/laws/rules that control the opportunity for public observation and potential witness testimony at legislative meetings in your state? See the following case examples.

A. *Hughes v. Speaker of the New Hampshire House of Representatives*, 876 A.2d 736 (2005) - New Hampshire. "Member of New Hampshire House of Representatives brought action, alleging that Speaker of House of Representatives, President of New Hampshire Senate, General Court, and House and Senate conference committees on bill concerning school funding violated constitutional and statutory right to know by excluding him and other members of the public from separate meetings of the House and Senate conferees. The Superior Court, McGuire, J., found that defendants violated plaintiff’s constitutional and statutory right to know and awarded him attorney fees and costs, but declined to invalidate bill. Defendants appealed.

Holdings: The Supreme Court, Duggan, J., held that: [1] whether defendants violated statutory provisions governing public’s right to know was political question not subject to Court’s review; [2] whether defendants violated constitutional provision governing public’s right to know was not political question; [3] defendants did not violate constitutional right to know provision. Reversed."

"[C]ourts generally consider that the legislature’s adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, not subject to judicial review unless the legislative procedure is mandated by the constitution.... Courts throughout the country have found that whether a legislature has violated the procedures of a state right-to-know law is not justiciable." (page 744, citations omitted).

"We emphasize that the question before us is not whether the Right–to–Know Law applies to the legislature. By the statute’s express terms, it does. See RSA 91–A:1–a, I(a). The question before us is whether the legislature’s alleged violation of the Right–to–Know Law is justiciable. We have concluded that this question is not justiciable because this legislative enactment “merely establishes a rule of procedure concerning how the legislature has decided to conduct its business,” and the legislature has sole authority to adopt such rules of procedure. Abood, 743 P.2d at 339. “Of course, having made the rule, it should be followed, but a failure to follow it is not the subject of judicial inquiry.” Id..................Although we have concluded that the plaintiff’s RSA chapter 91–A claim is not justiciable, we reach the opposite conclusion with respect to his Part I, Article 8 claim. As we recognized in Baines, 152 N.H. at 130, 876 A.2d 768, “[c]laims regarding compliance with these kinds of mandatory constitutional provisions are justiciable.” We have the
responsibility to examine whether the defendants’ conduct violated Part I, Article 8. See Baines, 152 N.H. at 132, 876 A.2d 768. It is our duty to interpret constitutional provisions and to determine whether the legislature has complied with them. State v. LaFrance, 124 N.H. 171, 177, 471 A.2d 340 (1983). While the constitution vests the legislature with the authority to create its own rules of procedure, no provision of the constitution commits to the legislature the determination of whether the public’s right of access to governmental proceedings has been unreasonably restricted. See Baines, 152 N.H. at 131–32, 876 A.2d 768. A legislative determination whether restrictions to public access are “reasonable” is subject to judicially discoverable and manageable standards." (Pages 746-747, some citations omitted).

B.  

State ex rel. Ozanne v. Fitzgerald, 798 N.W. 2d 436 (2011) - Wisconsin. "County district attorney brought action against state legislature and its members, alleging that defendants had violated Open Meetings Law in enacting budget repair bill which included provisions requiring additional public employee contributions for health care and pensions, curtailing collective bargaining rights for most state and local public employees, and making appropriations. The Circuit Court, Dane County, Maryann Sumi, J., entered order enjoining publication of the bill. Defendants petitioned for leave to appeal. The Court of Appeals certified the petition. Subsequently, the state and Secretary of Department of Administration petitioned for supervisory/original jurisdiction, challenging the trial court order.


"It also is argued that the Act is invalid because the legislature did not follow certain notice provisions of the Open Meetings Law for the March 9, 2011 meeting of the joint committee on conference. It is argued that Wis. Stat. § 19.84(3) required 24 hours notice of that meeting and such notice was not given. It is undisputed that the legislature posted notices of the March 9, 2011 meeting of the joint committee on conference on three bulletin boards, approximately 1 hour and 50 minutes before the start of the meeting. In the posting of notice that was done, the legislature relied on its interpretation of its own rules of proceeding. The court declines to review the validity of the procedure used to give notice of the joint committee on conference. See Stitt, 114 Wis.2d at 361, 338 N.W.2d 684. As the court has explained when legislation was challenged based on allegations that
the legislature did not follow the relevant procedural statutes, "this court will not
determine whether internal operating rules or procedural statutes have been
complied with by the legislature in the course of its enactments." Id. at 364, 338
N.W.2d 684. "]W[e will not intermeddle in what we view, in the absence of
constitutional directives to the contrary, to be purely legislative concerns." Id. The
court's holding in Stitt was grounded in separation of powers principles, comity
concepts and "the need for finality and certainty regarding the status of a statute." 
Id. at 364-65, 338 N.W.2d 684."

actions against the Judiciary Committee of the House of Representatives, the Speaker of
the House, and representatives that were members of the Committee, seeking declaration
that House’s action on bill, which changed provisions of law governing reporting of
sexual abuse of children, was invalid because Committee violated statutory open
meetings requirement by holding a meeting that was closed to the public during a recess
of a Committee hearing. The Court of Common Pleas, Franklin County, upheld
magistrate’s conclusion that lobbyists were not entitled to relief. Lobbyists appealed.

[Holding:] The Court of Appeals, Sadler, J., held that evidence supported
conclusion that a majority of Committee members did not take part in meeting that was
closed to public during recess of Committee hearing.....Evidence supported conclusion
that a majority of members of the Judiciary Committee of House of Representatives did
not take part in meeting that was closed to public during recess of Committee hearing, as
necessary to establish a violation of statute requiring that all meetings of any General
Assembly committee be open to members of general public at all times, for purposes of
lobbyists’ action against Committee Speaker of the House, and Committee members
seeking declaration that House’s action on bill changing provisions of law governing
reporting of sexual abuse of children was invalid because Committee violated statute;
legislative services attorney testified that discussions regarding bill that took place during
recess did not involve all members of Committee who were present in room, and
circumstantial evidence did not support inference that violation of statute occurred."

"Press club brought action against Legislature, seeking declaration that closed meetings of
legislative committees violated Idaho Constitution. The District Court of the Fourth
Judicial District, Ada County, Kathryn A. Sticklen, J., found that there was no violation,
and press club appealed. Holdings: The Supreme Court, Eismann, J., held that: [1] closed
meetings did not violate provision of Idaho Constitution requiring that the business of
each house be transacted openly and not in secret session, and [2] closed meetings did not
violate provision of Idaho Constitution giving the people the right to instruct
representatives. Affirmed. Jones, J., dissented and filed opinion, in which Burdick, J.,
conurred."
E. Mason's Manual, Sec. 630 (footnotes omitted):

"Committee meetings are generally open to persons who are interested in the business before the committee and to the press and public. Historically, it was quite common for committees to hold some meetings in private, without notice. Most states now have provisions in their constitutions, statutes or rules that require legislative committee meetings to be open to all members and the public, subject to public notice, except when considering certain strictly specified subjects where secrecy is required."

III. "Political speech" and time, content, manner restrictions.

Question: When your legislature offers the opportunity for public comment at legislative meetings, what basic constitutional requirements may be generally applicable and how should they be applied to witnesses in specific situations? See the following brief examples.

A. State v. Duffy, 441 A.2d 524 (1982) - Rhode Island. "The defendant, Bernard Duffy appeals from a conviction after trial by jury, of obstructing a police officer in the execution of his duty.........The incident occurred when a uniformed member of the state police, acting pursuant to instruction from a legislative committee, informed several people not to bring placards or bullhorns into an auditorium where the committee was conducting a public hearing. Upon hearing this, defendant Duffy, who was standing outside the auditorium, took signs from a person standing there and stormed the entranceway in defiance of the police officer’s order..... A conviction of s 11-32- requires (1) that the defendant acted knowingly, (2) that the defendant “resisted” or “obstructed” a police officer, (3) that the defendant knew the police officer was in fact a police officer, and (4) that the police officer was performing an authorized act within his official capacity. State v. Berberian, R.I., 416 A.2d 127 (1980). The defendant attempts to collaterally attack his conviction by challenging the committee’s prohibition of signs at the hearing. He contends that the regulation unconstitutionally infringed on his first amendment right of free speech, and therefore justified his obstruction of the police officer.................

It is clear that a committee of the state legislature has the authority to adopt reasonable content neutral regulations governing the manner of speech at its public hearings. See Police Department Of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); United States v. O’Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, reh. denied, 393 U.S. 900, 89 S.Ct. 2627, 61 L.Ed.2d 188 (1968); Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed.2d 153 (1949); A Quaker Action Group v. Morton, 516 F.2d 717 (D.C.Cir.1975). The committee’s order prohibited the use of all signs and bullhorns inside the hearing and was presumably issued to ensure that the orderly process of the hearing was not disrupted.

The constitutionality of the committee’s order prohibiting signs and placards is not before us. The only issue before us is whether the constitutionality of a regulation affects the duty of a citizen to obey a police officer enforcing the regulation. By enacting s 11-32-1, the legislature has determined that police officers should carry out their orders unobstructed by others. Since the enactment of a law or regulation forecloses speculation by enforcement officers concerning its constitutionality, we would be amiss if we held that citizens could challenge the constitutionality of a law by obstructing a police officer charged with enforcing it. See Michigan v. DeFillippo, 443 U.S. 31, 99 S.Ct. 2627, 61
L.Ed.2d 343 (1979). Citizens must submit to the authority of a police officer. See State v. Ramsdell, 109 R.I. 320, 285 A.2d 399 (1971). The proper place to challenge the constitutionality of a law or regulation is in the courts, not on the streets. State v. Ramsdell, supra. The defendant’s appeal is denied and dismissed; the judgment of conviction is affirmed, and the case is remanded to the Superior Court for further proceedings in accordance with this opinion.”

B. State v. Babson, 279 P.3d 222 (2012) - Oregon case. Defendants appealed from conviction for second-degree criminal trespass for violating overnight rule promulgated by Legislative Administration Committee (LAC) prohibiting overnight activities on steps of State Capitol. Held, reversed.

"We conclude that the rule was properly promulgated and that, on its face, it does not violate any provision of the Oregon Constitution. We also conclude, however, that whether the rule was lawfully enforced against defendants depends on whether the motive driving the enforcement was a desire to protect public safety, as the state maintains, or to stifle defendants’ expression, as they maintain, and that the trial court erred in preventing defendants from questioning two members of the Legislative Assembly who might have provided relevant and significant testimony on that question. We therefore reverse and remand with instructions to allow defendants to question the two legislators on that specific issue. Because the result of that remand could obviate the need to address federal law, we do not reach the federal constitutional question."

"Our conclusion that the overnight rule is constitutionally authorized does not, of course, mean that the rule is immune from the constitutional limitations imposed on all government action, usually by a provision in a bill of rights. Nor does our reluctance to interfere in the legislature’s control of its own operations extend to the exercise of judicial review for constitutionality of generally applicable enactments. In this case, defendants argue that the overnight rule violates the Oregon Constitution’s limitations on enactments that infringe on free expression and assembly, as well as the United States Constitution’s free speech guarantee."

"In sum, the overnight rule was properly promulgated by the Legislative Administration Committee. Further, defendants’ claims that the overnight rule, on its face, violates Article I, section 8, or Article I, section 26, fail as well; the rule does not expressly prohibit speech or assembly and is therefore susceptible to challenge only as enforced in a particular case. In this case, the success of that challenge depends on whether the motive behind the enforcement was or was not to impinge on defendants’ rights of expression or assembly. Two legislator members of the LAC might have been able to provide testimony that was relevant to that determination, but the trial court quashed defendants’ subpoenas of those legislators on the ground that the legislators had immunity from questioning under Article IV, section 9, of the Oregon Constitution. We conclude that the legislators
did not have that immunity and, consequently, the court erred in quashing the subpoenas. We therefore reverse and remand so that defendants can question the legislators that they subpoenaed, but only with respect to whether either or both of them expressly or implicitly instructed or encouraged the LAC administrator or any other person to enforce the rule against defendants because of the content of their expression or the purpose of their assembly. (footnotes omitted).

C. Teri Day and Erin Bradford, Civility in Government Meetings: Balancing First Amendment, Reputational Interests, and Efficiency, 10 First Amendment Law Review 57 (2011) - (footnotes omitted)

"Where government meetings do include public comment sessions, rules of decorum are aimed at minimizing disruption so that government business can be accomplished and citizens’ voices can be heard. The foundation of all rules of decorum is that government may not silence viewpoints it disfavors. Beyond this basic requirement, local entities can adopt rules that require speakers to maintain relevancy and civility when commenting."

"Preventing disturbances at public meetings is essential to achieving the dual goals of fostering citizen participation and ensuring the efficient accomplishment of public business. To achieve these goals, it is necessary for local entities to adopt and implement rules of procedure for maintaining decorum in public meetings. Common among the rules of decorum adopted by government entities for public comment sessions are prohibitions against speech that is “repetitive,” “harassing” or “frivolous.” Citizens have been denied the opportunity to speak or ejected from public meetings for ignoring “legitimate” requests from the presiding official to cease their comments and sit down. Courts have deemed the following “legitimate” reasons to silence a speaker: when the speaker has exceeded his allotted time limit; debated irrelevancies; pursued repetitive debate; discussed matters of private concern; or delivered comments in a harassing, insulting manner."

"A presiding official must be tasked with the responsibility of cutting off irrelevant, repetitive and caustic debates to avoid free-for-alls and interminably long meetings. Neutral rules provide guidance to officials conducting public meetings who must decide what constitutes a disruption and at what point the speaker should be silenced so that government business can proceed and other citizens can be heard. However, neutral rules of general applicability become vehicles of government censorship when government entities and officials enforce rules of decorum in a selective and arbitrary manner."

"Members of the public do not have a constitutionally guaranteed right “to be heard by public bodies making decisions of policy.” However, when state and local laws create a forum for citizen input at public meetings, constitutional guarantees apply."
"The right to participate in public meetings is not a constitutional right, but one created by statute or judicial fiat. Once created, however, constitutional protections from government interference apply to citizens who comment at public meetings."

"It has long been recognized that discussion of public issues lies “at the heart of the First Amendment[].” Free and uninhibited political discussion is so essential to our constitutional system that it is considered vital to “the security of . . . [our] Republic.” “[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions[.]” However, despite the unequivocal language of the First Amendment, it has never been interpreted literally nor considered an absolute freedom."

"The First Amendment affects government restrictions on private speech and the constitutional validity of government speech restrictions depends on the “what and where” of those restrictions. Although First Amendment protection is at its zenith when public debate is involved, that maxim does not hold true when the discourse occurs in public meetings because “the government’s ability to limit private expression in a public context” depends upon the forum in which it occurs.

