# LEGISLATIVE SUBPOENA ISSUES

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**CAVEAT:** One size does **not** fit all. Specific requirements and procedures vary from state to state. Research always begins with the specific constitutional provisions, laws, legislative rules, and jurisprudence of your state.

**GENERAL**. In connection with this outline, see generally:

Mason's Manual of Legislative Procedure (NCSL, 2010 ed.), "Investigations by Legislative Bodies", §§795-803, and "Public Order", §§805-807.

2014 NCSL Materials on Legislative Subpoenas by Frank Arey and Legislative Witnesses by Jerry G. Jones - see NCSL website, http://www.ncsl.org/documents/lsss/legislative_subpoenas.pdf and http://www.ncsl.org/documents/lsss/mon_jones_handout.pdf, and also current citations and updates to the authorities cited in these materials.

"Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure", Congressional Research Service, RL 34097, May 12, 2017. (hereinafter "Congress's Contempt Power")

When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry, Morton Rosenberg, Constitution Project Fellow, The Constitution Project (2d ed. 2017) (available online at http://www.thecre.com/forum8/wp-content/uploads/2017/05/WhenCongressComesCalling.pdf) (hereinafter "When Congress Comes Calling")

## I. LEGISLATIVE SUBPOENAS IN THE NEWS

"State Officials Subpoenaed in House Investigation", *The Oklahoman*, November 20, 2017.

"New Jersey Transit Withholds Data Subpoenaed for Lawmakers' Safety Probe", Bloomberg, December 5, 2017.

"Michigan Lawmakers Turn Legislative Microscope on MSU, Sexual Assault", Michigan Live, January 25, 2018.

"Federal Judge Sides With Florida House in Subpoena Battle", *Daily Business Review*, January 22, 2018.

"Legislature Must Stay Restricted on Subpoenas, House Panel Says", capjournal.com, February 13, 2018.

"Circuit Judge Gievers Quashes House Subpoenas Seeking Records of LaGasse's TV Producer", *Tallahassee Democrat*, February 14, 2018.

"Judge Quashes Final Subpoenas in Visit Florida Lawsuit, Signaling Loss for Corcoran", *Tampa Bay Times*, February 14, 2018.

"General Assembly Leaders Hint at Subpoena Over Pipeline Fund", WRAL.com, February 20, 2018.

"Florida House Issues Subpoenas In Probe of Parkland Shooting", *Tampa Bay Times*, February 28, 2018.

"Legislature Decides Audit Committee, Upon Approval, Could Issue Subpoenas" *rapidcityjournal.com*, March 10, 2018.

"State Assembly Takes 'Extraordinary' Step of Issuing Subpoena to Free Woman to Tell Her Story in Cmmittee Hearing on Bill to End Forced Arbitration", Press Release, California Labor Federation, April 23, 2018.

"Unmuzzled by Legislature's Subpoena, Bay Area Woman Backs Workers' Rights Bill", *San Francisco Chronicle*, April 24, 2018.

"Nebraska AG Sues Lawmakers to Block Subpoena of Prisons Head", AP, May 1, 2018.

"After Loaning $20 million, City of Industry Subpoenas SGVWP for Solar Farm Project Records", *San Gabriel Valley Tribune*, May 15, 2018.

"Nebraska lawmakers, AG argue over subpoena power in death penalty 'turf war'", *Omaha World-Herald*, June 18, 2018.

"Former Nebraska Supreme Court Judge Defends Legislative Subpoena Power", KETV, June 18, 2018.

"Lawmakers Vote to Subpoena DHHS Chief After Agency No-Shows in Child Death Probe", *Portland Press Herald*, June 28, 2018.

"Former RISE Official Faces Flood Committee", WOWK.com, July 11, 2018.

## II. LEGISLATIVE POWER TO INVESTIGATE AND SUBPOENA.

A. A fundamental and inherent component of the legislative function is the power to investigate, and to enforce such investigative power through issuance of subpoenas and punishment for contempt. The power includes review concerning the administration of existing laws, as well as inquiry concerning the need for proposed ones. (See, e.g., McGrain v. Daugherty, 273 U.S. 135, 174-175 (1927); Watkins v. United States, 354 U.S. 178 (1957); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); 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); "Congress's Contempt Power", supra.)

(1) Securities And Exchange Commission v. Committee on Ways and Means of the U.S. House of Representatives, 161 F. Supp. 3d 199 (United States District Court S.D. New York 2015) - discussing the protections of the Speech or Debate clause, the court stated:

"For example, as discussed above, the power to investigate and gather information "is inherent in the power to make laws[,] because '[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.' " Eastland, 421 U.S. at 504, 95 S.Ct. 1813 (quoting McGrain, 273 U.S. at 175, 47 S.Ct. 319)). Accordingly, legislative information gathering, whether formal or informal, is protected under the Speech or Debate Clause. See Biaggi, 853 F.2d at 103; McSurely, 553 F.2d at 1286-87 ("[I]nformation gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation.... 'The acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct....' ") (quoting Reinstein, supra, 86 Harv. L. Rev. at 1154)". (See pages 241-243 for full discussion).

B. The inherent power of legislative investigation is broad and extensive. In the Bean case discussed in the next section, the U.S. District Court for the District of Columbia stated in 2018:

"This Court, however, lacks the authority to restrict the scope of the Committee's investigation in the manner plaintiff suggests. Congress's power to investigate "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." Eastland, 421 U.S. at 504 n.15, 95 S.Ct. 1813. Indeed, "[t]he power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide

upon due investigation not to legislate." Barenblatt v. United States, 360 U.S. 109, 111, 79 S.Ct. 1081, 3 L.Ed.2d 1115 (1959). And the Supreme Court has left no doubt that the issuance of subpoenas is "a legitimate use by Congress of its power to investigate." Eastland, 421 U.S. at 504, 95 S.Ct. 1813. While Fusion is correct that "Congress' investigatory power is not, itself, absolute" and that it "is not immune from judicial review," Pl.'s Renewed Mot. 5, this Court will not-and indeed, may not-engage in a line-by-line review of the Committee's requests. Cf. McSurely v. McClellan, 521 F.2d 1024, 1041 (D.C. Cir. 1975) ("There is no requirement that every piece of information gathered in [a Congressional] investigation be justified before the judiciary.").

Instead, where, as here, an investigative subpoena is challenged on relevancy grounds, "the Supreme Court has stated that the subpoena is to be enforced 'unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the ... investigation.' " Senate Select Comm. on Ethics v. Packwood, 845 F.Supp. 17, 21 (D.D.C. 1994) (quoting United States v. R. Enterprises, Inc., 498 U.S. 292, 301, 111 S.Ct. 722, 112 L.Ed.2d 795 (1991)). In determining the proper scope of the Subpoena, "this Court may only inquire as to whether the documents sought by the subpoena are 'not plainly incompetent or irrelevant to any lawful purpose [of the Committee] in the discharge of [its] duties.' " Packwood, 845 F.Supp. at 20-21 (quoting McPhaul v. United States, 364 U.S. 372, 381, 81 S.Ct. 138, 5 L.Ed.2d 136 (1960)). And "[t]he burden of showing that the request is unreasonable is on the subpoenaed party." FTC v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir. 1977)"......"Because the Committee possesses the power to investigate Russian active measures directed at the 2016 Presidential election, and there is a reasonable possibility that the records requested will contain information relevant to that investigation, the Subpoena is not impermissibly broad, even if the records turn out to be unfruitful avenues of investigation. See Eastland, 421 U.S. at 509, 95 S.Ct. 1813 ("Nor is the legitimacy of a congressional inquiry to be defined by what it produces. The very nature of the investigative function-like any research-is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result.")."

C Presumption of legitimate object. Upholding a legislative subpoena and pointing out the court must presume that the object of an investigation is of a matter about which prospective legislation could be contempted, see Joint Legislative Committee of Legislature v. Fuselier, 174 So.2d 817 (La. App. 1 Cir. 1965), rehearing denied, writ denied, 247 La. 723, 174 So.2d 133 (1965). See also, 1 Sutherland Statutory Construction § 12:3 (7th ed.), stating in part that the "McGrain court quoted a New York case approvingly: 'We are bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed, and we have no right to assume that the contrary was intended.' ". The same section concludes "In view of the wide range of subjects on which most legislatures have constitutional authority to act in one way or another, it is hard to imagine any kind of information that would not be relevant to some question the legislature could legitimately decide."

See also 65 A.L.R. 1518 (Originally published in 1930); 9 A.L.R. 1341 (Originally published in 1920); 1 Sutherland Statutory Construction § 12:5 (7th ed.); West's ALR Digest States 39.5; and 16 C.J.S. Constitutional Law § 320, stating in part:

> "While the legislature is without authority to conduct an investigation which is judicial in nature, it has power to conduct investigations to determine the expediency and necessity of contemplated legislation.
>
> Notwithstanding the constitutional prohibition of encroachment on the functions of the judiciary, each branch of the legislature has power to conduct investigations to determine the necessity and expediency of contemplated legislation.1 In order to find that a legislative committee's investigation has exceeded the bounds of legislative power, it must be obvious that there was a usurpation of functions exclusively vested in the judiciary.2
>
> A legislative body may conduct an inquiry in aid of its proper legislative functions even though the subject of inquiry may also be the proper concern of the courts and grand juries in their enforcement of the criminal laws.3 The separation-of-powers doctrine does not prohibit a person in the legislative branch from investigating the official conduct of any person performing duties in any branch of the government,4 and inquiries by legislative committees into the administration of an executive office are not judicial in character and are therefore within the scope of legislative authorization.5" (footnotes omitted).
>
> [Note: But see Section IV concerning potential challenges arising from claims of encroachment, executive privilege, and immunity of federal officials and records.]

See also, 33A Ill. Law and Prac. State Government § 23; and Joint Legislative Committee of Legislature v. Strain, 263 La. 488, 268 So. 2d 629 (1972), upholding a legislative subpoena by a joint committee, and trial court's subsequent finding of contempt against a member of the Legislature for refusing to appear at a committee hearing in response to the subpoena and produce tape recordings or excerpts sought by the committee.