"While common sense can help public officials and citizens to maintain civility in open comment sessions, properly implementing rules of decorum cannot rest on common sense alone. What seems commonsensical may offend constitutional principles..........................Despite constitutional complexities, a code of conduct should incorporate some basic principles. Foremost, whichever forum rules a jurisdiction has adopted, government entities must adopt civility rules that are viewpoint neutral. Government entities may constitutionally limit discussion topics and groups consistent with their subject matter jurisdiction, but, beyond this, rules should be content neutral. Rules that limit citizen comments should address the time, place, and manner of the comments. For instance, government entities may impose time limits on citizens’ comments. The open comment session of public meetings may be scheduled at the beginning or end of meetings. Placards, signs, and visual aids may be barred from public meetings and comment sessions. Depending on the type of forum created, comments may be limited to agenda items. Citizens may be required to request speaking time prior to the meeting and list the topic of their planned comments, so long as the review process is timely and impartial to subject matter and identity of the speaker."

"All codes of conduct should include rules of procedure for cutting off disruptive comments. For example, rules of procedure may require a presiding official to inform a speaker of his non-compliance, to warn a speaker of possible consequences for non-compliance, and to request voluntary compliance before taking more punitive measures, such as ejection from the meeting or arrest for disrupting a public meeting. Rules can restrict comments that are irrelevant, repetitive, and harassing. However, public officials must take care to apply these
rules according to the governing procedures and in a consistent, non-arbitrary manner."

See also - 16A Am. Jur. 2d Constitutional Law § 534 - Generally; time, place, and manner regulations as not violating First Amendment; 70 A.L.R.6th §513 -Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum-Characteristics of Forum; Hafelia, "Say What?!: A Look at the Right to Speak at Public Meetings Under the Illinois Open Meetings Act and the First Amendment", 25 DuPage County Bar Association Brief 22 (January 2013).
IV. Public comment - procedure and public record.

Questions: (1) What are the particular legislative rules or laws in your state applicable to the procedures for taking testimony by the legislature, including testimony given in both public and closed meetings? (2) What should legislative witnesses generally know before they testify, including meeting time and place and procedures generally applicable to their witness testimony?

A. For example, in Louisiana La. Const. Art. 3, Sec. 15 states in part - "Action on any matter intended to have the effect of law shall be taken only in open, public meeting."

While it is unresolved whether this sentence is actually limited only to action by the full body of a house, in Louisiana both committee meetings and floor action are generally public meetings that are broadcast live on the Internet and archived by the legislature. The archived broadcasts are available online through the Louisiana Legislature website, www.legis.la.gov

The procedures for committee meetings, including notice and agenda, are provided by legislative rule. See also, La. R.S. 42:18 and 19(B). Meeting notices and agendas are available online at the legislative website, along with the address and parking information for the state capitol. See Section II on potential applicability or non-applicability of "open meetings" laws, and justiciability of claims.

Witnesses should understand prior to their testimony that their comments in a public forum are being recorded and, along with any exhibits they furnish to the committee, will be considered as a public record. In Louisiana, committee witnesses must fill out a witness card prior to testimony and by doing so will be deemed to be testifying under oath.

Where necessary and appropriate, witnesses should also be reminded that a legislative hearing on proposed legislation is not a fact-finding evidentiary and adjudicative inquiry similar to a judicial trial. Only committee members may ask questions and there is no right to cross-examine other witnesses or question the committee members. Time limitations and other reasonable content-neutral restrictions upon witness testimony may be applied as determined necessary by the committee chairman for the orderly conduct of the committee's business. The chairman is also responsible for decorum and the appropriate conduct and language of a witness will be expected and maintained.

Filing of prepared statements are authorized:

*Louisiana Senate Rule 13.79. Filing of prepared statements*

"Any interested person or any committee member may file with a committee a prepared written statement concerning a specific instrument or matter under consideration by the committee or concerning any matter within the committee's scope of authority. The committee records shall
reflect receipt of such statement and the date and time thereof and shall include a copy thereof."

*Louisiana House Rule 14.33. Filing of prepared statements*

"A. Any interested person or any committee member may file with the committee a prepared statement concerning a specific instrument or matter under consideration by the committee or concerning any matter within the committee's scope of authority, and the committee records shall reflect receipt of such statement and the date and time thereof.

B. Any person who files a prepared statement which contains data or statistical information shall include in such prepared statement sufficient information to identify the source of the data or statistical information. For the purposes of this Paragraph, the term "source" shall mean a publication, website, person, or other source from which the data or statistical information contained in the prepared statement was obtained by the person or persons who prepared the statement."

Prepared statements filed with a committee become part of the permanent committee records. Louisiana House Rule 14.48 and Senate Rule 13.95.

**B. Louisiana House of Representatives Rule 14.32. Hearings; Persons to be Heard; Sworn Statement**

"A. At any time a committee holds a public hearing, whether on an instrument or other matter before the committee, opportunity to appear before the committee shall be provided to a representative number of proponents and opponents on each issue which the instrument or matter presents. The author of any instrument on which a hearing is held or his designee, or, if the hearing is not on an instrument, the member offering the motion under discussion, shall be entitled to make opening and closing remarks.

B.(1) Persons desiring to appear before a committee shall notify the committee chairman or the committee secretary no later than the beginning of the meeting. To be certain that an opportunity is afforded all persons who desire to be heard, the chairman shall inquire at the beginning of the hearing on each matter if there are additional persons who wish to be heard other than those who have previously notified the committee. The chairman shall allot the time available for the hearing in an equitable manner among those persons who are to be heard.

(2) Each person appearing before a committee shall be required to identify himself and the group, organization, or company he represents, if any. Before being allowed to testify before the committee, he shall also be required to file with the committee chairman or the committee staff a sworn written statement in the form of a signed witness card affirming that his testimony is true and correct. He
shall then be considered to be under oath while providing such testimony before the committee."

C.  *Louisiana Senate Rule 13.78. Hearings; persons to be heard; sworn statement; authority to compensate*

"A.  When a committee holds a public hearing on an instrument or other matter, opportunity to appear before the committee shall be provided to a representative number of proponents and opponents on each issue which the instrument or matter presents.  The author of an instrument on which a hearing is held, or his designee, or, if the hearing is not on an instrument, the member offering the motion under discussion shall be entitled to make opening and closing remarks.

B.(1)  Persons desiring to appear before a committee shall notify the committee chairman or the committee secretary no later than the beginning of the meeting.  However, to assure that an opportunity is afforded all persons who desire to be heard, the chairman shall inquire at the beginning of the hearing on each matter if there are additional persons who wish to be heard.  The chairman shall allot the time available for the hearing in an equitable manner among those persons who are to be heard.

(2) Each person appearing before a committee shall identify himself and the group, organization, or company he represents, if any.  Before being allowed to testify before the committee, he shall also be required to file with the committee chairman or the committee secretary a sworn written statement in the form of a signed witness card swearing or affirming that his testimony is true and correct.  He shall then be considered to be under oath while providing such testimony before the committee.

C.  Whenever a committee or the president finds it necessary or desirable to invite or request the appearance before a committee of any person to present testimony, the president shall have authority to invite or request such appearance and to determine and approve the expenditure of funds available to the Senate to pay reasonable compensation and expenses of such witnesses."
V. Government employee as witness.

Question: Does your state have particular requirements regarding government employees as legislative witnesses?


"§52. Persons to whom applicable; exceptions

Unless the context clearly indicates otherwise, the provisions of this Part shall apply only to persons who are lobbyists as defined in R.S. 24:51. The provisions of this Part shall not apply to an elected official or any designee of an elected official when such designee is a public employee and when such elected official or public employee is acting in the performance of his or her official public duties."

"§56. Prohibited conduct

*    *    *

F. No state employee in his official capacity or on behalf of his employer shall lobby for or against any matter intended to have the effect of law pending before the legislature or any committee thereof. Nothing herein shall prohibit the dissemination of factual information relative to any such matter or the use of public meeting rooms or meeting facilities available to all citizens to lobby for or against any such matter.

*    *    *

B. Louisiana Department of Civil Service General Circular Number 2012-004 Update - "State Classified Employees' Rights to Address Members of the Legislature"

C. See also, 16 A.L.R. 1358 - Governmental control of actions or speech of public officers or employees in respect of matters outside the actual performance of their duties.

D. Day and Bradford, Civility in Government Meetings: Balancing First Amendment, Reputational Interests, and Efficiency, 10 First Amendment Law Review 57 (2011)-(footnotes omitted):

"First Amendment rights afforded to citizens who speak in public comment sessions do not apply with equal force to government employees. The "recently minted government speech doctrine" imposes another layer of confusion to this already complex area of the law. The Supreme Court explained the government speech doctrine in a recent case involving a city’s right to accept or deny privately donated monuments to be permanently installed in a public park. Beginning with the premise that “[t]he Free Speech Clause . . . does not regulate government speech,” the Court concluded that the government is free to pick and
choose the content and viewpoint of its own message. When the government speaks or when “it enlists private entities to convey its message,” it may “regulate the content of what is or is not expressed.”

This limitation on First Amendment speech rights applies when government employees speak in their official capacity. Articulating its employee-speech doctrine, the Court has consistently held that “when public employees are making statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.” In employee-speech cases, the beginning premise is that the government cannot condition public employment on the relinquishment of constitutionally protected rights of freedom of expression. However, in these cases, the Court has made a distinction between situations in which an employee speaks “as a citizen upon matters of public concern” and when the employee speaks in his or her official capacity. Further, government employees cannot use the First Amendment to “constitutionalize” an employee grievance."
VI. Why is the witness testifying before a legislative committee?

Voluntarily concerning proposed legislation, rule or agency oversight, or an investigatory matter pertinent to the lawmaking function of the legislature and duties of that committee; or

It is part of the job duties of the witness, or the witness was specifically "requested" by the committee, to be present and testify concerning proposed legislation, rule or agency oversight, or an investigatory matter pertinent to the lawmaking function of the legislature and duties of that committee; or

The witness was compelled by legislative subpoena to appear before that committee and testify/produce information on a matter pertinent to the lawmaking function of the legislature and duties of that committee.

Questions:

1. Do the legislative rules or laws of your state differ on witness procedure and treatment depending upon the reason for their appearance, including whether testimony is sworn or unsworn, recordation of testimony, and availability of any state statutory immunity in exchange for legislative testimony?

2. Do the legislative rules or laws of your state differ on witness procedure and treatment depending upon the job function of the witness, such as paid lobbyist or government employee?

3. Do the legislative rules or laws of your state differ on witness procedure and treatment for a witness who voluntarily appears, has been "requested" to appear, or who has been subpoenaed to appear? Under the laws of your state, when a witness has been "requested" orally or in writing by a committee to appear, does that have the same legal effect as being "compelled" to appear by subpoena?

4. If a committee witness testifies concerning proposed legislation, how is such testimony treated by the courts of your state in issues of statutory interpretation and determinations of "legislative intent" (including matters such as the severability or prospective/retroactive application of the legislation)? Can such witness testimony have probative value as part of the "legislative history" or is it rejected as an unreliable indicator of "intent"? If courts are willing to consider such testimony in their determinations, are there any particular duties of committee staff to ensure that such testimony during the committee hearing is "accurate"?
VII. Legislative privilege generally applicable to witness testimony.

A. Mason's Manual:

Sec. 631 -
"Citizen participation in legislative proceedings is vital to ensure a fully informed and representative legislature. When acting in the narrow role of a participant in a legislative committee hearing, a witness is not limited in the scope of testimony offered, that testimony being presented in accord with the rules and practices of the legislature and its committees. Speech to a legislature is privileged, insulating the witness from legal action." (footnotes omitted).

Sec. 800(4) - (legislative investigations)
"4. Witnesses before a legislative body or its committee need not be sworn, unless there is some rule or provision of law or of the constitution requiring it, but give their testimony under the penalty of being adjudged guilty of contempt and punished if they testify falsely." (footnotes omitted).

B. Contempt/Criminal Liability:

Questions: (1) Under the specific language of the laws or legislative rules of your state, is potential liability for contempt of the legislature or for criminal offenses such as perjury or false swearing expressly limited only to a legislative witness who was actually subpoenaed/specifically placed under oath? (2) If your state has a specific statute authorizing civil or criminal immunity in exchange for the testimony of a legislative witness, what is the scope of the immunity? See also, Section XI, infra.

C. Civil Immunity:

(1) David Elder, Defamation: A Lawyer’s Guide § 2:17, Legislative immunity—Witness or testimonial privilege - (footnotes omitted)

"The cases generally accord witnesses participating in legislative proceedings at the federal, state, and local level absolute immunity as to matters having “some relation” to the proceedings. This rule applies to verbal and written statements, sworn and unsworn statements, firsthand, admissible testimony and hearsay, voluntary and compelled appearances, volunteered and responsive statements, and to all legislative proceedings wherever located—even at atypical site hearings. The testimonial rule was even applied to subpoenaed testimony in a public setting republished by the media and to statements contemporaneously disseminated to the legislative audience, including the media, as technical aids in following the witness’s testimony."
The clear consensus view treats this testimonial privilege as “undoubtedly the same” as in judicial proceedings, referencing the policy that “[t]he administration of justice requires the testimony of witnesses to be unrestrained by vexatious litigation,” as it is “essential that the legislature be fully informed in order to enact appropriate legislation.” However, if the purported witness is a voluntarily appearing proponent of a bill who is not questioned by the legislative committee and not treated as a witness, only a qualified privilege is applied. Moreover, a witness, like a legislator, has no absolute privilege where he participates in an interview with the press outside the legislative arena.

A minority view accords witnesses in legislative proceedings only a qualified privilege. For example, in a thoughtful recent opinion, the Wisconsin Supreme Court declined to accord absolutely privileged status to a witness who voluntarily spoke in an open city council meeting where unsworn, unsubpoenaed testimony was given at the speaker’s discretion without even the supervision of questions directed from the council. The court distinguished the “remarkably different” scenarios where legislative witness testimony was subject to “procedural safeguards” which justified absolute immunity and held that “any ‘chilling effect’ upon a citizen’s participation in the legislative process that might result without the exhaustive protection of an absolute privilege cannot outweigh a citizen’s right to redress.” The court found such an absolute immunity “particularly inequitable” where, as in the case before it, the testimony was simultaneously published on television. It further found the liberal relevancy test insufficient as a control. For example, under the latter criterion a meeting to discuss improvement and beautification of the city would privilege imputing to plaintiff operating a pornography business, selling drugs from his or her home, or being a prostitute, sexual predator or pedophile. “Permitting such a result is not only bad public policy but also defies common sense.”

The testimonial privilege applies also to “communications preliminary” to the legislative proceeding having “some relation” thereto.

(2) 53 C.J.S. Libel and Slander: Injurious Falsehood §120 - (footnotes omitted)

"As a general rule, defamatory matter published in the due course of legislative proceedings is absolutely privileged. The rule is broad and comprehensive, including proceedings in all legislative bodies, whether federal, state, or local or subordinate legislative and quasi-legislative bodies. With respect to the latter bodies, the rule applies where the defamatory publications or statements are made relating to matters within the scope of the particular body’s authority. Remarks made outside of the legislative process are entitled to qualified or conditional immunity only.

The nonliability of a member of a legislative body for defamation for words
published in the discharge of his or her official duties exists without regard to motive or reasonableness of conduct, and even though such publication is made maliciously. That is, the privilege for communications made in any legislative proceeding is absolute and remains privileged whether made with or without malice. However, if the communication is not pertinent to the occasion it is not within the privilege.

The privilege of a witness appearing before a committee of the legislature in a matter within the jurisdiction of the committee is the same as that of a witness in judicial proceedings. A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he or she is testifying, or in communications preliminary to the proceeding, if the matter has some relation to the proceeding. Thus, a statement made by a witness in such an examination which is pertinent to the questions and the subject of the examination is absolutely privileged. On the other hand, under some authorities, a communication made by a citizen voluntarily appearing before a legislative body is not absolutely privileged, but it is qualifiedly privileged if made in good faith and without malice."

(3) 50 Am. Jur. 2d Libel and Slander §278, Testimony before legislative bodies or committees thereof - (footnotes omitted)

"A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he or she is testifying or in communications preliminary to the proceeding. The purpose of granting absolute immunity from liability for a privileged publication or communication made in a legislative proceeding is to keep the paths leading to the ascertainment of truth as free and unobstructed as possible. Moreover, the absolute privilege for defamatory statements in legislative proceedings ensures that the decision makers will be more fully informed to enact suitable legislation. Thus, a citizen, who, while an audience member at a televised meeting of the village board of trustees, alleged that a trustee had accepted bribes, is deemed a witness testifying at a legislative proceeding, as would support application of the absolute privilege for defamatory statements, even though the citizen was not subpoenaed to appear at the meeting and did not testify under oath, and the statement was not in response to direct questions from the board, where the meeting was open to the public, and the trustees accepted and invited testimony from the audience.

However, defamatory statements made in legislative proceedings must be pertinent or relevant in order to qualify for absolute privilege. This requirement is not strictly applied and must be broadly interpreted, and all doubts should be resolved in favor of a finding of pertinency. This requirement limits the application of the absolute privilege and counters the potential for abuse. Indeed, defamatory statements in legislative proceedings that have no relation to the issues under discussion will not receive the benefit of the absolute privilege, in effect protecting the allegedly defamed individuals.
Although there is authority to the contrary, the absolute privilege for defamatory statements made in legislative proceedings attaches regardless of whether the material is solicited or subpoenaed. Moreover, a witness does not have to be under oath in order to qualify for the absolute privilege for defamatory statements made in legislative proceedings."

(4) *Adserv Corporation v. Lincecum*, 385 So.3d 432 (La. App. 1 Cir. 1980) -

"Corporation which managed state employees' group insurance filed suit for defamation against witness who [voluntarily] testified before legislative committee for statements concerning corporation's management of insurance program." HELD: "petition alleging that statements about corporation made by witness appearing before legislative committee were made with knowledge of their falsity or with requisite disregard for truth of same for political reasons and were made by such person with actual malice stated cause of action for libel and slander".

The First Circuit Court of Appeal stated in part: "Louisiana recognizes that judicial allegations are not libelous and actionable unless shown to have been false, maliciously made, and uttered without probable cause. Thus only a qualified privilege is afforded... The same qualified privilege is afforded a witness in a judicial proceeding. We conclude that the same qualified privilege must be afforded a witness appearing before a legislative committee, as long as the statements were made without malice, that is, without knowledge that they were false, or without reckless disregard of whether they were false or not, and that they be material and relevant to the inquiry....The petition alleges that the statements made by defendant were made “with knowledge of their falsity or with reckless disregard for the truth of same for political reasons” and were made by defendant with actual malice. Since these allegations, if proved, would defeat the qualified privilege, the trial judge was in error in sustaining the exception of no cause of action." (citations omitted)

(Note: There was no discussion of legislative "speech or debate" privilege or absolute privilege for testimony in legislative proceedings as applied by cases elsewhere.)
VIII. Subpoenas to compel testimony and production of documents in legislative proceedings, and punishment for contempt.

A. As previously discussed, the power of a legislature in performing its constitutional functions to issue a subpoena and subpoena duces tecum and to punish for contempt is inherent and usually also express, and is broad but not unlimited. Legislative subpoenas may be subject to attack as being overbroad or seeking information protected from disclosure, or being invalid as arising from an unauthorized legislative purpose. Separation of powers issues, including justiciability of claims, may arise when courts are asked to review actions of a legislature undertaken in furtherance of its inherent powers of investigation prior to a finding of contempt. See the following.


"Although the Supreme Court continues to refer to inherent limits in the power of Congress to investigate when they lack a valid legislative purpose, in practice, limits on congressional investigations are more likely to be successful when based upon specific constitutional prohibitions or guarantees. As a result, the Bill of Rights becomes the primary source for limiting investigations into private beliefs, associations, or activities. The First Amendment to the Constitution puts limits upon all powers of Congress including its implied power of investigation. The Supreme Court Justices have noted, “The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking,” adding, “The Bill of Rights is applicable to investigations as to all forms of governmental action.” Protection of basic liberties extends with similar force to either federal or state legislative investigations. In the latter context, the Justices noted, “Investigation is a part of lawmaking and the First Amendment, as well as the Fifth, stands as a barrier to state intrusion of privacy.”.................In addition to First Amendment concerns, the Fourth Amendment ban upon unreasonable searches and seizures, and the Fifth Amendment Due Process Clause and privilege against self-incrimination also limit the investigative power of Congress. A subpoena used by congressional investigators will run afoul of the Fourth Amendment when it is so broad as to constitute an unreasonable search and seizure. Whether a subpoena is too broad will depend in part upon the purpose and scope of the inquiry. In the past, the Supreme Court has sustained broad subpoenas as not violative of the prohibition against unreasonable searches and seizures.............The Due Process Clause of the Fifth Amendment requires that before any witness under congressional investigation can be punished for failure to cooperate, the pertinency of the interrogation to the topic under the congressional
committee’s inquiry must be brought home to the witness at the time the questions are presented........Even when a legislative committee acts within bounds, the form of questions asked and the rulings on objections to them may be so obtuse as to make it violative of due process of law for courts to punish a refusal to answer........Persons before congressional committees who claim the Fifth Amendment need not testify if their answers will incriminate them before either the federal or state government........Congress has the power to grant immunity from prosecution and then to compel testimony of reluctant witnesses. If a witness is granted use immunity, then in any subsequent criminal prosecution, the prosecutor will have the burden of proving affirmatively that evidence proposed to be used was “derived from a legitimate source wholly independent of the compelled testimony.” That requirement applies not only to subsequent testimony of the accused but also to questions about the testimony and circumstances of witnesses who were exposed to the defendant’s immunized testimony." (footnotes omitted)

C. 91 C.J.S. United States §39 (Excerpt - footnotes omitted):

"It is a misdemeanor, punishable by fine and imprisonment, for a person summoned as a witness by the authority of either house of Congress to give testimony or to produce papers on any matter under inquiry before either house of Congress or any committee of Congress to willfully make a default. It is also a misdemeanor for any person who has appeared to refuse to answer any question pertinent to the question under inquiry. Thus, a witness who willfully refuses to answer proper questions by a congressional committee is guilty of contempt. Likewise, the refusal of a witness to give any testimony whatever pertinent to the question under inquiry constitutes contempt. In order to be liable, however, a witness must be asked a question and must refuse to answer. A committee cannot, however, multiply the offense of a witness who has refused to give any testimony by continuing to ask him or her numerous questions after he or she has refused to answer any questions at all.

Default, pursuant to such provisions, is a failure to comply with the summons. Default occurs where a person properly summoned fails and refuses to produce papers and documents requested. It also occurs when a person fails or refuses to appear. Failure to attend, following an appearance, also constitutes default. Appearance before a committee is not an essential element of the offense. Neither is it necessary that a refusal to testify or produce papers before a committee be in the presence of a quorum.
An intentional failure to testify or produce papers, however the refusal or intentional omission is manifested, is contemplated. It is unimportant whether the subpoenaed person proclaims his or her refusal to respond before the full committee, sends a telegram to the chair of the committee, or simply stays away from the hearing on the return day. The violation must, in fact, be intentional. The offense of contempt for refusal to answer is a deliberate and intentional refusal and not an inadvertence, an accident, or a misunderstanding.

"Willful," as used in such provision, does not mean that the failure or refusal to comply with the order of the committee must necessarily be for an evil or a bad purpose but only that the failure or refusal was deliberate and intentional and not a mere inadvertence or accident. Specific criminal intent need not be shown. Further, willfulness is not an element of the offense. The offense may be committed where the witness voluntarily appears, as well as where he or she is required to attend. Accordingly, where a witness appears before a committee but refuses to be sworn or to testify, whether the subpoena was lawfully issued or served is immaterial. Where a witness refuses to answer, a specific direction to answer must be given, and objections by the witness must be specifically overruled.

The refusal of a person to comply with a committee subpoena which exceeds the authority delegated to the committee by Congress does not constitute an offense. Nor does the refusal to answer a question constitute an offense where the witness properly invokes the privilege against self-incrimination. A failure to produce records before a congressional committee in compliance with a subpoena is not an offense unless the witness is responsible for their unavailability. A failure of a witness to answer a question abandoned by the committee is not an offense.

Pertinency.

Pertinency is an element of the statutory offense of refusing to answer any question pertinent to the question under inquiry. It is also an element of the statutory offense of refusing to produce papers and documents.

Time offense occurs.

Subject to the qualification that a default does not mature until the return date of the subpoena, whatever the previous manifestation of intent to default, the offense matures only when the witness is called to appear to answer questions or produce documents and willfully fails to do so."

Sec. 801(4) - (6) (footnotes omitted):

"4. Witnesses cannot be punished for contempt before a legislature unless the matters inquired into are within the jurisdiction of the legislature. A witness before a court or any other inquisitorial body who is otherwise orderly and respectful cannot be adjudged guilty of contempt committed in the presence of such tribunal for the witness' failure or refusal to answer any question or to produce any record, book or paper, unless the order so adjudging the witness guilty of contempt contains an express recital of the facts, affirmatively showing not only the precise question that the witness has declined to answer, or the precisely specified books or papers that the person has refused to produce, but also affirmatively setting forth the facts that show the materiality and pertinency of each of these forms of evidence to the issue before the court or tribunal.

5. In order to authorize a conviction under a statute making it a misdemeanor for a witness in an investigation before a legislative committee to refuse to produce documents in the witness' possession, it must appear that the documents demanded are material to the inquiry.

6. The right to compel a witness to produce books and papers before a legislative committee is determined by whether their production is necessary to the inquiry that it is conducting. The production of papers material to an inquiry cannot be refused merely because they are private."

Sec. 802(4) and (5) (footnotes omitted):

"4. When a subpoena duces tecum has been issued under statutory authority, showing that the purpose of the examination was within the scope of the inquiry authorized, the court cannot cancel the subpoena nor enjoin the issuance of any further subpoena.

5. When a witness lawfully summoned refuses to appear, a warrant may be issued to compel the witness' attendance."

E. Louisiana law and cases:

(1) La. Const. Art. 3, Sec. 7(B) - "(B) Subpoena Power; Contempt. Each house may compel the attendance and testimony of witnesses and the production of books and papers before it, before any committee thereof, or before joint committees of the houses and may punish those in willful disobedience of its orders for contempt."
Specific state statutes on legislative duties and powers - See, for example, La. R.S. 24:511, et seq. - statutes governing duties and powers of Legislative Auditor and Legislative Audit Advisory Council, including subpoena and contempt powers; La. R.S. 24:651, et seq. - statutes governing duties and powers of Joint Legislative Committee on the Budget. La. R.S. 24:2-6 (legislative investigations, subpoena power, and contempt.); La. R.S. 24:14 (Senate confirmations); La. R.S. 49:950, et seq, Administrative Procedure Act and oversight duties of legislature concerning proposed rules.

Louisiana Senate Rule 13.15. Standing committees; subpoena power, punishment for contempt

"Each standing committee established by Rule 13.1 and each joint committee established pursuant to the authority granted in Rule 13.12, and any subcommittee of either, is hereby specifically and expressly granted the power and authority, with the written approval of the President, to hold hearings, subpoena witnesses, administer oaths, require the production of books and records, and to do all other things necessary to accomplish the purposes of the study, hearing, or investigation assigned to it by the Senate or by the Legislature or by a majority of the members of the committee. However, if a study or investigation is undertaken during the interim between sessions, a subpoena or a subpoena duces tecum shall issue only upon the approval of a majority of all the members of the standing committee and of the President and upon the rendition of a special order of the Nineteenth Judicial District Court or of any other judicial district court, subject to general rules of venue, authorizing the committee to issue the subpoena or subpoena duces tecum, in which order the court may prescribe such requirements and conditions as it may consider just and reasonable. In the event a subpoena or subpoena duces tecum is not honored, the standing committee or joint committee also shall have the power to punish for contempt and to provide for the prosecution of any individual for refusal to testify, false swearing, or perjury before the committee or subcommittee in accordance with law."

Louisiana House Rule 14.51. Standing committees; subpoena power, punishment for contempt

"Each standing committee established by House Rule 6.1, each joint committee established pursuant to the authority granted in House Rule 14.16, and any subcommittee of such standing or joint committee is hereby specifically and expressly granted the power and authority to hold hearings, subpoena witnesses, administer oaths, require the production of books and
records, and to do all other things necessary to accomplish the purposes of the study or investigation assigned to it by the House or by the legislature or by a majority of the members of the committee. However, a subpoena or a subpoena duces tecum shall be issued only upon the approval of the Speaker upon the request of the chairman of the committee or upon the request of a majority of the members of the standing committee. The chairman of the committee or a majority of the members of the committee, as the case may be, shall submit sufficient information to the Speaker to justify the issuance of the subpoena or subpoena duces tecum which shall include a description in general terms of the proceeding for which the issuance of the subpoena is sought; in the case of process to secure the attendance and testimony of a witness, the reasons for believing that the testimony of the witness is relevant to the proceeding; in the case of process to secure the production of books or records, the reasons for believing such materials are relevant to the proceeding; in either such instance a subpoena is sought, the reasons why a subpoena is necessary to obtain such attendance, testimony, or materials; and any other information the Speaker deems necessary. In the event a subpoena or subpoena duces tecum is not honored, such committees shall have the power to punish for contempt. In addition, such committees shall have the power to provide for the prosecution of any individual for refusal to testify, false swearing, or perjury before the committee in accordance with the laws of this state."

La. R.S. 24:2-6  (all date from the 1960s)

"§2. Investigations by legislature; authority to compel attendance of persons and production of papers

Either house may send for persons and papers, and compel their attendance or production whenever necessary in the investigation of any matter before them. The chairman or acting chairman of any committee of the senate or house of representatives, or of any joint committee composed of members from both, may administer the oath to any witness who may be called before them to testify in relation to any subject referred to them for their consideration.