D. In addition to inherent powers of the legislative function (and unlike the federal constitution granting powers to Congress), state constitutional provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its legislature. See, e.g., Radiofone, Inc. v. City of New Orleans, 630 So.2d 694 (La. 1994).

E. General Overview Summaries #1 (See also materials in Section VI.):

(1) "A legislature's inherent power to conduct investigations includes the power to compel the attendance of witnesses and the production of books and papers by means of legal process,1 whether those proceedings are conducted directly by the legislative body or through a properly constituted committee.2 Before the courts will enforce a legislative subpoena duces tecum, the legislature must show that a proper legislative purpose exists, that the subpoenaed documents are relevant and material to the accomplishment of that purpose, and that the information sought is not otherwise practically available.3" (footnotes omitted) - "Subpoenas", 72 Am. Jur. 2d States, Etc. §56

(2) "The power to punish for contempt is inherent in the legislative function.1 Each house of the legislature has the authority to punish a contempt if the misconduct is committed in the legislature's presence2 or if a witness refuses to appear or to testify before its duly empowered committee or to produce books or papers.3

Legislative bodies may institute and enforce contempt proceedings in order to compel the attendance of witnesses and the production of documentary evidence as may be legally called for in the course of the proceedings,4 whether conducted by the legislative body or a branch of it, directly or through properly constituted committees.5 Although the legislature is not a court, the procedure prescribed for contempt of court may be used for contempt of the legislature, within the constraints of applicable constitutional or statutory provisions.6

In order for a witness to be punished for contempt on the grounds of refusing to answer, the disputed testimony must be pertinent to the question under inquiry.7 A witness may not, however, be compelled to answer incriminating questions.8 The evidence sought by the committee

must be material and have been willfully withheld.9 A contemnor, whom the trial court finds to be in criminal contempt for failing to appear and answer a valid legislative subpoena, will fail to preserve for appellate review a challenge to the sufficiency of the evidence to support the contempt finding against if the contemnor fails to make a motion for dismissal at the close of evidence.10" (footnotes omitted) - "Punishment for contempt", 81A C.J.S. States § 119.

F. Necessity of willful default and pertinency. 91 C.J.S. United States §39 (June 2018 update):

"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.15 It is also a misdemeanor for any person who has appeared to refuse to answer any question pertinent to the question under inquiry.16 Thus, a witness who willfully refuses to answer proper questions by a congressional committee is guilty of contempt.17 Likewise, the refusal of a witness to give any testimony whatever pertinent to the question under inquiry constitutes contempt.18 In order to be liable, however, a witness must be asked a question and must refuse to answer.19 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.20

Default, pursuant to such provisions, is a failure to comply with the summons.21 Default occurs where a person properly summoned fails and refuses to produce papers and documents requested.22 It also occurs when a person fails or refuses to appear.23 Failure to attend, following an appearance, also constitutes default.24 Appearance before a committee is not an essential element of the offense.25 Neither is it necessary that a refusal to testify or produce papers before a committee be in the presence of a quorum.26

An intentional failure to testify or produce papers, however the refusal or intentional omission is manifested, is contemplated.27 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.28 The violation must, in fact, be intentional.29 The offense of contempt for refusal to answer is a deliberate and intentional refusal and not an inadvertence, an accident, or a misunderstanding.30

"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.31 Specific criminal intent need not be shown.32 Further, willfulness is not an element of the offense.33 The offense may be committed where the witness voluntarily appears, as well as where he or she is required to attend.34 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.35 Where a witness refuses to answer, a specific direction to answer must be given, and objections by the witness must be specifically overruled.36

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.37 Nor does the refusal to answer a question constitute an offense where the witness properly invokes the privilege against self-incrimination.38 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.39 A failure of a witness to answer a question abandoned by the committee is not an offense.40

Pertinency.

Pertinency is an element of the statutory offense of refusing to answer any question pertinent to the question under inquiry.41 It is also an element of the statutory offense of refusing to produce papers and documents.42

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,43 the offense matures only when the witness is called to appear to answer questions or produce documents and willfully fails to do so.44" (footnotes omitted).

G. General Overview Summaries #2:

(1) "Any person subject to the sovereign governing jurisdiction of a state is thereby subject to the investigative process of its legislature and may be punished for contempt unless he is exempted by special constitutional privilege. Such a privilege relieved members of a grand jury from compulsion to disclose their votes, opinions, and deliberations.1 Massachusetts has ruled that the principle of separation of powers does not protect the head of an executive department from being required to report information to the legislature,2 though this issue continues to be debated in other jurisdictions.3 A member of a legislature has been subject to arrest and compulsion to testify before a committee of the legislature of which he

was a member.4 In the federal system the Supremacy Clause deprives state legislatures of power to investigate federal agencies.5" (footnotes omitted) - "Persons subject to the investigative process", 1 Sutherland Statutory Construction § 12:8 (7th ed.).

(2) "When a witness, lawfully summoned before the legislature or its committee, refuses to appear, a warrant or attachment may issue to compel the witness's attendance.1 Furthermore, the legislature has the authority to punish for contempt,2 or a proceeding may be initiated in criminal court for failing to appear and answer a valid legislative subpoena.3" (footnotes omitted) - 81A C.J.S. States § 118

(3) "Where information relating to a group or organization is sought by a legislative subpoena for the purpose of gathering information on a subject on which legislation may be had, there is no unconstitutional invasion of privacy.14" (footnotes omitted) - Associational privacy, generally, 16B C.J.S. Constitutional Law § 1182. (See also, Bean excerpt, next section.)

H. Pertinency requirement broader in legislative context than court but still need showing of scope of investigation - "The congressional contempt statute, 2 U.S.C. § 192, provides that a committee's questions or subpoena requests must be "pertinent to the subject under inquiry." However, the standard is very broad, and permits a wide range of questions relevant to an investigation. In deciding whether a subpoena is pertinent, the courts have required only that the specific inquiries be reasonably related to the subject matter under investigation.38

**Comparison to rules of evidence in court proceedings**: Because of the breadth of congressional investigations, the courts have long recognized that pertinency in the legislative context is broader than that of relevance under the law of evidence applicable in court. "A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress …. A judicial inquiry relates to a case, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates all possible cases which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry which generally is very broad."39

**The standard**: The Supreme Court has warned that a witness "acts at his peril" in deciding not to respond to a committee's questions or subpoena demands on grounds of pertinency. However, to help them decide whether to comply with a subpoena, witnesses are entitled to receive a description of the investigation's scope "with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense."40 The subject matter of an investigation may be shown through a variety of sources: (1) the declaration of the question under inquiry found in the authorizing rule or

resolution of the committee or subcommittees, (2) the introductory remarks of the committee chair or other members, (3) the response of the chair to the witness' pertinency objection, (4) the question itself, or (5) the "nature of the proceedings."41

The Supreme Court has distinguished cases in which the pertinency standard is met from those in which it is not. For example, an inquiry is not pertinent where "the question under inquiry had not been disclosed in any illuminating matter; and the questions asked … were not only amorphous on their face, but in some instances clearly foreign to the alleged subject matter of the investigation," whereas an inquiry is pertinent when "[t]he subject matter of the inquiry had been identified at the commencement of the investigation as Communist infiltration into the field of education" and the scope of the particular hearing "had been announced as 'in the main communism in education and the experiences and background in the party by Frances X. T. Crowley.'"42 (footnotes omitted)" - page 18, When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry, Morton Rosenberg, Constitution Project Fellow, The Constitution Project (2d ed. 2017), available online at http://www.thecre.com/forum8/wp-content/uploads/2017/05/WhenCongressComesCalling.pdf (hereinafter "When Congress Comes Calling")

## III. LIMITS UPON LEGISLATIVE SUBPOENA POWER.

A. While broad, the legislative investigative power is not absolute nor does it take place in a vacumn. A legislative subpoena does not automatically deprive a witness of constitutional or legal rights. A legislative subpoena may be subject to a number of constitutional and other challenges. These can include challenges arising from state law making testimonial privileges or other confidentiality requirements specifically applicable to legislative hearings.

B. Potential challenges. As mentioned in the previous section, and further discussed in this and the next section, these challenges can be generally summarized as:

(1) No legislative purpose or pertinency to a legislative purpose.
Failure to follow procedural requirements for issuance, form, and service, including lack of authority by legislative entity to issue subpoena.
All or part of subpoena constitutionally prohibited, depending upon who or what is being sought.
The subpoena is overbroad, vague, or unreasonable in what is being sought, or seeks information not relevant to the legislative purpose.
Testimonial/evidentiary privileges or other confidentiality requirements are applicable to prohibit or limit the testimony or materials sought.

(2) In response to these challenges, the legislative entity can seek judicial enforcement of the subpoena and offer defenses pursuant to its broad investigative powers, including potential claims of lack of justiciability by the judicial branch and prematurity. (See, for example, the Bean case discussed below, and the Office of Governor, Ellef, D'Amato, and Guam Memorial cases in the Appendix.)

C. To avoid potential claims of waiver or default, most challenges to a subpoena will usually be made prior to testimony or due date for production of materials. See below. However, issues or challenges at the hearing may still arise. See materials in the section on legislative hearings and witnesses.

D. Prudence required. Legislative staff must exercise prudence and preventive maintenance. Potential challenges and related concerns must be considered in advance when deciding whether, who, and what to subpoena and also when preparing for the hearing (including if necessary the seeking of subpoena compliance or enforcement, or the seeking of contempt and penalties for noncompliance.).