§3. Compensation of witnesses

Witnesses summoned to testify before the senate or the house of representatives, or before any of the several committees thereof, shall receive two dollars per day while in attendance, and ten cents per mile travelled in going to and returning from the place of appearance.
§4. Contempt of the legislature; penalties

A. Whenever the legislature or either house of the legislature, or whenever any committee of either house or any joint committee of both houses or any sub-committee of any such committee, which committee, joint committee or sub-committee has been specifically and expressly granted the subpoena power, has summoned any person as a witness to give testimony or to produce papers or other evidence upon any matter under inquiry before such house, committee, joint committee or sub-committee, such person shall be guilty of contempt of the legislature if he or she

1) willfully defaults by failing to appear or to produce papers or other evidence, as ordered, or

2) having appeared, refuses to take the oath or affirmation of a witness, or

3) having appeared, refuses to answer any question pertinent to the question under inquiry.

B. Whoever is found guilty of contempt of the legislature under the provisions of this section shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than six months, or both.

C. The provisions of R.S. 24:4 through R.S. 24:6 are hereby declared to be supplemental to the powers of the legislature and of the senate and of the house of representatives to punish for contempt, and the legislature hereby reserves to itself and to the senate and to the house of representatives all inherent and all constitutional powers to punish for contempt.

§5. Certification of facts of contempt; prosecution

Whenever a statement of facts alleged to constitute contempt under R.S. 24:4 is reported to either house of the legislature while the legislature is in session, or whenever, while the legislature is not in session, such statement is reported to and filed with the president of the senate or the speaker of the house of representatives, said president or speaker, as the case may be, shall certify the statement to the district attorney of a district where venue lies, as provided in the general laws governing venue or as provided by R.S. 24:6 in the case of offenses defined in R.S. 24:4(A), and the district attorney shall institute and prosecute a criminal proceeding against the accused for contempt of the legislature under the provisions of R.S. 24:4.
§6. Contempt prosecution; venue

Any other provisions of law to the contrary notwithstanding, any offense defined by the provisions of R.S. 24:4(A) shall be deemed to have been committed (1) in the parish where the subpoena issued, (2) in the parish where the offender was served with the subpoena or (3) in the parish where the subpoena ordered the offender to give testimony or to produce papers or other evidence, and the trial of the offender for such offense may take place in any of such parishes."

(2) Joint Legislative Committee v. Fuselier, 174 So.2d 817 (La. App. 1 Cir. 1965), rehearing denied, writ denied, 247 La. 723, 174 So.2d 133 (1965) -

(a) from summary - "documents and records in possession of district attorney which had been used by a grand jury as part of an investigation and which had been developed and acquired in a prior investigation conducted by the state board of education and which had subsequently been delivered to the attorney general, whether considered public or private records, were documents and records which the joint legislative committee of the legislature was entitled to use in conducting an investigation."

(b) "until it is affirmatively shown otherwise, this court presumes that the object of the investigation is of a matter about which prospective legislation could be contemplated. We will not pass on the merits of the wisdom of the investigation." (page 820).

(c) "We are of the opinion that the Committee under the facts in this case is entitled to have the defendant in rule produce these records to be used in the investigation by the Committee under the writ of subpoena duces tecum.

These records are not such private records as were considered in the Hewitt v. Webster case, which evidently was nothing more nor less than an attempt by private citizens to obtain the names of witnesses who appeared before the grand jury to testify in its investigation of matters before it. In that case the court properly remarked that the plaintiffs therein had no particular or special interest or right to inspect and peruse the records sought which were of a private nature. This is not true in the case at bar. Here we have a legally constituted legislative committee charged with the duty, and invested with the right, to investigate the matter which was the subject of an investigation by the Board of Education and which
resulted in the compilation of the documents herein sought under
the subpoena duces tecum.

We are therefore of the opinion that regardless of whether the
documents sought under the subpoena duces tecum in this case are
branded public or private the committee herein is factually and
legally entitled to the relief sought: namely, the production of the
documents by the defendant in rule in compliance with the
subpoena duces tecum.

As we appreciate it, the materials sought by the Committee of the
defendant are books, records, documents, etc., produced, developed
and acquired in a prior investigation conducted by another agency of
the State, namely, the State Board of Education. These records merit
no veil of secrecy as would evidence produced, obtained, developed
or testified to before a grand jury. These materials assume no
privileged status by reason of having been considered by the Grand
Jury of Evangeline Parish, if, in fact, such is the case. This material
was considered by the agency that first conducted an investigation,
was later in the hands of the Attorney General and then delivered to
the defendant. Any number of individuals controlled and had
possession of it prior to the defendant obtaining it from the Attorney
General. There is no conceivable legal reason why this Committee
of the Legislature should be deprived of free access to these
materials.” (pages 823-824).

(3) Asp, Inc. v. Capital Bank & Trust Company, 174 So.2d 809 (La. App. 1 Cir. 1965),
writ denied, 247 La. 724, 174 So.2d 133 (La. 1965). Other actions by the same
legislative investigatory committee involved in Fuselier above were upheld in this
case. Two witnesses subpoenaed by committee refused to answer questions on the
grounds that such questions were outside of the scope of the committee's inquiry. A
summary proceeding was filed against each defendant in the 19th Judicial District
Court, ordering each to show cause why he should not be found guilty of contempt
of the legislature. Separately, a subpoena duces tecum issued by the committee to a
company for bank records was challenged on the grounds it was too broad. All of
these issues were consolidated on appeal to the First Circuit Court of Appeal. The
First Circuit upheld the committee's actions, stating in part:

(a) "We believe the following basic principles of our form of
government should be noted and kept in mind in consideration of
this matter. Our constitution provides in Article II, Section 1,
LSA—"The powers of the government of the State of Louisiana
shall be divided into three distinct departments—legislative, executive, and judicial.’ And, Section 2 provides: ‘No one of these departments, nor any person or collection of persons holding office in one of them, shall exercise power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.’

It is universally recognized that with the power to legislate there is inherent in the Legislature the power to conduct investigations, and that these investigations should be conducted solely as an aid to its consideration and determination of prospective legislation. The right of inquiry and investigation may be exercised by it as a body of the whole legislature, or the Legislature may delegate its investigative powers to a committee of less than the whole of the Legislature.

In furtherance of the Legislature's right to investigate, the Legislature, or a committee designed by it, has the unquestionable right to require the attendance of anyone from whom it desires to obtain pertinent information. This right is exercised through the power of the subpoena and the subpoena duces tecum.

In the exercise of the power of subpoena and subpoena duces tecum, the Legislature would be helpless and ineffective to command compliance with its order unless it has the power to punish for contempt or a method of instituting contempt proceedings. Equally inherent, then, with the power of subpoena is the power of the Legislature to punish for contempt.” (footnotes omitted, pages 813-814).

(b) "The power of the Legislature to punish for contempt was not in any way or manner impaired, delimited or restricted by the enactment of LSA-R.S. 24:4—6. Any person who is in contempt of the legislature may be punished by the House or Senate, which ever one the contempt was committed against, and the same act will give rise to a prosecution under the provisions of LSA-R.S. 24:4—6. The one act may be a statutory offense under the penal clause of the statute and also a violation of the inherent authority of the Legislature." (footnotes omitted, page 815).

c) "The Fourth Amendment to the U.S. Constitution guarantees against unreasonable searches and seizures, and this safeguard of the rights of individuals finds application to subpoenas issued by legislative
investigating committees as it does to judicial or extra-judicial proceedings. However, we must recognize the limitation of the judiciary to interfere in legislative investigations. The committee system of inquiry, in order to maintain a separation of powers, remain pretty much on its own. The propriety of investigations has long been recognized and infrequently curbed by the courts. The only excuse or pretense which a court has for interfering with an investigation of any subject that properly addresses itself to the legislative function of the legislature is to safeguard the constitutional rights of individuals who are summoned before a legislative committee to give testimony or to bare personal and private records that have no appropriateness to the scope of the inquiry.

There is no evidence before the court on which we can ground a determination that the subpoena duces tecum was too broad, or that the private papers and documents were not pertinent to the subject of inquiry. Whether these papers and documents are private, personal records is not the true test, but rather whether these records are within the scope of the inquiry and investigation; it is that quality of the records that determines the reasonableness of the subpoena." (footnotes omitted, page 816).

(4) Joint Legislative Committee of Legislature v. Strain, 263 La. 488, 268 So.2d 629 (1972). Louisiana Supreme Court upheld a trial court's finding of contempt against a member of the Legislature for failing to respond to a subpoena issued by a joint legislative committee, stating in part:

(a) "Nor is it a violation of the principle of separation of powers expressed in Article II, Section 1, of the Constitution for the legislature to authorize the trial of contempt of the legislature in the courts of law. This is not a delegation of legislative power. It is more properly a provision for asserting legislative power by imposing the implementing authority upon the judiciary. It is no more an improper delegation of legislative power than it is to require by legislation the trial in the courts of crimes against the State." (pages 506-507).

(b) "While Section 1 of Title 24 of the Revised Statutes stays civil proceedings against members of the legislature ‘during their attendance at the sessions of their respective houses,’ it grants no such exemption from subpoena or attendance at a duly constituted
"We fail to see how an order to testify before the committee concerning statements Strain made publicly imputing improper influences to government officials is an impairment of freedom of expression. This subpoena was not the result of an indiscriminate dragnet procedure. Strain, by his public statements, furnished probable cause for the committee to believe that he possessed information which was pertinent to the purposes of the investigation for which the committee was created.

Often those who are possessed of the most vital information relating to investigations preliminary to legislation are not always willing to testify. For this reason, most states, including Louisiana, have enacted statutes investing legislative committees with subpoena and contempt powers. These statutes are necessary to effectuate the investigative power and they are within expressed constitutional authority. La.Const. art. 5 s 17; La.R.S. 24:2-6.

It is unquestionably the duty of citizens, especially public officials, to cooperate in a legislative investigation into organized crime and improper influencing of government officials. In fulfilling this duty it is their unremitting obligation to respond to subpoenas, to promote, uphold and respect the dignity of the legislature and its committees and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the legislature as they are in courts of justice. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure, nor can First Amendment freedoms of speech be abridged. Cf. Watkins v. United States, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957)." (pages 512-513).

House of Representatives v. Bernard, 373 So.2d 188 (La. 1979). Louisiana Supreme Court upheld contempt adjudication proceeding by House of Representatives against a commissioner and deputy commissioner of insurance. Appearing before a House subcommittee on insurance regulations in response to a legislative subpoena, the men interrupted the subcommittee proceedings by insisting upon a reading a statement, then refused to stay and left the committee room. In doing so, they ignored warnings given at that time from the subcommittee that their actions subjected them to contempt proceedings, and that by leaving they were waiving any opportunity to present defenses.
After they left, the subcommittee voted to find the men in contempt and fined them $500 each. Thereafter the full committee met and ratified the actions of its subcommittee.

A resolution was then introduced affirming the contempt action and referred to House and Governmental Affairs for hearing. At that committee hearing, the defendants appeared through counsel and opposed passage of the resolution. The committee voted to favorably report the resolution to the full House, where it was subsequently adopted.

The resolution included language authorizing the Clerk of the House to seek civil proceedings to collect the fines. The defendants refused to pay. The Clerk then filed a summary civil proceeding in the Nineteenth Judicial District Court seeking judicial recognition and execution of the contempt adjudication. At the rule to show cause, the trial court entered a judgment making the fines imposed executory.

Judgment of the trial court affirmed on writs to the Louisiana Supreme Court. The Louisiana Supreme Court stated in part:

(a) "While no party seriously challenges the inherent and constitutional powers of the legislature to punish for contempt, we feel it necessary to set forth those powers briefly. The First Circuit Court of Appeal, in ASP, Incorporated v. Capital Bank & Trust Company, 174 So.2d 809 (La.App. 1st Cir. 1965), accurately outlined the parameters of legislative contempt power:

...........................................................

The power of the legislature to punish for contempt without reliance on the executive or judicial branches of government is of great importance to the maintenance of the legislature as a coordinate branch of government. See Comment, Constitutional Law Due Process Power of a Legislature to Punish for Contempt, 40 Wis.L.Rev. 268, 278 (1971).

We hold, therefore, that the House of Representatives is constitutionally empowered to charge, adjudicate and punish the defendants for contempt of its lawful authority without regard to the other two branches of government, provided, of course, that in doing so it does not violate any constitutional rights of the defendants." (footnotes omitted, pages 191-192).

(b) "Our opinion in Strain cannot be interpreted to mean that the House of Representatives or the Senate must resort to the judiciary to have
legislative contempt charges adjudicated. As noted in the discussion above, either house of our legislature is constitutionally empowered to adjudicate and punish persons in contempt of its lawful authority, nor can Strain be read to hold, as defendants suggest, that one body of the legislature cannot punish for contempt without the approval of the other.

Most important, *Strain*, supra, is not authority for the proposition that the legislature cannot use the courts of this state to execute fines imposed against defendants found guilty of contempt by a legislative body. To the contrary, since a contempt adjudication by the House or Senate is no more than a judgment rendered by a co-equal branch of government pursuant to express constitutional authority, we see no reason why the adjudicating body would be less entitled to enforce that judgment in the courts of our state than a party who seeks to have a judgment in one district enforced in another, or a person who seeks to have a foreign judgment enforced within this state." (page 193).

(c) "To summarize, we find that either the Senate or the House is entitled to seek to enforce contempt adjudications made by those bodies in the civil courts of this state. Such an action is civil, not criminal, since it is one to enforce a prior adjudication analogous to a judgment rendered by a court of proper jurisdiction in this state. Since the proceeding is one to enforce a prior adjudication by a co-equal branch of government operating under express constitutional authority, no trial De novo is warranted. However, a defendant is entitled to raise any constitutional defenses, such as denial of due process, in order to block enforcement of the adjudication. Because the action to enforce a judgment is a civil action, the litigants would have the right to appeal the result to the intermediate court." (footnote omitted, page 194).

(d) "Defendants claim the procedure adopted by the Subcommittee denied them due process. We disagree. The United States Supreme Court in *Groppi v. Leslie*, 404 U.S. 496, 92 S.Ct. 582, 30 L.Ed.2d 632 (1972), examined the question of what procedures are required by the due process clause when a state legislature seeks to impose punishment for contemptuous conduct committed in its presence (direct contempt). The Court observed:

". . . Courts must be sensitive to the nature of a legislative contempt
proceeding and the ‘possible burden on that proceeding’ that a given procedure might entail. (Citation omitted) Legislatures are not constituted to conduct full-scale trials or quasi-judicial proceedings and we should not demand that they do so although they possess inherent power to protect their own processes and existence by way of contempt proceedings.” (92 S.Ct. at 585)

In Groppi, the Court reversed a finding of contempt on due process grounds, holding the defendant had not been given ample notice and opportunity to be heard where the Wisconsin Assembly, without notice, found defendant guilty of contempt two days after the act in question was alleged to have occurred. The Court indicated, however, that immediate adjudication of direct contempt might not create the same due process problems:

“The potential for disrupting or immobilizing the vital legislative processes of State and Federal Governments that would flow from a rule requiring a full-blown legislative ‘trial’ prior to the imposition of punishment for contempt of the legislature is a factor entitled to very great weight; this is particularly true where the contemptuous conduct, as here, is committed directly in the presence of the legislative body. The past decisions of this Court strongly indicate that the panoply of procedural rights that are accorded a defendant in a criminal trial has never been thought necessary in legislative contempt proceedings. The customary practice in Congress has been to provide the contemnor with an opportunity to appear before the bar of the House, or before a committee, and give answer to the misconduct charged against him. (Citations omitted) . . .” (92 S.Ct. at 585).