E. Limits Overview. William Rich, "Constitutional Limits Upon the Power of Investigation", 3 Modern Constitutional Law § 37:12 (3rd edition, December 2017 update);

> "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.1
>
> 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,"2 adding, "The Bill of Rights is applicable to investigations as to all forms of governmental action."3 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."4
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> In 1959, the Court held that in cases of governmental interrogation, a citizen's First Amendment interests must be balanced against the "public interests at stake." The Justices observed:
>
> > 'Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.5
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> However, when on the facts there was no showing of present danger of sedition against a state, the Supreme Court ruled that the state's "interest on this record is too remote and conjectural to override the guarantee of the First Amendment that a person can speak or not, as he chooses, free of all governmental compulsion."6
>
> It can be assumed that the same principle will be applied to investigations by Congress, and when the federal interest is "too remote and conjectural," the First Amendment interest should prevail. "The First Amendment," noted the Justices in 1966, "prevents use of the power to investigate enforced by the contempt power to probe at will and without

relation to existing need."7

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.8

A lawyer whose client receives a congressional subpoena which is thought to be too broad or burdensome would be well advised to bring this objection to the attention of the committee or subcommittee of Congress at the first opportunity. In such a case, the Supreme Court Justices have pointed out that "the defect, if any, 'could easily have been remedied'" by such procedure.9

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. The Justices have explained:

> Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto.10

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. In 1961, the Supreme Court ruled that to convict witnesses for refusing "to answer the questions to which they objected but which they were not directed to answer would deprive them of due process in violation of the Fourteenth Amendment."11 More generally, the Justices indicated that a person before a legislative investigatory body is entitled to procedural due process and is deprived of due process when subjected to conduct by the legislators or their staff that "would deeply offend traditional notions of fair play."12

The privilege against self-incrimination contained in the Fifth Amendment also limits the power of Congress to conduct investigations. Persons who appear before congressional committees need only claim their privilege against self-incrimination in "language that a committee may reasonably be expected to understand as an attempt to invoke the privilege."13 Waiver of the privilege against self-incrimination by a

person before a congressional committee is not to be readily or lightly inferred,14 and when a person claims the privilege before congressional investigators, the committee or subcommittee contemplating later punitive action must specifically overrule the person's objection and direct that an answer be given.15

Although waiver of the privilege will not be inferred in a technical manner, designed to trap the unwary, those intending to resist congressional investigations on constitutional grounds must reasonably and clearly raise their constitutional objection before the congressional investigators, indicating the constitutional clause or amendment upon which they rely. “To hold otherwise,” Justice Harlan noted, “would enable a witness to toy with a congressional committee in a manner obnoxious to the rule that such committees are entitled to be clearly apprised of the grounds on which a witness asserts a right of refusal to answer.”16

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. “We hold,” ruled the Supreme Court Justices in 1964, “that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.”17

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.”18 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.19" (footnotes omitted).

[See also, §37:10 and 11 discussing congressional power to investigate and punish for contempt; 1 Sutherland Statutory Construction § 12:7 (7th ed.).]

F. Waiver and Default of Challenges/Objections - General:

(1) "A number of cases have addressed the waiver consequences of complying with a legislative subpoena and reached varying results. One of the earlier cases arising out of a congressional subpoena established an extraordinarily high threshold for demonstrating reasonable steps to resist compelled disclosure. In Sanders v. McClellan,7 a congressional subcommittee issued a subpoena to a publisher compelling production of, inter alia, the names of individuals who authored articles in a publication on how to accomplish sabotage and terrorism. The publisher filed suit in federal district court seeking to enjoin the subcommittee from enforcing the subpoena. Declining to issue an injunction, the District of Columbia Court of Appeals identified certain steps to be followed when challenging a congressional subpoena:

> We first note the existence, apart from resort to our jurisdiction in equity, of an orderly and often approved means of vindicating constitutional claims arising from a legislative investigation. A witness may address his claims to the Subcommittee, which may sustain objections. Were the Subcommittee to insist, however, upon some response beyond the witness' conception of his obligation, and he refused to comply, no punitive action could be taken against him unless the full Committee obtained from the Senate as a whole a citation of the witness for contempt, the citation had been referred to the United States Attorney, and an indictment returned or information filed. Should prosecution occur, the witness' claims could then be raised before the trial court.8

The majority of cases to address the issue, however, has held that it is not necessary to stand in contempt of Congress to preserve a future claim of privilege, but the privilege holder must take "all reasonably available steps and exhaust[ ] all reasonable avenues short of standing in contempt before they turn[ing] over the documents" to Congress.9" (footnotes omitted) - 2 McLaughlin on Class Actions § 11:10 (14th ed.).

(2) "Failing to adequately contest a Congressional subpoena and stand in contempt of Congress for refusing to produce has also been held to constitute a waiver of the privilege protection. For example, in Iron Workers Local Union No. 17 Insurance Fund v. Philip Morris, Inc.,28 the tobacco industry made only a perfunctory objection to an order by the chairman of the House Committee on Commerce to produce written communications that the industry had claimed was privileged. The standards employed in determining whether a party has sufficiently taken steps to contest a legislative subpoena are high. Generally, a party seeking to preserve a claimed privilege, despite Congressional subpoena, must challenge such a subpoena by standing in contempt of Congress. In

Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972), the District of Columbia Court of Appeals identified certain steps to be followed when making such a challenge. The court stated:

> A witness may address his claims to the Subcommittee, which may sustain objections. Were the Subcommittee to insist, however, upon some response beyond the witness' conception of his obligation, and he refused to comply, no punitive action could be taken against him unless the full Committee obtained from the Senate as a whole a citation of the witness for contempt, the citation had been referred to the United States Attorney, and an indictment returned or information filed. Should prosecution occur, the witness' claims could then be raised before the trial court. …

In short, a party must do more than merely object to Congress' ruling. Instead, a party must risk standing in contempt of Congress. … It is fair for a court to require the witness show "that some serious effort was made to convince the Chair and/or the committee itself to recognize the privilege claims being asserted."29" (footnotes omitted) - "Failure to properly object to disclosure of confidential communications", 2 Attorney-Client Privilege in the U.S. § 9:33.

(3) See also the excerpt in the previous section from 91 C.J.S. United States §39 (June 2018 update) discussing default.

G. Bean LLC v. John Doe Bank, 291 F.Supp.3d 34 (U.S. District Court District of Columbia 2018) - "Synopsis Background: Research firm that was hired to conduct political opposition research on then-candidate for United States presidential election moved for temporary restraining order and for preliminary injunction preventing enforcement of Congressional subpoena served to firm's bank and requiring production of records regarding firm's financial transactions with clients and contractors, in conjunction with House of Representatives Permanent Select Committee on Intelligence's investigation into Russian interference with presidential election. Committee intervened." Motion denied.

> "Fusion opposes the Subpoena on four independent grounds: (1) it lacks a valid legislative purpose; (2) it is overbroad and seeks information that is not relevant to the Committee's investigation; (3) it violates Fusion's First Amendment rights; and (4) it violates the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. § 3401 et seq., and the Gramm-Leach-Bliley Act ("GLBA"), 15 U.S.C. § 1601 et seq. For the foregoing reasons, this Court finds Fusion's objections to the Subpoena to be unavailing and will DENY its motion. I address each argument in turn."....

> "Plaintiff first contends that the Subpoena is invalid because it was issued without authority. Specifically, plaintiff avers that, in issuing the

Subpoena, "Mr. Nunes has acted alone, pursuant to no resolution.....According to plaintiff, the Committee was required to have a "formal public 'unambiguous resolution' [to] authoriz[e] this investigation," and because no such resolution exists, "the subpoena is not part of a legitimate legislative activity." Id. I disagree. To begin with, it is clear that Congress has delegated to the Committee its investigatory power over intelligence-related activities.....Plaintiff counters that the Subpoena is still invalid because the Russia investigation was not authorized by a "formal public" resolution. Pl.'s Mot. 7. Fusion's theory appears to be that every Congressional investigation must be authorized by a separate formal resolution in order to qualify as legitimate legislative activity. To say the least, that is wishful thinking! In considering the scope of the Congressional investigative power, the Supreme Court has required only a grant of authority "sufficient to show that the investigation upon which the [Committee] had embarked concerned a subject on which 'legislation could be had.' " Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 506, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975) (quoting McGrain v. Daugherty, 273 U.S. 135, 177, 47 S.Ct. 319, 71 L.Ed. 580 (1927)). "....."

"Fusion next asserts that the Subpoena is overbroad because it seeks to compel production of records not pertinent to the Committee's investigation. Pl.'s Renewed Mot. 8. Specifically, Fusion objects to the Committee's request for bank records related to its transactions with ten law firms on the ground that "[n]one of the law firms about which Intervenor seeks information (other than Perkins Coie and Baker Hostetler) contracted with Fusion GPS to perform work related to Russia or Donald Trump, in any way." Id. at 9. Fusion similarly alleges that the request for records of transactions between Fusion and certain media companies, journalists, and businesses are "not pertinent." Id. at 9-11. Plaintiff therefore asks that I enjoin the Bank's compliance with the Committee's outstanding request for the seventy responsive transactions on the ground that those records are irrelevant to the Committee's legitimate Congressional inquiry.

This Court, however, lacks the authority to restrict the scope of the Committee's investigation in the manner plaintiff suggests. Congress's power to investigate "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." Eastland, 421 U.S. at 504 n.15, 95 S.Ct. 1813. Indeed, "[t]he power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate." Barenblatt v. United States, 360 U.S. 109, 111, 79 S.Ct. 1081, 3 L.Ed.2d 1115 (1959). And the Supreme Court has left no doubt that the issuance of subpoenas is "a legitimate use by Congress of its power to investigate." Eastland, 421 U.S. at 504, 95

S.Ct. 1813. While Fusion is correct that "Congress' investigatory power is not, itself, absolute" and that it "is not immune from judicial review," Pl.'s Renewed Mot. 5, this Court will not-and indeed, may not-engage in a line-by-line review of the Committee's requests. Cf. McSurely v. McClellan, 521 F.2d 1024, 1041 (D.C. Cir. 1975) ("There is no requirement that every piece of information gathered in [a Congressional] investigation be justified before the judiciary.").

Instead, where, as here, an investigative subpoena is challenged on relevancy grounds, "the Supreme Court has stated that the subpoena is to be enforced 'unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the ... investigation.' " Senate Select Comm. on Ethics v. Packwood, 845 F.Supp. 17, 21 (D.D.C. 1994) (quoting United States v. R. Enterprises, Inc., 498 U.S. 292, 301, 111 S.Ct. 722, 112 L.Ed.2d 795 (1991)). In determining the proper scope of the Subpoena, "this Court may only inquire as to whether the documents sought by the subpoena are 'not plainly incompetent or irrelevant to any lawful purpose [of the Committee] in the discharge of [its] duties.' " Packwood, 845 F.Supp. at 20-21 (quoting McPhaul v. United States, 364 U.S. 372, 381, 81 S.Ct. 138, 5 L.Ed.2d 136 (1960)). And "[t]he burden of showing that the request is unreasonable is on the subpoenaed party." FTC v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir. 1977).