We believe our legislature, no less than our courts, must possess the power to act “immediately” and “instantly” to quell disorders in the chamber or committee room if it is to be able to maintain its authority and continue with the proper dispatch of its business. For these reasons, we hold the legislative contempt power includes the power to punish summarily those persons guilty of contempt of the legislature committed in its immediate presence.

There is no question that the conduct which formed the basis for both charges was committed in the immediate presence of the Subcommittee. Also, the Subcommittee immediately took up the question of whether to hold the defendants in contempt. Prior to
their leaving the committee room, both defendants were advised that by leaving they were waiving any right to present any defenses or evidence in mitigation which they might have had. Bernard and Britson could not defeat the power of the Subcommittee from acting on the defendants' contumacious conduct by voluntarily absenting themselves from the hearing room. Cf. Ex Parte Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888).

The defendants were also afforded a further opportunity to present any defenses or evidence in mitigation at a hearing before the Committee on House and Governmental Affairs. Bernard and Britson elected to appear through counsel who also filed briefs in opposition to the proposed ratification by the committee of the Subcommittee adjudication.

We find that the Subcommittee's holding a summary proceeding to determine whether or not defendants should be found in contempt of the legislature for acts committed in the immediate presence of the committee, which proceedings was held immediately following the conduct in question, did not violate the defendants' rights to due process. We, therefore, affirm the trial court's judgment making the fines imposed by the subcommittee executory." (pages 194-195).

F. Brodsky v. Zagata, 235 A.D.2d 764 (1997) - New York. "Chairman of State Assembly Committee on Environmental Protection moved to compel Commissioner of Department of Environmental Conservation to comply with subpoena duces tecum. The Supreme Court, Albany County, Keegan, J., granted motion, and Commissioner appealed. The Supreme Court, Appellate Division, Yesawich, J., held that: (1) Commissioner’s compliance with subpoena mooted his appeal, but (2) trial court did not err in refusing to dismiss matter as moot. Dismissed."

"Concerned that consent orders entered into by the Department of Environmental Conservation (hereinafter DEC) were negotiated with little or no public participation, petitioner Richard Brodsky (hereinafter petitioner) initiated a legislative inquiry to ascertain whether legislation restricting such consent orders should be enacted. As part of the investigation, petitioner subpoenaed certain documents from DEC relating to two particular consent orders. The subpoena also required respondent’s presence at a hearing on January 18, 1996. The day prior to the hearing, some of the requested documents were displayed at a press conference. Respondent did appear and testify at the hearing, but did not bring the requested documents, instead offering to make them available for inspection by petitioner’s staff. Petitioner recessed the hearing but reserved his rights to enforce the
subpoena. On January 22, 1996, respondent offered to provide petitioner with copies of the documents sought, with the exception of those assertedly containing trade secrets or other confidential material. In response, petitioners commenced this proceeding to compel respondent to comply with the subpoena. Supreme Court directed respondent to deliver to the court all the subpoenaed documents that had not been displayed publicly, along with the lists of the requested documents respondent had compiled. After doing so, respondent cross-moved to quash the subpoena.

At oral argument on the motions, respondent contended that the issues of confidentiality and trade secrets involving a handful of the documents were the only matters still unresolved, the rest having become moot because of his offers to make the remaining documents available for inspection and copying, or to provide copies of those items that petitioner would select from a list. Prior to rendering its decision, Supreme Court was informed that the parties had reached an agreement with respect to the documents purportedly containing trade secrets and the names of informants. While Supreme Court noted that fact, it nevertheless found that insofar as the other documents were concerned, respondent’s actions did not constitute “substantial compliance” with the subpoena, as he maintained, and accordingly refused to dismiss the matter as moot. In its decision and order dated February 15, 1996, the court directed respondent to produce the remaining documents, and this appeal followed.

Then, by letter dated February 21, 1996, respondent informed Supreme Court that the documents at issue had indeed been delivered voluntarily on February 15, 1996, the same day the court had issued its order, and asked that this delivery “be deemed to constitute compliance with the court’s order and the subpoena”. A week later, respondent’s counsel also certified that the documents had been furnished, although that certification stated the last date of delivery as February 22, 1996.

Because respondent has now fully complied with the subpoena, his rights can no longer be affected by a decision on appeal, and this appeal is moot."

G. Kalkstein v. DiNapoli, 170 Misc.2d 165 (1996) - "Representatives of two corporations created to serve as management entities for inaugural events and transition period for newly elected governor filed petition to quash subpoenas served by state legislative committees that demanded production of all records of corporations. The Supreme Court, Albany County, Harris, J., held that to extent subpoena demanded documents other than names of contributors, respective amounts contributed, and where, to whom, and for what such contributions were spent, subpoena was overbroad. So ordered."

"The instant case involves the perpetual clash between the legislative process, the constitutional rights of free speech, association and privacy of individuals, and the
power of the judiciary as the arbiter between the two." (Pages 165-166)

"Receiving no voluntary response to a request for production of books and records, on February 27, 1996, subpoenas served upon petitioners by respondents (three chairmen of standing committees of the New York State Assembly), returnable March 20, 1996, requiring the production of all of the records of the two corporations (indeed, seemingly every scrap of paper), and other oral testimony. In their subpoenas respondents, pursuant to the mandate of Sec. 73(2) of the Civil Rights Law, set forth a copy of Sec. 73(2) and a “general statement of the subject of the investigation.”

The “General Statement of the Subject of the Inquiry and Investigation” as set forth in the subpoenas recites:

“This is to advise you, pursuant to Section 73(2) of the Civil Rights Law, that the subjects of the inquiry and investigation being conducted by the New York State Assembly Committees on Governmental Operations, Election Law and Oversight, Analysis and Investigation are: the activities of New York Inaugural ‘95 Inc., and New York Transition ‘95 Inc. and whether existing election, ethics and related laws and regulations relating to the activities of corporations such as these are adequate to protect the public interest.’

Although Sec. 73(2) calls for a “general” statement of the subject of the investigation, considering the nature of this case, in which there is no evidence of the violation of any current law, but the contrary, the statement of the subject of the inquiry in the instant subpoenas is as skimpy as one can get without being in essence no statement at all. If such a statement is sufficient here, no corporation or individual would be immune from the whim of a legislative committee, thus destroying the rights of association and of privacy guaranteed by the United States Constitution and the Constitution of the State of New York. Such a skimpy statement, if sufficient, does nothing to curb the excesses of governmental subpoenas for which sec. 73(2) of the Civil Rights Law was enacted in 1954." (pages 167-168).

“It has been repeatedly stated that a witness subject to a “non-judicial” subpoena duces tecum may always challenge the subpoena in court on the ground it calls for irrelevant or immaterial documents or subjects the witness to harassment [citations omitted]. And the public official seeking court enforcement of the nonjudicial subpoena must show the records bear a reasonable relation to the subject matter under investigation and the public purpose to be served. (Page 171, citations omitted).
"A consideration in the instant case not present in the above-cited cases is that involved herein are the prerogatives of the Legislature and legislative committees to investigate not for the uncovering of wrongdoing respecting current law but for the purpose of determining the necessity for new laws. This is a consideration of a higher order than those involving mere executive governmental agencies engaged in the task of uncovering wrongdoing under current law. Nevertheless legislative committees are also bound by the principles stated above—a showing of authority, relevancy of the matters sought to the purpose of the inquiry, and some factual basis for the inquiry. In the instant case there is absolutely no evidence of wrongdoing to be uncovered, and it would appear that the legitimate purpose of the respondents’ inquiry may be fully satisfied by the petitioners’ furnishing respondents the names of contributors, the respective amounts contributed, and where and for what such contributions were spent, without the necessity for further documents and, for the present at least, oral testimony. To hold otherwise would be to condone a fishing expedition by respondents into the personal affairs of the citizenry." (Pages 171-172)

H. Lunderstadt v. Pennsylvania House of Representatives Select Committee, 519 A.2d 408 (1986) - "Parties subpoenaed by select committee investigating improprieties in government project sought to quash subpoenas duces tecum issued in course of legislative investigation. The Commonwealth Court, Nos. 50 and 51 C.D. 1986, Jacob Kalish, J., denied motions to quash, and appeal was taken. The Supreme Court, Nos. 11 and 16 W.D. Appeal Dockets, 1986, Flaherty, J., held that: (1) select committee was not limited to investigation of use of foreign steel in capitol addition project, but rather, had authority to inquire into whether state construction projects had become victimized by schemes to subvert existing procedures governing award of construction contracts, and (2) subpoenas issued by legislative select committee requiring subpoenaed parties to produce monthly statements of any and all checking accounts, savings accounts, financial statements, and records of all acquisitions and sales or transfers of money market certificates, certificates of deposit, notes, bonds or stock were too broad in their coverage, and were therefore invalid under constitutional article guaranteeing rights of privacy. Orders reversed. Hutchinson, J., filed concurring opinion. Zappala, J., filed concurring opinion in which Larsen and Papadakos, JJ., joined."

IX. Witness refusal to answer questions based upon constitutional or statutory claim of testimonial privilege or confidentiality.

See also, previous section on subpoenas and compelled testimony and production of documents; Mason's Manual, Secs. 800-801.

A. 91 C.J.S. United States §§35 and 41 - (Excerpts and footnotes omitted):

§35 - "Persons properly summoned by Congress or a congressional committee have the duty to comply with same and to conform to the procedure of the committee. However, a witness before a congressional committee is not deprived of his or her legal rights or constitutional privileges.

Generally, persons properly summoned by Congress, or a congressional committee, have the duty and obligation to comply with same. They must appear at the hearing. Further, a witness who has appeared before a committee is required to remain in attendance and not to depart from same without leave of the committee as long as such witness is physically able so to do without serious impairment to his or her health. A witness cannot impose conditions under which, having appeared, he or she will remain in attendance. A witness has no right to leave a hearing because he or she does not like the questions propounded to him or her. He or she is bound to conform to the procedure of the committee. The remedy of such witness is by objection and a refusal to answer.

A witness properly summoned by Congress or a congressional committee must also respond to the committee’s questions. The witness has no right to vary the committee’s procedures nor can the witness impose conditions on his or her willingness to testify.

A witness before a congressional committee is not deprived of his or her legal rights or shorn of his or her constitutional privileges. The witness is not required to remain in attendance or testify when he or she is physically or mentally unable to do so or where there is reasonable basis for belief by the witness that, by so doing, his or her health will be seriously impaired. Also, the witness may rightfully refuse to answer questions where they exceed the power of the body making the investigation or are not pertinent. Identification of the subject matter is essential to a determination as to whether the witness was advised of the pertinency. The right of a witness before a congressional committee to refuse to answer a question which is not pertinent is not a personal privilege, such as the right to refrain from self-incrimination, which is waived if not seasonably asserted. If a witness urges two constitutional objections to a congressional committee’s line of questioning, the witness is not bound, at his or her peril, to choose between them; by pressing both objections, the witness does not lose the privilege which would have been valid if
he or she had only relied on one.

In the absence of a grant of immunity, the witness may refuse to answer questions which will tend to incriminate him or her. On the other hand, a person acts at his or her peril where he or she fails or refuses to appear or to produce documents before a congressional committee. Such is also true where a person refuses to answer questions by such a committee. A congressional committee is not required to resort to any fixed verbal formula to indicate its disposition of a witness’ objection to a question asked, and so long as the witness is not forced to guess the committee’s ruling, the witness has no cause to complain.

It is the duty of the courts, when called on to uphold and enforce the power of Congress to investigate, to determine whether or not a constitutional limitation justifies a witness in refusing to answer a question propounded to him or her. The duty of a witness to answer questions asked of him or her must be judged as of the time of the witness’s refusal to answer, and it cannot be enlarged by subsequent action of Congress. Witnesses in committee hearings cannot be required to be familiar with the complications of parliamentary practice.” (footnotes omitted).

§41 - "A mistake of law or the good faith of the accused is no defense in a prosecution for contempt of Congress, or a congressional committee, in the carrying on of an investigation. A mistake of law is no defense in a prosecution for refusing to answer questions by a congressional committee.1 It is also no defense that a witness in refusing to answer questions acted in good faith. Nor is it a defense that the witness acted on the advice of competent counsel. Similarly, the fact that an accused, in failing to respond to a subpoena, claims in a letter to the committee that such action is the result of his or her own legal opinion, based on consultation with counsel, is no defense. A person prosecuted for a failure or refusal to produce records, papers, or documents before a congressional committee cannot rely on the absence of a committee quorum as a defense where he or she relied on other grounds to justify his or her refusal to produce the records and where it appears that the witness would not have complied in any event.

The fact that evidence was obtained by eavesdropping is not a defense barring a prosecution for refusing to answer questions by a congressional committee. The motives of the subcommittee in summoning the defendant are also not a defense. Other defenses are inapplicable as well. Still, other matters are good defenses under particular facts and circumstances of the case." [noting refusing to grant or consider request of witness for executive session and failure of committee to follow own rules.]
B. Claim of constitutional or statutory privilege:

(1) \textit{1 Sutherland Statutory Construction} §12.10 (7th ed.), "Evidence which may be required in legislative investigations—The privilege against self-incrimination" -

"Courts have held that a witness cannot be compelled to incriminate himself in an investigative hearing." (footnotes omitted).

(2) \textit{81 Am. Jur. 2d Witnesses} § 98: (footnotes omitted) -

"No artificial organization may utilize the personal privilege against compulsory self-incrimination. The Fifth Amendment privilege against self-incrimination applies only to natural persons, and may not be asserted by or on behalf of a corporation or any other collective entity, including labor unions, and political organizations. The privilege cannot be invoked on behalf of a partnership, where the partnership form in question has many of the incidents of a collective entity, nor by a trust, because a trust is a separate legal and collective entity. This includes a family trust and a business trust."

[See also, Roberto Iraola, Self-Incrimination and Congressional Hearings, 54 Mercer Law Review 939 (Winter 2003); \textit{McPhaul v. United States}, 364 U.S. 372 (1960).]


"SUMMARY. State law authorizes the legislature to compel the attendance and testimony of witnesses at committee hearings and makes it a crime for a witness who is subpoenaed to refuse to answer any questions pertinent to the issue the committee is considering. State law specifies that the witness may not refuse to testify to any fact because his testimony may tend to disgrace him or otherwise render him infamous.

A witness has a constitutional and statutory right to refuse to answer questions that tend to incriminate him. A witness might also be able to refuse to answer questions based on other state and federal constitutional guarantees and protections such as freedom of speech, association, and religion, equal protection, and due process. But it is not clear whether, or to what extent, these other constitutional provisions give witnesses the right to refuse to answer questions at legislative hearings.

Also, it appears that a witness may refuse to answer questions that are not pertinent to the issues the committee is considering since the statute making it a crime to refuse to answer specifies that the questions must be pertinent to the issues the committee is looking at."
It also appears that a witness may rely on various statutory or common law privileges that prohibit people from revealing confidential information they discover by virtue of a special relationship with another person. These include such relationships as attorney-client, physician-patient, and psychologist-patient. Most of the statutes that establish these privileges explicitly prohibit the disclosure of confidential information at legislative proceedings. Five of the privileges (those involving spouses, social workers, teachers, marital and family therapists, and professional counselors), do not explicitly mention legislative proceedings. Thus, it is not as clear whether these five privileges apply to legislative proceedings.

The law also makes certain information discovered in the course of government investigations or other official functions confidential except under certain limited circumstances. Examples include: (1) the identity of an informer in a criminal investigation, (2) reports of the labor commissioner, (3) drug test results, (4) information disclosed in the divorce mediation program, (5) disease control clinic records, (6) medical peer review proceedings and medical studies, and (7) erased criminal history record information. (We have not attempted to specify all statutes that require the confidentiality of certain information. ) Presumably, witnesses may refuse to answer questions at a legislative hearing that would reveal such information.

In addition witnesses subpoenaed to appear before Connecticut legislative committees might be able to make the following challenges recognized by federal courts in connection with Congressional hearings: (1) the legislature lacked the authority to investigate the subject matter of the hearing; (2) the committee lacked the jurisdiction or authority to deal with the subject matter of the hearing; (3) the questions were not pertinent to the hearing's subject matter; and (4) the committee failed to follow established procedures for issuing the subpoena and conducting the hearing. Presumably, witnesses summoned to appear before a Connecticut legislative committee could raise these same challenges. Since Connecticut courts have not addressed these issues it is unclear whether, or to what extent such challenges would be upheld. But, it is interesting to note that Mason's Manual of Legislative Procedure, 1989 edition, which is incorporated by reference in the House and the Senate rules, mentions these same issues when describing how legislative business should be conducted.

Another possible basis to refuse to answer questions might be based on separation of powers arguments if the subpoenaed witness was part of the executive or judicial branch. Connecticut’s constitution specifies that the powers of government are divided into three distinct
departments—legislative, executive, and judicial—and that each department has its own authority and power. This "separation of powers" provision has been used in various disputes between the branches of government. The courts have held that one branch may not significantly interfere with the operations of another branch. But they have also held that the authority of branches often overlap. It seems possible that a witness who is employed by the executive or judicial branch of government might rely on this separation of powers provision to refuse to answer questions. Whether or not such a challenge would be upheld would ultimately be decided by our courts and would depend on the precise circumstances involved.

There are cases on the federal level interpreting the federal constitution as it relates to the federal government that address this principle. One such example involves executive privilege. Presidents have asserted this privilege to challenge the authority of Congress to subpoena certain documents and records or compel the testimony of agency heads or others who advise the president. The courts have acknowledged this privilege under certain, limited circumstances. It is possible that executive branch officials and employees might make a challenge similar to executive privilege in Connecticut based on the separation of powers provision.

Finally, our courts have recognized the "mental process rule. Under this rule, judges and other officials who adjudicate disputes are ordinarily not required to answer questions about the mental process they used to reach a decision. Presumably, adjudicators from the executive or judicial branch could try to use this rule to refuse to answer questions from legislators at public hearings. It is unclear whether our courts would apply this rule to legislative hearings. A related "deliberative process privilege" has been recognized by federal courts and at least one Superior Court judge. It applies to confidential deliberations of policy makers and relates to internal opinions, recommendations, and advice. It is unclear whether Connecticut courts will ultimately embrace this privilege or apply it to legislative hearings.

We have tried to identify every type of legal basis upon which a person could refuse to answer questions at a committee hearing. But because no Connecticut court has addressed this precise issue it is not possible to provide a definitive answer. Thus, there may be legal theories that witnesses could rely on that we have not mentioned in this report."
"Witnesses called to testify in connection with a congressional investigation do enjoy constitutional protections. Despite Congress's broad investigative authority and ability to set its own rules, witnesses in congressional investigations have the right to invoke constitutional privileges during a congressional investigation. Common law privileges such as the attorney-client privilege and the work product doctrine, on the other hand, are not among those specifically guaranteed by the Constitution."............

The attorney-client privilege "is the oldest of the privileges for confidential communications known to the common law." "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." The privilege extends to confidential communications between the client and his attorney.

Although Congress is not obligated to respect common law privileges in committee investigations, in practice it generally accommodates a witness's legitimate assertions of attorney-client privilege. In the congressional investigation of Bank of America, the bank's attorneys doubted "that a majority of the House would be willing to hold a witness in contempt for withholding information that is truly privileged under the attorney-client doctrine." As many members of Congress are former attorneys or have some legal background, it is likely that they would take pause before voting to hold in contempt a witness who has a legitimate privilege claim. Nevertheless, protection of a legitimate privilege remains uncertain, and protection of a weaker claim is nonexistent. Moreover, assertion of such a claim could provoke political rancor and possibly contempt proceedings themselves. Thus, the lesson for the four companies in our example is not that they should rashly assert a claim and then hope that Congress will blink first in a privilege standoff. Rather, the companies should note that if they choose to forgo voluntary disclosure and assert privilege, their claim must first be legitimate, falling within the judicially recognized bounds of the attorney-client privilege. For example, as the attorney-client privilege typically is waived when confidential information is communicated to a third party, Congress would have a ready excuse to refuse a witness's privilege claim if there were third-party disclosure.

When confronted with a witness refusing to provide documents on the grounds of attorney-client privilege, Congress at times has suggested that the privilege is not waived when documents are provided to Congress under threat of contempt. For example, the Senate Whitewater Committee
suggested that "[a] court is likely to treat disclosure under compulsion of a congressional order as involuntary and, therefore, not effecting a waiver." This position, as discussed in Section VI.A, is not fully consistent with existing jurisprudence.

(5) State statutes specifically providing that certain testimonial privileges are applicable in legislative proceedings. While the statutory language cannot "trump" the inherent constitutional authority of the legislature, it may create a potential question as to whether a legislative committee can simply ignore the statute, or whether the legislature must first exercise its power by amending or deleting the relevant statutory provision.

See, for example, Louisiana Code of Evidence Article 1101:

"Art. 1101. Applicability

A. Proceedings generally; rule of privilege.

*   *   *   *

(2) Furthermore, except as otherwise provided by legislation, Chapter 5 of this Code with respect to testimonial privileges applies to all stages of all actions, cases, and proceedings where there is power to subpoena witnesses, including administrative, juvenile, legislative, military courts-martial, grand jury, arbitration, medical review panel, and judicial proceedings, and the proceedings enumerated in Paragraphs B and C of this Article." [note: Chapter 5 includes spousal confidential communications, lawyer-client, work product, health care provider-patient, communications to clergymen, political vote, trade secrets, identity of informer, accountant-client, trained peer support member, judge.]

C. Application of Hecht, 349 N.Y.S. 2d 368 (1977) - "Director of city department of probation filed application to quash legislative subpoena for production of family court probation records of juvenile issued by legislative committee investigating crime. The Supreme Court, Special Term, Part I, County of New York, Edward J. Greenfield, J., held that legislative committee had right to examine all matters bearing upon administration of juvenile justice and custodial practices of state agencies entrusted with duty of detaining and caring for those potentially dangerous individuals for whom some restrictions on freedom have been prescribed and accordingly, motion to quash subpoena would be denied. Motion denied."

"This Court holds that the legislative committee has a right to examine into all matters bearing upon the administration of juvenile justice and the custodial practices of state agencies entrusted with the duty of detaining and caring for those potentially dangerous individuals for whom some restrictions on freedom have been prescribed. The Family Court Act, and the administrative rules of that court and of the Department of Probation (22(c) NYCRR 2830.9 (Family Court Rules); 9(A) NYCRR 348.4 (Dept. of Probation Rules) providing for the sealing and keeping secure of case records cannot thwart a bona fide legislative investigation. Indeed, the very policy of the confidentiality of such records was created by the legislature, and may be scrutinized by it to determine if that policy should be retained or modified.

“The same principle which renders it the duty of the courts to hold legislative action illegal when it unduly encroaches upon the province of the judiciary, forbids interference by the latter with the action of legislative bodies or the exercise of their discretion in matters within the range of their constitutional powers.”

“The law-making power given to the Legislature authorizes it by inquiry, to ascertain facts which affect public welfare and the affairs of government. Such power of inquiry, with process to enforce it, is an essential auxiliary to the legislative function.” Matter of the Joint Legislative Committee (Teachers Union), 285 N.Y. 1, 8, 32 N.E.2d 769, 771 (1941). Whenever the mantle of confidentiality is breached, for overriding considerations of public interest, genuine concern must exist as to whether legitimate use of such records may prejudice the youth in question with respect to his rights to a fair trial free of undue publicity, and his rights to pursue a subsequent career. See Sheppard v. Maxwell, 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.Ed.2d 600. The committee must be relied on to protect the rights of the individual while pursuing the interests of society. Much of the mantle of confidentiality of the records has already been tattered by extensive reports in the press and on television, identifying the individual in question and detailing his background. Nevertheless, prudence and circumspection are called for. The motion to quash the subpoena is denied." (Pages 370-371).
D. *Ward v. Peabody*, 405 N.E. 2d 973 (1980) - Massachusetts. "Legislative investigating commission commenced proceedings to enforce documentary part of summons. The Superior Court, Suffolk County, Brogna, J., refused all enforcement but the judge, assuming provisionally that he might be held wrong in his decision, went on to suggest which items of summons should be enforced and which refused enforcement. On expedited appeal, the Supreme Judicial Court, Kaplan, J., ordered that the summons should be enforced holding that: (1) legislative investigating commission’s investigatory power did not expire when the commission proposed remedial legislation; (2) work product rule did not excuse production of the materials sought; and (3) privacy considerations could be pressed if the commission applied for enforcement of parts of summons seeking information which shaded into slight relevance while possibly exposing personal relationships of no concern to legitimate investigation. Order accordingly."

"The record of some legislative investigating committees and commissions of relatively recent memory warns of the possibility of abuse of the information gathering function, and so, in the first place, nice care must be taken to allow legitimate claims of standard privileges against even demand for relevant information: important here are the privilege against self-incrimination and the attorney-client privilege. See, e.g., Quinn v. United States, 349 U.S. 155, 161, 75 S.Ct. 68, 672, 99 L.Ed. 964 (1955). Inquiries in some sense germane to the work of a commission may trench so far on First Amendment rights for example, associational rights that the information demanded can be withheld without courting contempt. See Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963); Barenblatt v. United States, supra. At the edge of relevancy, when the value to the investigation of a piece of demanded information is seen to be marginal, courts have been prepared to assess and allow as a counterweight "the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of (a witness’s) personal and private affairs" (Sinclair v. United States, 279 U.S. 263, 292, 49 S.Ct. 268, 271, 73 L.Ed. 692 (1929)) a privacy interest to which we return at point (d) below. Finally there is protection against harassing tactics unjustified by the requirements of sober investigation." (Page 978, footnotes omitted).

E. *Louisiana Dept. of Ins. ex rel. Donelon v. Theriot*, 64 So.3d 854 (La. App. 1 Cir. 2011), writ denied, 71 So.3d 286 (La. 2011). "Department of Insurance brought action against Legislative Auditor and others seeking, among other things, a declaration that it was not required to provide the Auditor with access to materials protected by the attorney-client and deliberative process privileges. The Nineteenth Judicial District Court........granted exceptions raising the objections of lack of subject matter jurisdiction and/or mootness, no right of action, and no cause of action. Department appealed. Holding: The Court of Appeal, McDonald, J., held that phrase “confidential or otherwise,” in statute granting Auditor access to a state agency's documents did not include privileged material."

(1)  La. Const. Art. III, §11:
"§11. Legislative Auditor

Section 11. There shall be a legislative auditor responsible solely to the legislature. He shall serve as a fiscal advisor to it and shall perform the duties and functions provided by law related to auditing fiscal records of the state, its agencies, and political subdivisions. He shall be elected by the concurrence of a majority of the elected members of each house and may be removed by the concurrence of two-thirds of the elected members of each house." (emphasis added)

(2) La. R.S. 24:513 - powers and duties of legislative auditor. Subsection (I) states:

"I. The authority granted to the legislative auditor in this Section to examine, audit, inspect or copy shall extend to all books, accounts, papers, documents, records, files, instruments, films, tapes, and any other forms of recordation, including but not limited to computers and recording devices, whether confidential or otherwise. However, the legislative auditor shall comply with any and all restrictions imposed by law on documents, data, or information deemed confidential by law and furnished to the legislative auditor." (emphasis added).

(3) First Circuit Court of Appeal declined to discuss constitutionality of above statute, stating

"Because of the strict penalties for failure “to comply with the provisions of R.S. 24:513,” or otherwise cooperate with the legislative auditor, the Department seeks judicial interpretation of this statute. The Department has indicated that it has concerns regarding the constitutionality of the statute. We recognized in Kyle v. Louisiana Public Service Commission, 2003–0584 (La.App. 1st Cir.4/2/04), 878 So.2d 650, 657, that separation of powers issues are implicated in judicial interpretation of the statutes in Title 24 dealing with the Auditor. We decline to address any constitutional issues here. We note that it is preferable to render judgments, when possible, by interpretation of a statute without reaching issues of constitutionality, because statutes are presumed to be constitutional...............An examination of Title 24 is sufficient to resolve the issue in this case."

(4) Reviewing Subsection (I) above of the statute, the First Circuit concluded:

"The Department contends that there is a difference between information that is “privileged” (i.e., protected by a recognized legal privilege) and information that is “confidential.” It argues that the data to which the Auditor has been granted access pursuant to LSA–R.S. 24:513 cannot and does not extend to privileged data, nor to information that is part of the deliberative process. In support, the Department argues that while the
and authorizes the Auditor to access confidential information, the statute
omits (and therefore does not allow for) access to privileged information.

The attorney-client privilege is recognized by the legislature in
LSA–C.E. art. 506, which specifically provides that “[a] client has a
 privilege to refuse to disclose, and to prevent another person from
disclosing, a confidential communication” under certain circumstances.
LSA–C.E. art. 506B. It is a very important privilege, with a long
jurisprudential history. See Frank L. Maraist, Evidence and Proof in 19
Louisiana Civil Law Treatise, § 8.6 (2d ed.2007). The deliberative process
privilege protects “confidential intra-agency advisory opinions disclosure of
which would be injurious to the consultative functions of government.” Kyle
v. Louisiana Public Service Commission, 878 So.2d at 659, quoting
Taxation With Representation Fund v. Internal Revenue Service, 646 F.2d

The Auditor contends that the requirement of LSA–R.S. 24:513 I
that the Auditor maintain confidentiality of any confidential documents
received is sufficient to safeguard the privileges. While the legal
requirement regarding the confidentiality is correct, and is sufficient to
prevent access to documents pursuant to the Public Records Law, we do not
find it persuasive in this context. See Kyle v. Perrilloux, 02–1816 (La.App. 1
Cir. 11/7/03), 868 So.2d 27. We note the mandate of LSA–R.S. 24:513 I that
the Auditor comply with any and all “restrictions imposed by law.” A
“privilege” constitutes a “restriction imposed by law.” Further, the law
controls how the Auditor must treat the information it receives. The Auditor
must maintain confidentiality. However, this does not answer the question
before us, which is whether the Auditor has a right to receive the
information in the first place. (emphasis added).