After reviewing the record in this case, I cannot say that the documents sought by the Subpoena are "plainly incompetent or irrelevant" to the Committee's lawful purpose."....

"While Fusion assures the Court that the requested records do not, in fact, contain any transactions that are pertinent to the Committee's Russia investigation, Pl.'s Renewed Mot. 9-11, "it is manifestly impracticable to leave to the subject of the investigation alone the determination of what information may or may not be probative of the matters being investigated." Packwood, 845 F.Supp. at 21. This is particularly true here, where the full scope of the Committee's investigation is classified, and thus plaintiff cannot possibly know the complete justifications for the Committee's requests for certain documents. See Glabe Decl. 19.

Because the Committee possesses the power to investigate Russian active measures directed at the 2016 Presidential election, and there is a reasonable possibility that the records requested will contain information relevant to that investigation, the Subpoena is not impermissibly broad, even if the records turn out to be unfruitful avenues of investigation. See Eastland, 421 U.S. at 509, 95 S.Ct. 1813 ("Nor is the legitimacy of a congressional inquiry to be defined by what it produces. The very nature of

the investigative function-like any research-is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result."). This is particularly true in light of the fact that, at this stage of the proceedings, the Committee is acting as the "legislative branch equivalent of a grand jury, in furtherance of an express constitutional grant of authority." Packwood, 845 F.Supp. at 21. It is "well-established that such investigative bodies enjoy wide latitude in pursuing possible claims of wrongdoing, and the authority of the courts to confine their investigations is extremely limited." Id. Thus, conscious of the significant separation of powers principles at play in this litigation, and in light of my finding that the records the Committee has requested could reasonably produce information relevant to the general subject of the Committee's inquiry, I need inquire no further into the scope of the Subpoena in this case. Cf. Barenblatt, 360 U.S. at 132, 79 S.Ct. 1081 ("So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.").".....

"Plaintiff's third basis for enjoining the Bank's compliance with the Subpoena is grounded in First Amendment considerations. Specifically, Fusion asserts that the Bank's compliance with the Subpoena "would abridge Plaintiff's First Amendment rights to engage in free political speech, free political activity, and free association." Pl.'s Mot. 11. According to plaintiff, disclosure of its financial records would reveal the identity of its clients, and thus would hinder them from contracting anonymously with Fusion in the future..... At bottom, Fusion's argument amounts to a claim that the Subpoena intrudes on its associational rights under the First Amendment because it would hinder its ability to associate anonymously with its clients, and would thus chill its protected political activity. Unfortunately for plaintiff, I cannot agree.

Plaintiff alleges that the Committee's disclosure requests violate the private nature of plaintiff's relationships with its customers-relationships that plaintiff claims are protected by the First Amendment. But plaintiff points to no authority to support its theory that the freedom of association protects financial records. And this is not surprising, given that commercial transactions do not give rise to associational rights, even where the subjects of those transactions are protected by the First Amendment. Indeed, courts have uniformly held that the kind of commercial relationships Fusion seeks to shield from governmental inquiry here are not protected as associational rights under the First Amendment.

For example, in FEC v. Automated Bus. Servs., 888 F.Supp. 539 (S.D.N.Y. 1995), the court rejected a First Amendment challenge to

subpoenas that were issued to vendors who engaged in business with political associations. It did so on the ground that the subpoenas sought "information regarding corporate and business transactions, not information regarding any political association the [vendor] may have had with [its customer]." Id. at 541-42 (emphasis added). The Court reasoned that, "[a]lthough members of a political association and contributors to a political association have First Amendment associational rights that may be implicated when an administrative agency serves that political association with a subpoena, the Vendors have failed to cite any law in support of the proposition that a party that vends goods or services to a political association is entitled to similar First Amendment protection." Id. (internal citations omitted).

Similarly, in In re Grand Jury Subpoena Served Upon Crown Video Unlimited, Inc., 630 F.Supp. 614 (E.D.N.C. 1986), the court held that the commercial relationship between a customer and a video store owner "is not protected as an association right arising under the [F]irst [A]mendment" because "[t]here has been no showing that any of the subpoenaed corporations, in tandem with their respective clients, have advocated political, economic, religious or cultural beliefs through their commercial relationship." Id. at 619. Thus, while the court held that the videotapes involved in the commercial transactions were a form of speech protected by the First Amendment, the commercial relationship was not. Id. The same principle applies here.

While the opposition research Fusion conducted on behalf of its clients may have been political in nature, Fusion's commercial relationship with those clients was not, and thus that relationship does not provide Fusion with some special First Amendment protection from subpoenas. Cf. United States v. Bell, 414 F.3d 474, 485 (3d Cir. 2005) (tax professional's customer list not protected); IDK, Inc. v. Cty. of Clark, 836 F.2d 1185, 1193-95 (9th Cir. 1988) (escort-client relationship not protected); In re Grand Jury Subpoena Served Upon PHE, Inc., 790 F.Supp. 1310, 1317 (W.D. Ky. 1992) (commercial relationship between publisher and customers not protected). To hold otherwise would be to allow any entity that provides goods or services to a customer who engages in political activity to resist a subpoena on the ground that its client engages in political speech. Surely, to recast a line from the great Justice Robert H. Jackson, the First Amendment is not a secrecy pact ! See Terminiello v. City of Chicago, 337 U.S. 1, 37, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) (Jackson, J., dissenting). Here, while Fusion's clients may have First Amendment rights associated with their political affiliations, Fusion has failed to establish that it is entitled to similar First Amendment protection on the basis of its clients' political activities.

Moreover, it is worth noting that the likelihood of Fusion's financial transactions-let alone the nature of the work being performed for

Fusion's clients-being made public is quite low. The financial records the Committee seeks show only the name of the payor or payee, the amount of the payment, and certain identifying information; they do not indicate what the payment was for. And the Committee's executive session rules-which require subpoenaed materials, including the seventy transactions at issue in this case, to be kept confidential-are designed to prevent the disclosure that plaintiff fears.....Therefore, absent evidence to suggest that the Committee will not follow its own rules-and plaintiff has presented this Court with none-I must presume that those rules are being followed. See In re Navy Chaplaincy, 850 F.Supp.2d 86, 94 (D.D.C. 2012) ( [W]ell-settled case law ... requires a court to presume that government officials will conduct themselves properly and in good faith.").9.....The Subpoena at issue in today's case was issued pursuant to a constitutionally authorized investigation by a Committee of the U.S. House of Representatives with jurisdiction over intelligence and intelligence-related activities-activities designed to protect us from potential cyber-attacks now and in the future. The Subpoena seeks the production of records of financial transactions that have a "reasonable possibility," Packwood, 845 F.Supp. at 21, of producing information relevant to that constitutionally authorized investigation. Although the records being sought by the Subpoena are sensitive in nature-and merit the use of appropriate precautions by the Committee to ensure they are not publicly disclosed-the nature of the records themselves, and the Committee's procedures designed to ensure their confidentiality, more than adequately protect the sensitivity of that information. Thus, because I find all of Fusion's objections to the Subpoena to be unavailing, Fusion cannot satisfy the first factor of its burden for obtaining a preliminary injunction-a likelihood of success on the merits-and I need go no further.11 Plaintiff's motion must therefore be DENIED." (Excerpts, footnotes omitted, pages 41-50).

> [Note: see also, General Elec. Co. v. New York State Assembly Committee, 425 F.Supp. 909 (1975); Ward v. Peabody, 405 N.E.2d 973, 380 Mass. 805 (1980); Kalkstein v. DiNapoli, 253 A.D.2d 979 (1998); "Practice or procedure for testing validity or scope of the command of subpoena duces tecum", 130 A.L.R. 327]

## IV. BEFORE A SUBPOENA IS ISSUED - CHECK PROCEDURES AND REVIEW POTENTIAL CHALLENGES.

A. The Bean case quoted in the last section is example of how challenges to a legislative subpoena may be based upon pertinency, procedural, constitutional, and non-constitutional grounds. Again, at the state level these challenges can be summarized as:

No legislative purpose or pertinency to a legislative purpose.
Failure to follow procedural requirements for issuance, form, and service, including lack of authority by legislative entity to issue subpoena.
All or part of subpoena prohibited by constitutional grounds, depending upon who or what is being sought.
The subpoena is overbroad, vague, or unreasonable in what is sought, or seeks information not relevant.
Testimonial/evidentiary privileges or confidentiality requirements are applicable to prohibit or limit the testimony or materials sought.

Appropriate preventive maintenance means that all of these potential challenges should be considered by legislative staff prior to the issuance of a subpoena.

B. In their treatment of legislative subpoenas and proceedings for contempt, states vary in constitutional language, statutory provisions, legislative rule, and level of detail requirements. See, for example, Selected State Laws and Materials in the Appendix.

(1) Adherence is required to the particular procedures applicable in your state.

(2) Remember too that procedures or legal requirements may vary not only between chambers in the same state, but also between different legislative committees and legislative agencies.

(See, for example, regarding Congress - "A Survey of House and Senate Committee Rules on Subpoenas", Congressional Research Service, R44247, January 29, 2018. The discussion includes analysis and review by committee of full or conditional powers to authorize, issue, and serve a subpoena, and related procedural questions such as obtaining of authorization to issue a subpoena, applications to hearings/investigations, service of subpoenas, time limits, and committee requirements concerning quorum and votes required.)

C. The first question - Why issue a subpoena?

(1) Pursuant to the legislative inquiry being conducted, a proper legislative purpose exists to subpoena the particular person and materials; the subpoenaed person and materials are pertinent and relevant to the accomplishment of that purpose; the legislative entity is authorized and within the scope of its authority to seek the subpoena; the legislative entity will use valid procedures to issue and timely serve the subpoena; service of the subpoena will be validly made; and the information sought is not otherwise practically available.

a. Subpoenas are a method regularly used by the legislative entity to obtain witness and document information.

b. The person has been given an opportunity, but has declined to voluntarily testify or provide the desired information to the legislative entity.

c. The person or materials cannot be obtained without subpoena, or there are exigent circumstances necessitating the issuance of the subpoena, such as time constraints or potential loss of access to the witness or materials due to unavailability, flight, destruction, loss, etc.