Had the legislature intended privileged information to be included in
LSA–R.S. 24:513 I, it would have said “confidential, privileged, or
otherwise,” and not just “confidential or otherwise.” Information that is
privileged is always confidential, but confidential information is not always
privileged. When the legislature intends for privileged information to be
overridden by statute, the statute clearly indicates that the privilege is
trumped by the statute. In the present case, there is no indication that the
statute in question is specifically intended to supplant any privilege. Due to
the importance of the attorney-client privilege, any doubt as to whether
privilege should be encompassed by the words “confidential or otherwise”
should be resolved in favor of the two words' separate natures in order to
preserve the privilege. We find further support for this position by
interpreting the provisions of Chapter 8 of Title 24 only. The legislature repeatedly employs the qualifier, “in the performance of his duties” when providing for the authority of the Auditor. We are led inescapably to the conclusion that the access to information granted to the Auditor is only to include information that is reasonably related to a lawfully performed audit. Therefore, we find that an auditee has the right to challenge access to any documents that it believes it is not legally required to submit. In the case of disputes regarding the necessity for receipt of documents in order for the Auditor to lawfully perform his duties, the district court must resolve the dispute, and in camera inspections are available for balancing the need to protect privileged documents with the requirement for transparency in fiscal matters involving public funds. Further, considering the vital roles and competing interests of the Auditor and Department in serving the people of Louisiana and the need for openness and prompt resolution of disputes that arise in the auditing process, it is imperative that any legal challenge be decided expeditiously so as to avoid undue delay. There is a compelling interest to do so.

CONCLUSION

We conclude that an auditee's duty to provide information to the Auditor in connection with an audit is restricted by evidentiary privileges, whether legislatively enacted or jurisprudentially created. We further conclude, that any dispute between the Auditor's office and an auditee must be resolved in accordance with the statute, i.e., that a subpoena must be filed jointly by the Auditor and the Legislative Audit Advisory Council. If the documents subpoenaed are not provided, then an action may be initiated in the appropriate district court, which must be heard expeditiously. An auditee also has the right to seek a ruling from the district court as to whether the documents sought by the auditor's office are legally required to be submitted. Accordingly, we find error in the trial court's conclusion that the Department failed to state a cause of action for a judgment declaring that the type of information enumerated in LSA–R.S. 24:513 A(1)(a) excludes documents protected by the attorney-client and deliberative process privileges." (emphasis added).

(5) Whipple dissent. Judge Whipple's dissent is worthy of review. The dissent stated that the majority opinion was "unsupported by law and, more importantly, undermines important public policy considerations: the need and desire for open and transparent accountability regarding the public fisc." Additionally, the dissent discusses the Kyle case, stating that reliance by the majority upon such case is misplaced, as in that case:

"we did not have to reach the substantive issue of whether the Legislative Auditor's access to documentation could be restricted by
any privileges. Moreover, although this court thereafter discussed, arguably in dicta, an auditee's right to assert the attorney-client and deliberative process privileges, this court specifically noted that our analysis of that issue was limited to the particular facts before us, i.e., a performance audit, a type of audit not at issue herein."

(See also, Blanchard, From Sunshine to Moonshine: How the Louisiana Legislature Hid the Governor's Records in the Name of Transparency, 71 Louisiana Law Review 703 (2011))
X. Options of a witness compelled to testify or produce documents.

[See Sections VIII and IX, supra.]

• Comply.

• Advise committee prior to appearance of assertion of privileges/prot... of recall or revision of subpoena).

• Seek judicial action prior to appearance to quash or modify subpoena.

  Separation of powers/justiciability issues -

• Seek judicial action prior to appearance to enjoin committee from proceeding.

  Separation of powers/justiciability issues - See "Injunction Against Legislative or Other Action by Legislative Body", 42 Am. Jur. 2d Injunctions §151.

• Appear, but refuse to testify or produce documents on specified legal grounds, then argue the legal validity of such refusal in a subsequent judicial proceeding if punishment for contempt is sought.

  (1) Buell v. Superior Court of Maricopa County, 96 Ariz. 62, 391 P.2d 919 (1964) - Investigating the Corporation Commission, a legislative committee "heard testimony which indicated that certain payments to Corporation Commissioners or employees of the Commission, had been made through the trust account of A. Michael Bernstein, a Phoenix attorney. The Committee therefore issued a subpoena duces tecum for the records of this account including cancelled checks. Bernstein refused to produce the records and the cancelled checks claiming an attorney-client privilege. Being advised by its counsel that the attorney-client privilege did not apply, the Arizona House of Representatives adopted Resolutions 16 and 17 on March 12 and 18, 1964, finding Bernstein guilty of contempt. He was taken into custody by petitioner herein, the Sergeant-at-Arms of the Arizona House of Representatives." "Attorney-client privilege did not apply to permit attorney to refuse to comply with subpoena issued by legislative committee calling for production of records as a direct contempt rather than a constructive
contempt, vacated a writ of habeas corpus, and ordered the respondent remanded to custody. [See also, "Attorney-client privilege as extending to communications relating to contemplated civil fraud", 31 A.L.R.4th 458.]

(2) A "witness cannot defend himself on the ground that he thought the question was outside the committee's powers when the question is lawful. Mistake of law is no excuse, even though the statute requires the refusal to testify to be 'wilful'." - 1 Sutherland Statutory Construction §12.21 (7th ed.), "Methods of Enforcing a committee's investigating power - Criminal prosecution" (footnotes omitted).

See also, supra, Section IX, excerpts from 91 C.J.S. United States §§35 and 41.

(3) Raley v. State of Ohio (U.S. Ohio 1959), 79 S.Ct. 1257, 360 U.S. 423, 3 L.Ed.2d 1344:

"In Raley, four individuals were convicted of contempt for their refusal to answer questions before the Ohio Un-American Activities Commission. Id. The legislators had told them that they could refuse to answer the questions based upon their privilege against self-incrimination under the Ohio Constitution. Id. However, the legislators' interpretation was incorrect because an Ohio immunity statute deprived the defendants of the protection of that privilege. Id. The Supreme Court overturned their convictions because "to sustain the judgment of the Ohio Supreme Court ... would be to sanction the most indefensible sort of entrapment by the State-convicting a citizen for exercising a privilege which the State clearly had told him was available to him." Id. at 438." - Note, Reliance on an Official Interpretation of the Law: The Defense's Appropriate Dimensions, 1993 U. Ill. L. Rev. 565 (1993), footnote 3.

"But in a series of cases beginning in 1959 with Raley v. Ohio and ending in 1973 with United States v. Pennsylvania Industrial Chemical Corp., the Supreme Court ruled that the Due Process Clause circumscribes the ability of state and federal authorities to bring criminal prosecutions against defendants who acted in reasonable reliance on an official interpretation of law. Lower courts have given the name "entrapment by estoppel" to the developing doctrine." - John T. Parry, Culpability, Mistake, and Official Interpretations of Law, 25 American Journal of Criminal Law 1 (Fall 1997), page 2.
Where criminal/civil immunity in exchange for legislative testimony is available and applicable by statute, comply subject to express effects of such immunity.

Will such immunity be "automatic" upon testimony or must there first be express granting of immunity clearly set forth in the hearing record? What is the scope of such immunity?

Also, note that such statutory immunity may not protect against prosecution for perjury or other offenses arising from false testimony, and continued refusal to testify after being granted immunity may be considered contempt if immunity granted is co-extensive with protection afforded by privilege. Immunity for an offense admitted during testimony may not be applicable to prevent arrest and prosecution for such offense if it is provable by independent evidence.

Voluntarily appearing and testifying before a legislative subcommittee does not prevent a claim of immunity arising from such testimony - see Cassibry v. State, 404 So.2d 1360 (Miss. 1981); Kellum v. State, 194 So.3d 492 (Miss. 1967), and Wheat v. State, 30 So.2d 84 (Miss. 1947); 52 Am. Jur. 2d Arrest §109, "Persons in attendance at legislative hearing".

See also, next section.
XI. Statutes authorizing legislative witness immunity.

See previous sections discussing subpoenas and witness options in response to subpoenas.

A. Ronald Wright, Congressional Use of Immunity Grants After Iran-Contra, 80 Minnesota Law Review 407 (1995), footnote 37 -


B. Caveat:

The granting of legislative immunity can create potential issues when both the legislature and prosecutorial authorities are engaged in investigations arising out of the same event or series of events. See, for example, Volokh, Congressional Immunity Grants and Separation of Powers: Legislative Vetoes of Federal Prosecutions, 95 Georgetown Law Journal 2017 (2007); Note, Legislative Investigations: The Scope of Use Immunity Under 18 U.S.C. §6002, 27 American Criminal Law Review 209 (1989-1990); Adequacy of immunity offered as condition of denial of privilege against self-incrimination, 53 A.L.R.2d 1030; Immunity from prosecution, 1 Wharton's Criminal Law § 80 (15th ed.).
C. **Bridgegate.** A recent example of potential issues that can arise may be seen in the so-called "Bridgegate" scandal in New Jersey. Legislative subpoenas were issued and ultimately resulted in a trial court's ruling that the subpoenas were overbroad. However, in the judicial proceeding the legislature was the *plaintiff* not the defendant. These issues were discussed on April 9, 2014, in the lengthy opinion of Judge Mary Jacobson of the Superior Court of New Jersey, Law Division, Mercer County, (The New Jersey Legislative Select Committee on Investigation v. Bridget Anne Kelley, Docket No. L-350-14, and The New Jersey Legislative Select Committee on Investigation v. William Stepien, Docket No. L-354-14). Excerpts:

"This matter arises out of two verified complaints and orders to show cause filed by plaintiff, the New Jersey Legislative Select Committee on Investigations ("the Committee") against defendants, William Stepien and Bridget Anne Kelly. The Committee is investigating the "BridgeGate" controversy that involves the closure of multiple traffic lanes leading to the George Washington Bridge in Fort Lee, New Jersey in September 2013 ("the lane closures"). A subpoena *duces tecum*, or subpoena for documents, was issued to each defendant by plaintiff as part of that investigation. After defendants responded to the subpoenas by raising objections, the Committee moved to compel the production of documents, but defendants maintained their refusal to comply, citing their privilege against self-incrimination and the Fourth Amendment's protections against unreasonable searches and seizures. The Committee initiated this action to obtain: 1) a declaratory judgment from the court that defendants have failed to comply with the subpoenas without justification, and 2) a court order compelling defendants to produce the documents requested in the subpoenas." - Excerpt, Opinion of the Superior Court of New Jersey, Law Division, Mercer County, The Honorable Judge Mary Jacobson, on April 9, 2014, in The New Jersey Legislative Select Committee on Investigation v. Bridget Anne Kelley, Docket No. L-350-14, and The New Jersey Legislative Select Committee on Investigation v. William Stepien, Docket No. L-354-14. ("Opinion"), page 2.

"The procedural posture of these cases is highly unusual, and the parties referred the court to no binding precedents dealing with the same array of issues, in terms of substance, jurisdiction, and the formulation of proper relief. The vast majority of cases where courts have considered a witness's ability to assert the right to self-incrimination in response to a subpoena for documents have arisen in the context of criminal grand jury investigations. However, in the cases before this court, the privilege has been asserted in response to *legislative* subpoenas issued by a committee inquiring into a matter of public importance, while a federal criminal investigation into the same subject matter is underway. Moreover, in many of the case law precedents cited by both parties, such as United States v. Hubbell, 530 U.S. 27, 42 (2000), the issue of whether the self-incrimination
doctrine had been properly applied was raised after the actual documents had already been produced pursuant to a grant of immunity. In the cases before this court, however, broad subpoena requests were met with similarly broad objections based on defendants' right against self-incrimination without defendants providing any documents. Moreover, while a grant of immunity would likely result in the desired production of documents, the Committee has not offered immunity to defendants [note: New Jersey has a legislative immunity statute and part of the opinion discusses how it should be interpreted] and surprisingly has suggested that it may not have the power to grant immunity coextensive with the Fifth Amendment privilege against self-incrimination, as is frequently done in matters involving grand jury investigations. It nonetheless asks the court to compel the production of documents that the court has not viewed, and which may or may not incriminate the defendants. The defendants, on the other hand, wish to defeat the subpoenas without turning over any of the requested documents. With this background in mind, the court will undertake the challenging task of trying to resolve the Committee's applications in a manner that protects the defendants from compelled self-incrimination without unduly undermining the public interest served by the Committee's investigation."-

Reviewing the specific language of the subpoenas and in its analysis primarily treating them as if issued by a grand jury, the court determined the subpoenas were overbroad and implicated constitutional protections.

"The court thus finds that the subpoenas as written were intended to utilize the defendants as information-gatherers for the Committee's own investigative purposes. See Hubbell, supra, 530 U.S. at 41 ("It is apparent from the text of the subpoena itself that the prosecutor needed respondent's assistance to both identify potential sources of information and to produce those sources.") While legislative committees in New Jersey have broad powers, Morss v. Forbes, 24 N.J. 341, 354 (1957), they do not have the authority to abrogate the Fifth Amendment absent a grant of use and derivative use immunity." Opinion, pages 36-37.

"As discussed above, Mr. Stepien and Ms. Kelly are entitled to use and derivative-use immunity as to any evidence produced that is protected by the Fifth Amendment and New Jersey rights against self-incrimination. Therefore, the Committee may compel production of the requested materials as long as use and derivative-use immunity is conferred on any materials covered by the self-incrimination privilege."

The Court declined to issue an order directing defendants to comply if a grant of immunity was provided.
"But the court will not enter its own order directing defendants to comply with the subpoenas subject to a grant of immunity. The reason for the court’s reluctance to enter an order to compel is two-fold. First, after receiving this court’s ruling that the defendants justifiably invoked their privileges against self-incrimination, the Committee may, for strategic reasons, simply not wish to continue to compel production of the documents because of the consequences immunity may have on any subsequent criminal proceedings. Compelling defendants to produce the documents would require a subsequent criminal tribunal to conduct a hearing in which the prosecution bears the burden of demonstrating that its evidence was obtained from a source that is “independent” from the Committee’s compelled production of documents. See Kastigar, supra, 406 U.S. at 461-62; Strong, supra, 110 N.J. at 591-96. The Committee may wish to avoid placing this burden on any potential criminal prosecution. Indeed, the record reflects that the Committee’s Special Counsel has already met with the United States Attorney in charge of the federal investigation, suggesting that at least some level of coordination may result in the wake of this decision. Alternatively, the Committee may wish to issue a new subpoena entirely, to address the constitutional concerns raised by the defendants and discussed at length in this opinion. In light of the declaratory holdings set forth by the court, the Committee should be given the opportunity to decide how it wishes to proceed in regard to the subpoenas it issued to Ms. Kelly and Mr. Stepien."