D. Fundamental considerations prior to issuance of a subpoena:

(1) What is the "legislative purpose" for the subpoena?

(2) What is "pertinent" in your state?

a. See the discussion in Section II regarding pertinency and also, for example, Maryland Code, State Government, §2-1802, stating that paper, books, accounts, documents, testimony or records are "pertinent" if they: "(1) relate to the matters under inquiry or examination; (2) assist in assessing the credibility of a witness; (3) contradict or corroborate the testimony of a witness; or (4) demonstrate the existence of undue influence on a witness."

(3) Who does the legislative entity desire to subpoena? See below.

(4) What information does the legislative entity desire to subpoena? See below.

(5) What is the authority of the legislative entity to issue the subpoena? Is such power power full or conditional (must the entity seek approval of another body, person or judicial branch)?

(6) Is action in open meeting required to seek issuance of the subpoena, and if so what legislative record (information, vote, etc.) is required for such action? Or has such power been delegated to a committee chairman or other person?

(7) Can the subpoena be issued and served by the legislative entity, or is judicial approval and order required? (If the person or materials sought are not in the state, how will the subpoena be issued and served through the compliance state?)

(8) What is the prescribed form for the subpoena and who signs it?

a. Prescribed by your state law? (See Selected State Law and Materials in Appendix, including information from Arizona, Minnesota, Utah, Nevada, and New York.)

b. See, for example, Federal Rules of Civil Procedure, Rule 45 "Subpoena", and subpoena process overview at https://www.weil.com/~/media/files/pdfs/2018/subpoenas-drafting-issuing-and-serving-subpoenas-federal.pdf

and form at http://www.uscourts.gov/sites/default/files/ao088b.pdf

c. 25B Am. Jur. Pl. & Pr. Forms Witnesses § 88:

> "§ 88. Subpoena-Issued by legislative investigating committee-To require attendance before it to testify
> [Caption, see §28]
> SUBPOENA
> To: [name of witness]
> We command you that, all business and excuses being laid aside, you appear before the [name of committee] of the [name of legislative body] of the State of [name of state], appointed pursuant to a [type of legislative enactment] duly passed on [date of passage], at [address of committee hearing], [name of city], [name of state], on [date of appearance], at [time of appearance], then and there to testify and give evidence in a certain investigation now pending before that committee, that you are not to fail to appear under the penalty prescribed by law.

Witness [name of chair of committee], the chairperson of the [name of committee], this [date of issuance].

_____
[Name of chair of committee]"

(9) Who will actually serve the subpoena and in what manner? See the State Materials in the Appendix for various examples of requirements.

(10) What is the deadline for service, and what return of service is required for the legislative record?

(11) Must a witness fee or other information be included together with the subpoena when service is made?

a. See, for example, the Valley case in the Appendix, and the Minnesota, West Virginia, and Utah materials in the Appendix.

(12) Is there sufficient time following service of the subpoena to resolve challenges/objections or for judicial action to enforce compliance?

a. If there are objections to the subpoena, what are the procedures for negotiations with the legislative entity?

b. Are there procedures for revision or recall of a legislative subpoena prior to the appearance or production date?

c. Are there statutory procedures for addressing judicial challenges or seeking judicial enforcement of the subpoena prior to the hearing?

(See, for example, Vermont 2 V.S.A. §22, "Complaint filed in the Superior Court to compel testimony or production of evidence"; and West Virginia, W. Va. Code § 4-3-4 "Access to records of state agency or department; public hearings; meetings; administering oaths to persons testifying; compelling access to records and attendance of witnesses; production of evidence", providing in part that: "If any witness subpoenaed to appear at any hearing or meeting shall refuse to appear or to answer inquiries there propounded, or shall fail or refuse to produce books, papers, documents or records within his or her control when the same are demanded, the committee in its

discretion may enforce obedience to its subpoena by attachment, fine or imprisonment, as provided in section five, article one of this chapter; or it may report the facts to the circuit court of Kanawha county or any other court of competent jurisdiction and such court shall compel obedience to the subpoena as though such subpoena had been issued by such court in the first instance.")

d. Who will represent the legislative entity in court?

e. If a judicial action is filed challenging the subpoena, will the response by the legislative entity include seeking dismissal based upon lack of justiciability or prematurity? (See, for example, the Office of Governor, Ellef, D'Amato, and Guam Memorial cases in the Appendix.)

(13) Potential additional considerations:

a. Is there a witness fee for legislative witnesses, and when must it be paid?

b. In addition to witness fees, does state law address who pays for the cost of complying with the legislative subpoena and preparation of materials?

(See, for example, discussing cost-shifting in federal court, United States v. Cardinal Growth, L.P., No. 11 cv 4071 (N.D. Ill. Feb. 23, 2015))

F. Potential challenges. Potential challenges to a subpoena can include:

(1) Improper procedure in issuance/service, including naming or service upon wrong person.

(2) Lack of pertinency to legislative purpose.

(3) Constitutional protections or prohibitions.

(4) Testimonial/evidentiary privileges or other confidentiality protections.

(5) Insufficient time after service in which to respond, or overbroad, vague, unreasonable or not relevant in materials sought.

G. First Amendment - legislative investigations are subject to First Amendment protections. A balancing test is involved between the competing private and public interests at stake. If necessary, the legislative entity should be prepared to show a compelling state interest in the information sought that is sufficient to overcome a claim of "impermissible chilling effect" on protected speech. See the materials in Section II and III on limitations, including the Bean case. See also, "Congress's Contempt Power" at pages 64-67, and "Freedom of association for political purposes, generally", 16B C.J.S. Constitutional Law § 1155.

(1) "The First Amendment protects the freedoms of speech, press, assembly, religion, and petitioning the government. The amendment prohibits government conduct that unduly "chills" the exercise of these rights or inhibits the operation of a free press. The Supreme Court has held that the First Amendment restricts Congress in conducting investigations.136 In Barenblatt v. United States, 137 the Court held that "[w]here First Amendment rights are asserted [by a witness] to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." Thus, unlike the Fifth Amendment privilege against self-incrimination, the First Amendment does not give a witness an absolute right to refuse to respond to congressional demands for information.138.....First Amendment issues often arise when members of the press seek to protect the confidentiality of their sources and cite freedom of the press in response to congressional inquiries. The Court has held that in balancing personal privacy interests against the congressional need for information, "[t]he critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness."139 To protect the First Amendment rights of witnesses, the courts have emphasized the requirements discussed above concerning authorization for the investigation, delegation of power to investigate to the committee involved, and the existence of a legislative purpose.140 The Supreme court has never relied on the First Amendment as grounds for reversing a criminal contempt of Congress conviction.141 However, the court has narrowly construed the scope of a committee's authority so as to avoid reaching First Amendment issues.142 In addition, the Court has ruled in favor of a witness who invoked his First Amendment rights in response to questioning by a state legislative committee.143" (footnotes omitted) - "When Congress Comes Calling", pages 59-60.

(2) Note that First Amendment rights do not apply with equal force to government employees speaking in their official capacity. See cases and materials discussed in Day and Bradford, Civility in Government Meetings: Balancing First Amendment, Reputational Interests, and

Efficiency, 10 First Amendment Law Review 57 (2011); and also 16 A.L.R. §1358 and 16B C.J.S. Constitutional Law § 1156.

H. Fourth Amendment - The Fourth Amendment protects a witness against an unreasonably broad or burdensome subpoena. While "fishing expeditions" may be subject to attack, the purpose of a valid inquiry if broad may likewise authorize a broad scope of materials to be reasonably sought. A party must inform the committee or take action if he is unable to produce requested materials or doubts their relevancy to the inquiry. (See the Bean case and other materials on limitation in the preceding section; "Congress's Contempt Power" at pages 67-68; the Carpenter, Bonar, Brodsky, and other cases in the Appendix below; and "Practice or procedure for testing validity or scope of the command of subpoena duces tecum", 130 A.L.R. 327.)

(1) Note: Particular attention should be paid to the new U.S. Supreme Court case summarized in the Appendix of Carpenter v. U.S., 138 S.Ct. 2206 (2018). In its majority opinion the Court concluded that an individual maintains a legitimate expectation of privacy, for Fourth Amendment purposes, in the records of his physical movements as captured through cell-site location information, and a search warrant supported by probable cause was necessary before acquiring cell site location information from a wireless carrier. The majority opinion states in part, "Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter's claim to Fourth Amendment protection. The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.....Having found that the acquisition of Carpenter's CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records.....We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party."

As pointed out by the dissents, holding that government subpoenas must meet the same standard as conventional searches is contrary to previous jurisprudence and adversely impacts many forms of government subpoenas, including legislative subpoenas, grand jury subpoenas, and administrative subpoenas. While legislative subpoenas have a broad constitutional basis, does Carpenter open the door for Fourth or Fifth Amendment challenges to legislative subpoenas seeking third party records?

(2) "Several opinions of the Supreme Court suggest that the Fourth Amendment's prohibition against unreasonable searches and seizures applies to congressional committees; however, there has not been an opinion directly addressing the issue.154 The Fourth Amendment protects a congressional witness against a subpoena that is unreasonably broad or burdensome.155 Therefore, there must be a legitimate legislative or oversight-related basis for the issuance of a congressional subpoena.156 .....The Supreme Court has outlined the standard to be used in judging the reasonableness of a congressional subpoena: '[A]dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry' …. '[T]he description contained in the subpoena was sufficient to enable [the petitioner] to know what particular documents were required and to select them accordingly.'157.....If a witness has a legal objection to a subpoena duces tecum (one seeking documents) or is, for some reason, unable to comply with a demand for documents, the witness must give the grounds for the objection upon the return of the subpoena. The Supreme Court has stated: "If petitioner was in doubt as to what records were required by the subpoena, or found it unduly burdensome, or found it to call for records unrelated to the inquiry, he could and should have so advised the Subcommittee, where the defect, if any, 'could easily have been remedied.'"158 Where a witness is unable to produce documents, the witness will not be held in contempt "unless he is responsible for their unavailability … or is impeding justice by not explaining what happened to them."159.....In judicial proceedings, if evidence has been obtained in violation of a criminal defendant's Fourth Amendment rights, the exclusionary rule prohibits the prosecution from introducing that evidence at trial. The application of the exclusionary rule to congressional committee investigations depends on the precise facts of the situation. Documents that were unlawfully seized at the direction of a congressional investigating committee may not be admitted into evidence in a subsequent, unrelated criminal prosecution because of the command of the exclusionary rule.160 In the absence of a Supreme Court ruling, it remains unclear whether a congressional subpoena that was issued on the basis of documents obtained through an unlawful seizure by another investigating body (such as a state prosecutor) is valid. If the exclusionary rule applies, it would bar reliance on the unlawfully obtained evidence, and also on the subpoena itself.161" (footnotes omitted) - "When Congress Comes Calling", pages 61-62.

I. Fifth Amendment - The privilege against self-incrimination applies to legislative investigations. It may be invoked by natural persons but not juridical entities such as corporations or other "artificial persons". It prohibits being compelled to testify, but not to produce materials unless to do so would also effectively constitute self-incrimination. There is no "magic wording" for a witness to invoke the privilege. See also the discussion later below concerning grants of immunity for waiver.

(1) "The Fifth Amendment of the Constitution protects individuals from being compelled to testify against themselves in a criminal case. Although it has never been necessary for the Supreme Court to decide the issue, the Court has made it clear that the privilege against self-incrimination applies to witnesses in congressional investigations.102 The privilege is personal in nature103 and may not be invoked on behalf of a corporation,104 small partnership,105 labor union,106 or other “artificial” organization.107 The privilege protects a witness against being compelled to testify, but it generally does not protect against a subpoena for existing documentary evidence.108 However, where compliance with a subpoena asking for documents would effectively serve as testimony to authenticate the documents produced, the privilege may apply.109 On the other hand, the Supreme Court has held that a directive to a witness to authorize foreign banks to produce records if they existed is not testimonial in nature and, therefore, not incriminating.110".....There is no required verbal formula for invoking the Fifth Amendment privilege. Similarly, there does not appear to be a requirement that the congressional committee inform a witness of his or her Fifth Amendment rights.111 However, a committee should recognize any reasonable indication, such as the witness saying “the Fifth Amendment,” as a sign that the witness is asserting the privilege.112 Where a committee is uncertain whether the witness is in fact invoking the privilege against self-incrimination or is claiming some other basis for declining to answer, the committee should direct the witness to specify the nature of the objection.113"....."Witnesses may invoke the Fifth Amendment privilege during a congressional investigation with regard to testimony or documents that are (1) testimonial—that is, it “relate[s] to a factual assertion;”114 (2) self-incriminating, in that its disclosure would tend to show guilt or furnish a “link in the chain of evidence” needed to prosecute;115 and (3) compelled—that is, not voluntarily given. Oral testimony given pursuant to a subpoena and in response to questioning almost always would be testimonial and compelled. The remaining, critical inquiry, then, is whether the responsive testimony would be “incriminating.” The Supreme Court has taken the broad view of what constitutes incriminating testimony, holding that the privilege protects any statement “that the witness reasonably believes could be used in criminal prosecution or could lead to other evidence that might be so used.”116 Even a witness who denies wrongdoing can refuse to answer questions on the grounds that he or she might be “ensnared by ambiguous circumstances.”117.....The privilege against self-incrimination may be waived by failure to assert it, specifically disclaiming it, or previously testifying on the same matters as to

which the privilege is later asserted. However, because of the importance of the Fifth Amendment privilege, a court will not construe an ambiguous statement by a witness before a committee as a waiver;120 and where witnesses do not offer substantive testimony, and instead merely make general denials or summary assertions, federal courts have been unwilling to infer a waiver of the Fifth Amendment privilege.121" (footnotes omitted) - "When Congress Comes Calling", pages 55-57.

(2) Note the Fourth Amendment discussion earlier in this outline of the new Supreme Court case of Carpenter v. U.S., summarized in the Appendix. To what extent could a Fifth Amendment objection also be raised against subpoenas seeking production of third party records?

(3) Note also that the "Sixth Amendment right of a criminal defendant to cross-examine witnesses and call witnesses on his or her behalf has been held inapplicable to a congressional hearing.162" (footnotes omitted) - "When Congress Comes Calling", page 63. However, in the event of inherent contempt proceedings conducted by the legislature without judicial involvement, procedural due process requiring notice and opportunity to be heard is applicable. See the Bernard case in the section on contempt proceedings and Groppi v. Leslie, 692 S.Ct. 582 (1972)

J. Separation of powers. See the Connecticut Sullivan and Office of Governor cases in the Appendix. Impermissible encroachment under separation of powers may be invoked to challenge a legislative subpoena seeking an official such as a sitting judge or governor to appear and answer questions relating to their official duties or performance.

K. Federal officials or records. The Supremacy Clause and federal law provide protections from state subpoena of federal officials or documents. A state subpoena served on a federal official acting in his official capacity may be considered an action against the United States and subject to a sovereign immunity challenge. (See Beckett v. Serpas, 2013 WL 796067, (E.D. La. 2013); Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency, 86 F.3d 1208, 1211 (D.C. Cir. 1996); Giza v. Secretary of Health, Educ. & Welfare, 628 F.2d 748, 751-2 (1st Cir. 1980). See also, Bonnet v. Harvest (U.S.) Holdings, Inc., 741 F.3d 1155 (10th Cir. 2014); 9A Fed. Prac. & Proc. Civ. § 2463.2 (3d ed.), "Subpoenas of Administrative Agencies"; and 15 A.L.R. Fed. 3d Art. 5, "Depositions of High-Ranking Government Officials".)

(1) Consider a "Touhy" or FOIA request to obtain information from federal agencies if necessary.

a. "Under what has sometimes been referred to as the Housekeeping Act,1 various departments of the federal government are authorized to promulgate regulations protecting from disclosure official information in their possession.2 Thus, a federal government employee may not be compelled to testify as to specific matters where appropriate agency authorization has not been given.3 Under a government privilege, the holder of the privilege is the government,4 and the courts have no power to compel federal officials to disclose information which they are forbidden to disclose under such regulations.5

A Freedom of Information Act (FOIA) exemption from disclosure does not, on its own, create a civil discovery privilege.6 Exceptions to the disclosure of documents under FOIA only permit the withholding of specified categories of information from the public generally, and thus, in civil litigation, the need of a litigant for the material must be taken into account and may require disclosure where FOIA itself would not.7" (footnotes omitted) - 81 Am. Jur. 2d Witnesses §478.

b. See "Touhy Monograph" by Robert H. Foster, November 10, 2016, available online at https://www.americanbar.org/content/dam/aba/events/government_public/touhy_monograph.authcheckdam.pdf

(2) See also the Milardo case in the Appendix, concluding that the court lacked jurisdiction to grant writs of habeas corpus ad testificandum to enable the petitioners to return to the United States to testify in person before the Judiciary Committee of the Connecticut General Assembly in response to a legislative subpoena and to testify in person in support of a state habeas petition. Among other factors, ICE validly determined that videoconferencing technology in Italy was available for testimony.

L. "Executive privilege" may also be invoked to challenge a legislative subpoena.

(1) "Over the centuries, courts have recognized two primary categories of executive privilege: the deliberative process privilege and the chief executive communications privilege.....Although the two privileges "are closely affiliated," the chief executive communications privilege is broader in scope than the deliberative process privilege. Unlike the deliberative process privilege, it "applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative

ones."Although the chief executive communications privilege lacks the technical substantive and procedural requirements of the deliberative process privilege, it remains a qualified privilege. When an adequate showing of need has been established, the court proceeds to an in camera review of the materials so irrelevant materials can be redacted before disclosure.....State courts have exhibited near uniformity in extending at least some form of executive privilege to communications involving executive branch officials. Regardless of constitutional or common law origins, no state has been willing to take an unprecedented leap and declare the doctrine of executive privilege to be absolute. Although most of the states have refused to implement the substantive requirements of the deliberative process privilege, they generally have implemented the highly specific and technical procedural requirements.238 In particular, state courts overwhelmingly have expressed the necessity of asserting executive privilege with specificity. Affidavits often provide such specificity by explaining how and why the materials in question fall within the scope of executive privilege. After the requisite showing of specificity, the presumptive privilege attaches.239 Once the privilege has been properly asserted, most states adopted and applied a balancing test borrowed from the federal courts. This test pits the need for disclosure against the government's interest in confidentiality.240 Upon a sufficient showing of need, the majority of the states require the court to conduct an in camera review. The purpose of in camera review is "to determine whether the material is privileged, to sever privileged from non-privileged material if severability is feasible, and to weigh the government's need for confidentiality against the litigant's need for production."241 If the party seeking disclosure is unable to demonstrate "need," the privilege serves as a bar to disclosure." (Excerpts from Warnock, Stifling Gubernatorial Secrecy: Application of Executive Privilege to State Executive Officials, 35 Capital University Law Review 983 (2007) (footnotes omitted). The article discusses specific state cases at length.)

(2) For further discussion of state cases, see 10 A.L.R.4th 355 and annotation, Construction and application, under state law, of doctrine of "executive privilege"; 81 Am. Jur. 2d Witnesses §488, Deliberative process privilege, and §489, Deliberative process privilege-Basis in common-law privilege; purpose (noting that "Some courts have held that the deliberative process privilege is a common-law privilege,1 or that its roots lie in the common law.2 It has been held that the privilege does not arise from the doctrine of separation of powers3 but is grounded in the common law of evidence.4" (footnotes omitted)"

(3) State ex rel. Dann v. Taft, 853 N.E.2d 263, 110 Ohio St.3d 252-253 (2006) - "The governor urged this court to recognize an absolute privilege, a suggestion all members of this court rejected. State ex rel. Dann v. Taft, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472 ("Dann v. Taft I"). By contrast, courts in several states recognized absolute gubernatorial executive privilege as early as the 19th Century as a matter of common law based on principles of separation of powers. See Annotation, Construction and Application, Under State Law, of Doctrine of "Executive Privilege" (1981), 10 A.L.R.4th 355, 357. Absolute privilege is based on the theory that "the coequal status of the legislative, executive, and judicial branches would be disrupted if one branch, the judiciary, were empowered to compel another branch, the executive, to disclose information against its will." Id.