"The second reason the court is reluctant to issue an order for defendants to comply with the subpoenas pursuant to a grant of immunity is jurisdictional. This court clearly has jurisdiction to issue the declaratory relief requested by the Committee under the Declaratory Judgments Act. See General Assemb. of N.J. v. Byrne, 90 N.J. 376 (1982) (deciding declaratory judgment action brought by the Legislature to determine constitutionality of a statute); Morss, supra, 24 N.J. at 351, 357 (taking jurisdiction over matter seeking to determine the constitutionality of a statute because any jurisdiction-based objections were withdrawn). Indeed, neither defendant argues that this court does not have jurisdiction to issue declaratory relief, which is simply a declaration by the court of the legal rights of the parties."

"However, it is unclear whether this court has jurisdiction to order a witness to comply with a legislative subpoena. The court will not decide this issue as it is unnecessary to the resolution of the matters at hand. As with other issues before this court, the lack of helpful precedents further fuels uncertainty in this sensitive area implicating important separation of powers concerns. Nonetheless, the court remains concerned with its jurisdiction to order compliance with a legislative subpoena. The parties’ supplemental briefing did not allay these concerns. Since the issue may arise in the future, the court thinks it advisable to raise questions as to its jurisdiction to compel
compliance with a legislative subpoena for the parties’ consideration in shaping their conduct going forward."

"The previous legislative committee investigating this matter, represented by one of the same counsel that represents the Committee here, argued before the court in response to David Wildstein’s motion to quash a subpoena to testify that the court had no subject matter jurisdiction to hear the case. Similarly, in these cases no party has cited any statutory basis for the court to intrude upon the well-defined subpoena power of the Legislature and, more importantly, there is no need to do that because the Committee has full constitutional and statutory authority to compel enforcement with the subpoenas it issues. N.J.S.A. 52:13-1; see N.J. Const. Art. III, para. 1 (“The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.”); see Sham, supra, 92 N.J. at 530."

The Court in its opinion further noted that the plaintiff had not requested a finding of contempt.

"Importantly, in its complaints, the Committee has not asked the court to hold the defendants in contempt. Instead, the Committee has only requested an order to compel production, which the Committee clearly has authority to do on its own under the concurrent resolutions as well as under the statutory provisions that were discussed at length above. The fact that the Committee has the power to enforce its own subpoenas through orders to compel and grant immunity in return, and the lack of a clear jurisdictional basis for this court to intrude upon that power, raises serious questions concerning the exercise of judicial power to compel compliance with legislative subpoenas or to order a grant of immunity as a condition of compliance. These complicated and untested jurisdictional issues provide further justification for the court’s decision not to issue its own order compelling compliance with the subpoenas in exchange for immunity. See Worthington v. Fauver, 88 N.J. 183, 192 (1982) (“[A]n unnecessary decision on constitutional issues should be avoided.”).

CONCLUSION

For the reasons set forth in this opinion, plaintiff’s applications for judgments declaring that defendants have failed, without justification, to produce documents in accordance with the subpoenas are denied, as are plaintiff’s requests for injunctive relief ordering defendants to comply with the subpoenas. Plaintiff’s complaints in both actions are dismissed."
D. **Additional Questions Re Legislative Power to Grant Immunity to Witnesses:**

18 U.S.C. §6002 and related statutes authorize use immunity for congressional witnesses. As discussed above, many states also have statutes authorizing the legislature to grant some form of witness immunity or providing that legislative testimony cannot be used elsewhere for certain purposes. Usually, the grant of immunity does not include protection from criminal prosecution such as perjury for false testimony.

Given that the subpoena power is an inherent part of the lawmaking function, in a state without such a statute can the legislature still grant immunity for testimony sought to be compelled through subpoena? Is the power to grant immunity also "inherent" in the lawmaking function?

Would such grant of immunity be subject to challenge as being the functional equivalent of a law and thus lacking in procedures for valid enactment, including presentment to the governor? Or subject to challenge as an attempt by the legislature to exercise prosecutorial or judicial legal powers beyond the scope of their legislative power to punish for contempt? Or would it be mandatory that, consistent with constitutional principles, a legislature that compels a witness to testify to avoid contempt (despite initial refusal of the witness to testify arising from a valid claim of privilege) has at that point by its actions “automatically” ensured that such testimony is prohibited from use (whether transactional, use, derivative use) against the witness in a subsequent criminal/civil proceeding?

1. **Florida Attorney General Advisory Legal Opinion 75-219,** dated July 18, 1975, concluding that in the absence of express statutory language a legislative committee lacked authority to immunize a witness from subsequent criminal prosecution. Also, **Florida Attorney General Opinion 060-168,** October 12, 1960, concluding that in the absence of statutory power it is necessary for a witness, to avoid having self-incriminating testimony used against him in a subsequent prosecution, to exercise his self-incrimination right to refuse to give testimony for the committee. See also, Power of legislature to grant or authorize committee to grant immunity from criminal prosecution to witnesses summoned before legislative committee, 87 A.L.R. 435 (older cases).

2. **Doyle v. Hofstader,** 177 N.E. 489, 87 A.L.R. 418 (1931) - New York. Doyle appeared under subpoena as a witness before a legislative committee conducting an bribery investigation and refused to answer questions. Found guilty of contempt and his commitment directed. On appeal, modified and affirmed. A statute granting immunity for testimony before "any court, magistrate or referee" held not to include a grant of immunity to a witness who testified before a legislative committee.

The joint resolution creating the investigatory committee further purported to authorize the committee to grant immunity to witnesses, but this authorization was also rejected.
as invalid, the Court stating:

"This resolution, if valid, is in effect an act of amnesty. It wipes out as to the witness whose claim of privilege has been denied the criminal statutes of the state with all their pains and penalties, and, like a pardon, makes him a new man. A pardon may be granted by the Governor after conviction of the crime. Const. art. 4, § 5. An act of amnesty may be passed, like any other bill, by the Legislature, acting separately in its two houses (article 3, § 15), with the approval of the Governor, or, in the event of his veto, by a two-thirds vote thereafter (article 4, § 9). 'Every bill which shall have passed the Senate and Assembly shall, before it becomes a law, be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it shall have originated.' Const. art. 4, § 9. This resolution was never presented to the Governor. It never received his approval or his veto. It is not an act of amnesty; it is not an ‘act’ at all. "People ex rel. Argus Co. v. Palmer, 12 Misc. Rep. 392, 33 N. Y. S. 1088; Id., 146 N. Y. 406, 42 N. E. 543."

"Never has it been held that a Legislature alone may suspend the criminal law as to a person or a class of persons...........The argument is made that a legislative body has inherent power to conduct an investigation for the discovery of abuses in the operations of government........... and that the power to give immunity to witnesses, and to suspend to that extent the general laws of the state, must be deemed to be a necessary incident of the power to investigate. But it is not such an incident. It may at times be a useful incident, but it is not a necessary one, necessary, that is to say, in the sense of being a power so indispensable to the ordinary exercise of the investigating function that it must be taken as implied...........The conclusion, we think, is inescapable that a power to suspend the criminal law by the tender of immunity is not an implied or inherent incident of a power to investigate. It may be necessary for fruitful results in a particular instance, but it is not so generally indispensable as to attach itself automatically to the mere power to inquire. Whether the good to be attained by procuring the testimony of criminals is greater or less than the evil to be wrought by exempting them forever from prosecution for their crimes is a question of high policy as to which the law-making department of the government is entitled to be heard. In the state of New York that department is not the Legislature alone, but the Legislature and the Governor, the one as much as the other an essential factor in the process.............We beg the question when we argue that the Legislature may give immunity because the Legislature is the sole custodian of the legislative power. It is not the sole custodian of that power. The power is divided between the Legislature and the Governor.......... The Legislature can initiate, but without the action of the Governor it is powerless to complete. Not only do we beg the question when we infer the validity of the immunity from the possession by the Legislature of
the full legislative power; we concede by implication that, unless the legislative power has been thus committed without division, the immunity must fail. The argument, reduced to that basis, is seen to be self-destructive. The grant of an immunity is in very truth the assumption of a legislative power, and that is why the Legislature, acting alone, is incompetent to declare it. It is the assumption of a power to annul as to individuals or classes the statutory law of crimes, to stem the course of justice, to absolve the grand jurors of the county from the performance of their duties, and the prosecuting officer from his. All these changes may be wrought through the enactment of a statute. They may be wrought in no other way while the legislative structure of our government continues what it is...................The argument is made that the jurisdiction to grant immunity is an incident of the jurisdiction to punish for contempt. It is no more such an incident for a committee of the Legislature....................... than it is for a court or judge. The punishment for contempt may be imposed for disobedience of a lawful mandate. The power thus to punish may not be used as an excuse for the issue of an unlawful mandate and the remission of the pains and penalties of crimes in consideration of obedience." (citations omitted, pages 494-495).

(3) People v. Fahy (App. 4 Dist. 1970), 92 Cal.Rptr. 451, 13 Cal. App. 3d 808, cert. denied, 92 S.Ct. 341, 404 U.S. 966, 30 L.Ed.2d 285 - "Defendants, after their pretrial motions to set aside indictment and to suppress certain evidence were denied, were convicted in the Superior Court, Orange County, William C. Speirs, J., of grand theft and of conspiring to commit grand theft, and they appealed. The Court of Appeal, Kaufman, J., held that defendants, who were compelled to testify and produce documentary evidence in Attorney General's investigation, were not granted automatic immunity by statute providing that a person sworn and examined before the Senate or Assembly, or any committee, cannot be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify. Affirmed."

"45 Government Code, section 9410 is completely inapplicable. That section pertains to persons sworn and examined before either branch of the Legislature or committee thereof. Immunity is automatically granted so that a witness may not refuse to answer by asserting the privilege against self-incrimination. The Attorney General's office is not a committee of the Legislature. It is part of the executive department of government."
Ronny Frith, "Immunity of Witnesses Before Legislative Committees", National Conference of State Legislatures Fall Training Conference, Jackson, Mississippi, October 10, 1997 - Excerpt:

"I've covered a lot of points about witness immunity rather quickly. I'll try to pull the topic all together with a brief summary of the main points:

- The reason we have witness immunity is because of the constitutional privilege against self-incrimination.
- Immunity must come from a statute or the constitution; there is no inherent right to immunity.
- The purposes of immunity are to obtain information that would otherwise be unavailable because of the privilege, and to obtain truthful information.
- Immunity applies only to the witness himself; it does not apply to other persons that the witness talks about.
- Immunity does not apply in civil or administrative proceedings, but only in criminal proceedings.  *[jj caveat: scope of immunity depends upon specific text of law]*
- Immunity generally arises automatically when the witness testifies, without him having to claim the privilege first.  *[see above caveat]*
- Immunity arises only where the witness is compelled to give testimony, but the witness doesn't have to be subpoenaed in order for him to receive immunity.  *[see above caveat]*
- The constitution requires immunity to be granted before a witness can be required to give up his privilege and be compelled to testify.
- The 5th amendment requires that a witness be given at least "use and derivative use" immunity; but under a state constitutional provision, witnesses may have to be given full transactional immunity.  *[any post-1997 cases on this should be reviewed]*
- Immunity granted in one jurisdiction must be recognized in other jurisdictions, both state and federal.
- A witness with transactional immunity cannot be prosecuted for any offense to which his compelled testimony relates.  *[any post-1997 cases on this should be reviewed]*
- A witness with "use and derivative use" immunity can be prosecuted with evidence from a legitimate independent source.  *[any post-1997 cases on this should be reviewed]*
- A witness with either level of immunity can be prosecuted for perjury, contempt and future crimes."
"Practical considerations in having witnesses testify before legislative committees:

The first thing to do is --

Be sure you and your committee members are familiar with your state statutes and constitutional provisions that authorize witness immunity and that relate to the privilege against self-incrimination, and how the courts have interpreted them. Be sure you know the circumstances under which a witness would be entitled to immunity, and what level of immunity a witness would be entitled to.

Then make certain determinations –

(1) Determine if any of the persons that your committee is considering calling as witnesses have been charged with criminal activity, or have possibly been involved in any criminal activity, that is related to what they would be testifying about. You may want to check with your AG's office about the possibility or likelihood of any criminal prosecutions being brought against those persons in the future.

(2) Determine what the actual purpose of the investigation or hearing is. Is it to get information that the Legislature really needs for preparing legislation or for some other legislative purpose, which is not available anywhere else? Or, is the purpose of holding the hearing primarily because there is public or media pressure on the Legislature to do something about a problem? If the committee wants to call persons who have possibly been involved in criminal activity, determine how important it really is for the committee to have those particular persons testify, in light of the actual purpose of the investigation or hearing.

Things the committee should do or not do --

(1) If any of the potential witnesses have possibly been involved in criminal activity, your committee should consider not calling them as witnesses at all, if they think that the state or federal government may want to prosecute them in the future. Your committee needs to be very aware that if the witnesses testify, the committee may be trading immunity from prosecution for the information it receives from the testimony. Is the testimony so important that the committee is willing to let a witness not be prosecuted for a crime?

The committee might consider only calling those persons as witnesses in cases where the Legislature really needs important information to perform a legislative purpose and it could not get the information anywhere else. The committee probably should not call them in cases where the investigation or hearing is being held primarily because of public pressure and is to show the Legislature is doing something about the matter.

(2) If your committee decides that it wants to call the persons as witnesses anyway, it should consider limiting the witnesses that it calls to only minor participants who still might be able to provide the committee with the information it wants, and not call the
major participants, so that they could still be prosecuted later.

(3) If the committee wants to call the persons as witnesses but also wants to try to keep from giving them immunity that would jeopardize a future criminal prosecution, the committee should ask the witnesses very specific and limited questions so that what they testify about will be limited. The committee should carefully plan in advance what questions it will ask and those that it won't ask, so that the committee doesn't ask an careless question that inadvertently lets a witness talk about his criminal activity.

Immunity is limited to past actions, so if the witnesses only talk about what they plan to do in the future, immunity most likely would not apply to that testimony. However, if your state has transactional immunity, it may be that your committee cannot ask them anything that will provide informative testimony without them receiving immunity. Mississippi's statute provides immunity for "any act or fact touching which the witness is required to testify," which is very broad immunity. If a witness talks about a matter, he will be totally immune from any prosecution related to that matter.

(4) Make sure your committee records and transcribes the witnesses' testimony in order to verify what was said. This may help prevent any later dispute about whether what the witness said or what the committee did entitled the witness to immunity."
Biography

Jerry G. Jones, Chief Legislative Counsel, Louisiana Senate, is a graduate of the LSU Paul M. Hebert Law Center in Baton Rouge and is licensed in Louisiana, Texas, and the District of Columbia. In addition to public and private sector litigation and other experience, he has over twenty years of experience as a committee and staff attorney dealing with legislative hearings, including witness issues. He is an annual CLE speaker in Louisiana on recent developments in legislative law and procedure, and has written articles on legislative legal issues for The Legislative Lawyer and other publications. He is co-author of Legislative Law and Procedure (Volume 20 in the Thomson Reuters Louisiana Civil Law Treatise series) and the Louisiana Legislative Law and Procedure Companion Handbook.