Some form of executive privilege has long been accorded the executive branch by state courts as a matter of the common law of evidence, including courts in Alabama, Alaska, Arizona, California, Colorado, Maryland, New Jersey, New York, Pennsylvania, Vermont, and Wisconsin. See Annotation, supra, 10 A.L.R.4th 355, Sections 2(b) and 4. See, also, Nero v. Hyland (1978), 76 N.J. 213, 386 A.2d 846; Guy v. Judicial Nominating Comm. (Del.Super.1995), 659 A.2d 777; Wilson v. Los Angeles Cty. Super. Court (1996), 51 Cal.App.4th 1136, 59 Cal.Rptr.2d 537.

Consistent with this weight of authority, this court recognized not an absolute but a qualified gubernatorial-communications privilege in Dann v. Taft I, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472. We drew upon the decisions of a number of federal and state courts in crafting a three-step analytical framework for Ohio courts to follow when required to resolve a conflict between a requester of gubernatorial communications and a governor who claims that those communications are privileged. Id. at 62-72."

(4) "While the Nixon decision was not binding on states, after the issuance of the decision 10 states followed the Supreme Court's guidance in applying the executive privilege to their governors. In one commentator's view, "[s]tate courts have exhibited near uniformity in extending at least some form of executive privilege to communications involving executive branch officials."The one glaring exception to this uniformity is the Commonwealth of Massachusetts." - Executive Privilege, 38 Mass. Prac., Administrative Law & Practice § 2:16 (footnotes omitted).

(5) "Is there an executive privilege under state law?364 Some cases that say there is, use the phrase to refer to the official information privilege;365 e.g., the cases on whether there is an "executive privilege" for police files.366 A couple of cases have recognized an "executive privilege" in the sense used here for the governor of the state.367 The privilege seems to have similar limits to the privilege that applies to the president.368 One state case has recognized a witness privilege for "high-ranking officials."369 However, a federal decision refused to grant such a privilege to the mayor of a city.370" - 26A Fed. Prac. & Proc. Evid. § 5673 (1st ed.), Executive Privilege (footnotes omitted).

(6) See also the excerpts from the Donelon and Taft cases in the Appendix. See further, Keenan, Executive Privilege as Constitutional Common Law: Establishing Ground Rules in Political-Branch Information Disputes, 101 Cornell Law Review 223 (2015); McCormick on Evidence §108, Qualified privileges for government information; Kolhmeyeral, Executive Privilege,-The Ohio Supreme Court Finds the Existence of a Qualified Gubernatorial Communications Privilege Amid Separation of Powers Concerns and a "Particularized Need" Requirement. State Ex Rel. Dann v. Taft, 848 N.E.2d 472 (Ohio 2006), 38 Rutgers Law Journal 1395 (2007), discussing in part other state cases.

(7) "State Secrets" privilege - A "state secrets" privilege may also be claimed to prohibit disclosure of confidential information bearing on military, diplomatic, or similar matters. See "Invocation and Effect of State Secrets Privilege", 23 A.L.R.6th 521, and also "Court's power to determine, upon government's claim of privilege, whether official information contains state secrets or other matters disclosure of which is against public interest", 32 A.L.R.2d 391.

M. Testimonial/Evidentiary Privileges. What testimonial/evidentiary privileges may be applicable to the legislative witness under state law? Will there be a prior challenge or objection to the testimony or materials sought based upon such privilege? How does the legislative entity plan to proceed if such objection is made during the legislative hearing? Has the privilege been waived? (See default and waiver materials in Sections II and III.)

(1) Prudence is warranted. While there is precedent that legislative committees are not inherently obliged to recognize non-constitutional privileges usually recognized in judicial proceedings, state law and other factors must be considered. If recognition is discretionary with the legislative entity, there should be a balancing of interests. Release to the legislative entity of privileged information may not waive a claim of the privilege in other forums. See, "When Congress Comes Calling" at pages

65-73. But the legislative entity's ability to maintain the confidentiality of the information during hearing or afterwards should also be a practical consideration.

(2) State law. State law may expressly include the applicability to legislative proceedings of all or some testimonial/evidentiary privileges or confidentiality requirements recognized in judicial proceedings.

a. For example, Louisiana Code of Evidence Article 1101(A)(2) - "(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." (emphasis added). See also, the Donelon and Anaya cases in the Appendix.

b. For example, see the Tennessee materials in the Appendix discussing confidential information. See also, discussing privileges and exceptions applicable in Connecticut, "Refusal to Answer Questions at Legislative Hearings", Connecticut Office of Legislative Research, 2002-R-0571, June 28, 2002, available online at http://www.cga.ct.gov/2002/olrdata/jud/rpt/2002-R-0571.htm

c. See also, "When Congress Comes Calling", supra, pages 55-73, and The Availability of Common Law Privileges for Witnesses in Congressional Investigations Michael D. Bopp and DeLisa Laya, 35 Harvard Journal of Law & Public Policy 897 (2012).

(3) Attorney-client. Where claims of attorney-client or work-product privilege are involved, in addition to state law the rules of professional conduct must also be considered. If the privileges are not applicable by state law or otherwise recognized by legislative entities, rules of professional conduct may mandate action by attorneys seeking to limit or block disclosure of otherwise privileged information. But the ability to resist a legislative subpoena may be limited and does not include refusal leading to contempt. See, "When Congress Comes Calling" at pages 65-70 and page 73.

a. Regarding attorney-client privilege in legislative investigations, see also, Cole, Seikaly, Meitl, "Exploring Every Avenue: The Dilemma Posed by Attorney -Client Privilege Assertions in Congress", 8 Appalachian Journal of Law 157 (2009); "Lawyer-Lobbyists Need Permission to Disclose Their Clients", The Florida Bar News, December 15, 2016, Vol. 43, No. 24; Donald R. Berthiaume and Jeffrey J. Ansley, Where Did My Privilege Go? Congress and Its Discretion to Ignore the Attorney-Client Privilege, 47 No. 2 Criminal Law Bulletin ART 2 (2011); and https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion288.cfm.

b. Nebraska Judicial Ethics Committee, Advisory Opinion for Lawyers No. 11-05, 2011 WL 12708574, (NE. Jud. Eth. Comm.) (2011) - "In the legislative arena, the lawyer's ability to resist a subpoena is limited. This is illustrated in District of Columbia Ethics Opinion No. 288(1999), in which the committee observed that there is no direct appeal from a legislative subpoena. That opinion concluded that a lawyer may disclose the requested information when the committee directly threatens contempt. Comment [11] to § 3-501.6 states: "In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order." By the same reasoning, a lawyer is not obligated to endure a prosecution for contempt of the Legislature by refusing a direct demand to supply the requested information when it is enforced by the subpoena power.
Since the former client is a minor, she is not capable of giving informed consent to any disclosure. § 3-501.14. The lawyer is therefore obligated to resist disclosure of confidential information to the Legislative committee by all nonfrivolous means until she concludes that disclosure is necessary in order to obey the direct requirements of a subpoena issued under penalty of contempt."

c. See also, "Generally, waiver by client", 81 Am. Jur. 2d Witnesses § 326; "What corporate communications are entitled to attorney-client privilege—modern cases", 27 A.L.R.5th 76; "Application of Attorney-Client Privilege to Electronic Documents", 26 A.L.R.6th 287.

(4) General - Discussing claims of privilege and similar doctrines, including sample foundations and questions/objections/waiver arguments, see Imwinkelried, Evidentiary Foundations. See also pages 60-64 in "Congress's Contempt Power"; 2 Modern Constitutional Law § 25:7 (3rd ed.), "Contempt of Legislature"; 81 Am. Jur. 2d Witnesses §86, "Applicability of privilege in particular proceedings"; 68 A.L.R. 1503, "Constitutional provision against self-incrimination as applicable to questions asked or testimony given in proceeding before nonjudicial officer or body"; 2 Testimonial Privileges § 4:14 (3d ed.); "Physician-patient, attorney-client, or priest-penitent privilege as applicable in nonjudicial proceeding or investigation", 133 A.L.R. 732; "Legislative Proceedings", 1 Search & Seizure § 1.7(g) (5th ed.); "Admission of E-mail Evidence in Civil Actions", 103 Am. Jur. Trials 123; and also The New Wigmore: Evidentiary Privileges §1.3.3.

N. Vague, Overbroad, or Unreasonable. See the Fourth Amendment discussion above, the Bean case excerpt in Section III, and Carpenter, Brodsky and other cases and state laws in the Appendix.

(1) Practical considerations:

a. How are the materials relevant and pertinent to the legislative purpose?

b. Can the materials be obtained by means other than subpoena?

c. Could the materials or any portion be claimed as confidential or privileged and, if so, on what basis? See the discussions above concerning potential privilege claims.

d. If the materials can be obtained by the legislative entity but are otherwise confidential in nature, does the legislative entity plan to maintain the confidentiality of the material and, if so, how? Can the entity meet in executive session to take testimony or receive evidence? If not, once the materials sought are presented to the entity and discussed, are such materials then subject to public records or other disclosure laws?

(2) How should materials sought be described in the subpoena duces tecum?

a. Is the form and content of the subpoena mandated under state law? See previous discussion in this section regarding issuance of subpoena and also Selected State Laws in the Appendix.

b. Drafting the subpoena - use the seeking of materials "comprising" or "setting out" or "stating" rather than materials "relating to" or "evidencing"? Need clear and broad definitions specifying the things you want. Definition of records, documents need to be broad enough to cover all formats….Produce (or make available for inspection) original documents and any copies made, (photographs), records in whatever format held, including electronically stored information (ESI), or other tangible items, etc.

c. Remember: "The power to issue a subpoena compelling document production comes with it the obligation to tailor any document requests with specificity so that the recipient can reasonably ascertain what documents to produce." and "A similar standard should prevail when the courts are asked to enforce a legislative subpoena duces tecum, and this would require the Legislature to show: (1) that a proper legislative purpose exists; (3) that the subpoenaed documents are relevant and material to the accomplishment of such purpose; and (3) that the information sought is not otherwise practically available." (See Section III, and the Brodsky and Bonar cases and Selected State Laws in the Appendix.)

O. Legislative grants of immunity from prosecution in return for waiver of Fifth Amendment rights. Prudence and caution are especially required if the potential witness or records sought are (or may be) also part of a criminal investigation or prosecution. The impact of the legislative proceeding on such investigations/prosecutions must be considered in advance. As discussed below, such impact may include (i) claims of immunity and protection from prosecution or civil liability, and (ii) impact upon the criminal investigation or prosecution by discussion in the legislative hearing of sensitive or otherwise confidential material.

(1) Legislative privilege. Keep in mind that a witness in a legislative proceeding may claim legislative privilege against subsequent claims of defamation arising from their testimony. (See Mason's Manual §§631 and 800; "Testimony before legislative bodies or committees thereof", 50 Am. Jur 2d Libel and Slander §278; 53 C.J.S. Libel and Slander: Injurious

Falsehood §120; "Legislative immunity - Witness or testimonial privilege", David Elder, Defamation: A Lawyer's Guide §2:17; 1 Rights and Liabilities in Media Content § 6:78 (2d ed.), Common-law defamation privileges—Legislator immunity under state constitutional provisions; 2 Law of Defamation § 8:24 (2d ed.), Absolute immunity for participants in legislative proceedings—State legislators; 4 Modern Tort Law: Liability and Litigation §36:38, Defenses-Privilege-Absolute Privilege-Legislative Proceedings; Restatement (Second) of Torts §590A, Witnesses in Legislative Proceedings; and 24 A.L.R. 6th 255, Construction and Application of Federal and State Constitutional and Statutory Speech or Debate Provisions.)

(2) Even 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".

(3) Lack of legislative authority to grant immunity from prosecution? Although investigative and subpoena power may be "inherent", in the absence of specific law a state legislative entity appears to lack the authority to immunize a witness from subsequent criminal prosecution in return for self-incriminating testimony. See the cases and materials discussed on pages 68-70 in Jones, Witnesses Before Legislative Committees: Issues and Law, NCSL, 2014, http://www.ncsl.org/documents/lsss/mon_jones_handout.pdf.

(4) Legislative granting of immunity from prosecution. What is the relevant law in your state regarding the extent, if any, to which a legislative entity can grant immunity from prosecution in return for testimony? Is such immunity statutorily provided upon testimony or must there first be an express granting of immunity clearly set forth in the hearing record? Is a subpoena of the witness required? Is such granted immunity "use" or "transactional"? Does the immunity granted include immunity from both state and federal prosecution?

a. Must the witness first assert their right against self-incrimination?

b. Discussing state statutes and grants of immunity to witnesses by state legislative entities, see Ronald Wright, Congressional Use of Immunity Grants After Iran-Contra, 80 Minnesota Law Review

407 (1995), at footnote 37. The granting of 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 "When Congress Comes Calling", pages 20-23; 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. An additional concern may be the confidentiality of law enforcement "informant" or other records sought or arising in connection with such testimony. See, for example, the Tennessee materials in the Appendix.

d. For a discussion of relevant issues and cases, see Ronnie Frith, "Immunity of Witnesses Before Legislative Committees", NCSL presentation, October 10, 1997. Mr. Frith's practical considerations for legislative staff dealing with potential witnesses and immunity issues are worthy of review and are reproduced on pages 71-73 in Jones, Witnesses Before Legislative Committees: Issues and Law, NCSL, 2014, available online at http://www.ncsl.org/documents/lsss/mon_jones_handout.pdf .

(5) During the New Jersey "Bridgegate" investigations, the complexities of grants of immunity by a state legislative entity were discussed in a court opinion. See opinion of Judge Mary Jacobson of the Superior Court of New Jersey, Law Division, Mercer County, (2014 WL 1760028 (N.J.Super.L.) (Trial Order) 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). An excerpt from the opinion is reproduced beginning on page 64 in Jones, Witnesses Before Legislative Committees: Issues and Law, NCSL, 2014, available at http://www.ncsl.org/documents/lsss/mon_jones_handout.pdf.

(6) Prosecution for certain offenses not included under grant of immunity. Note that grants of immunity may not protect against prosecution for perjury or other offenses arising from false testimony at the legislative hearing. Continued refusal to testify after being granted immunity may be considered contempt if immunity granted is co-extensive with protection afforded by privilege. Also, immunity for an offense admitted during testimony may not be applicable to prevent arrest and prosecution for such offense if the offense is provable by independent evidence.

(7) Entrapment by Estoppel. See 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.
>
> > (ALSO: "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.)

## V. POTENTIAL WITNESS ISSUES AT THE LEGISLATIVE HEARING:

A. Do the constitutional provisions/laws/rules and applicable jurisprudence regarding legislative proceedings in your state:

(1) Address questions such as:

swearing of witnesses; information that must be placed in the record by the legislative entity showing authority, purpose, and relevancy/pertinency of the subpoenaed information; what testimonial or evidentiary privileges may be applicable in legislative hearings; whether the witness can be represented by counsel at the hearing; witness fees for attendance and also potential payment of any cost for preparation of subpoenaed materials; and requirements for maintaining if necessary the confidentiality of information obtained by legislative subpoena?

(2) Address who performs duties during the hearing, including:

maintaining meeting order and decorum; ruling on witness objections; if necessary, providing warnings to the witness; and required actions by the legislative entity if the witness is nonresponsive or defaults?

(3) Address as contempt of the legislature or as a separate offense or both, the perjury, false testimony, or inappropriate behavior of a witness at a legislative hearing?

(4) Address under what circumstances potential objections or claims of privilege or confidentiality may be considered to have been waived? (See willful default, pertinency, and waiver discussions in Sections II, III and VI and also, discussing privileges and including sample foundations and questions/objections/waiver arguments, Imwinkelried, Evidentiary Foundations.

B. Witness Compliance. 91 C.J.S. United States §35, "Compliance by witnesses, generally" (June 2018 update):

"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.1 They must appear at the hearing.2 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.3 A witness cannot impose conditions under which, having appeared, he or she will remain in attendance.4 A witness has no right to leave a hearing because he or she does not like the questions propounded to him or her.5 He or she is bound to conform to the procedure of the committee.6 The remedy of such witness is by objection and a refusal to answer.7

A witness properly summoned by Congress or a congressional committee must also respond to the committee's questions.8 The witness has no right to vary the committee's procedures9 nor can the witness impose conditions on his or her willingness to testify.10

A witness before a congressional committee is not deprived of his or her legal rights or shorn of his or her constitutional privileges.11 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.12 Also, the witness may rightfully refuse to answer questions where they exceed the power of the body making the investigation or are not pertinent.13 Identification of the subject matter is essential to a determination as to whether the witness was advised of the pertinency.14 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.15 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;16 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.17

In the absence of a grant of immunity, the witness may refuse to answer questions which will tend to incriminate him or her.18 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.19 Such is also true where a person refuses to answer questions by such a committee.20 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.21

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.22 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.23 Witnesses in committee hearings cannot be

required to be familiar with the complications of parliamentary practice.24" (footnotes omitted).

C. Not a witness defense. 91 C.J.S. United States §41, "Defenses" (June 2018 update):

"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.2 Nor is it a defense that the witness acted on the advice of competent counsel.3 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.4 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.5

The fact that evidence was obtained by eavesdropping is not a defense barring a prosecution for refusing to answer questions by a congressional committee.6 The motives of the subcommittee in summoning the defendant are also not a defense.7 Other defenses are inapplicable as well.8 Still, other matters are good defenses under particular facts and circumstances of the case.9 (footnotes omitted).

D. Potential witness actions/objections at the hearing. See Section IV on challenges and objections. Potential witness actions/objections at the legislative hearing include:

(1) The witness declines to appear, or appears but does not provide desired materials, or does not remain at the hearing.

(2) The witness declines to be sworn or declines to affirm that their testimony will be truthful. (note: the proper person must perform the swearing-in and should read from the oath language written out in advance.)

(3) The witness declines to answer questions or provide information, citing Fifth Amendment or other constitutional or non-constitutional grounds, including state laws making testimonial privileges or other confidentiality requirements applicable to legislative hearings.

(4) The witness challenges the pertinency of questions or materials to the legislative investigation, or the authority of the legislative entity to conduct the investigation or to seek the information.

E. Potential responses by the legislative entity:

(1) As discussed in the preceding sections, keep in mind the necessity of building a record showing: legislative purpose, authority, and pertinency; witness "willfulness" in refusing to comply with the subpoena or answer appropriate questions; and adherence to "fairness" and procedural due process.

(2) Direct the witness to specify the privilege or objection claimed for refusing to comply, and establish that such refusal to comply is a willful and intentional act.

(3) Warn the witness of potential consequences of their actions, including exposure to contempt proceedings and penalties, then after warning ask them again to comply.

(4) If the objection is maintained, overrule the objection if appropriate and require the witness to comply.

(5) If the witness still refuses to comply, take further action as appropriate by the legislative entity to find/seek contempt and impose penalties.

(6) If the witness improperly objects to a question on the grounds of pertinency, the legislative entity must state for the record the subject under inquiry at that time, the manner in which the propounded questions are pertinent to that inquiry, the ruling of the committee regarding the objection, and the directing of an answer.

(7) Note:

a. Waiver. See discussion in the preceding sections regarding waiver. In brief, a privilege may be waived if the witness declines to assert it, specifically waives it, or testifies as to the same matters on which the privilege is later asserted.

i. See also "Congress's Contempt Power" at pages 68-73; "When Congress Comes Calling" at pages 33-38 and 55-73; and also Imwinkelried, Evidentiary Foundations.

b. If the privilege against self-incrimination is claimed, the legislative entity may seek to direct the witness to answer, in return for a grant of immunity from subsequent criminal prosecution. Numerous issues are involved in this action. See discussion in the previous section regarding grants of immunity from prosecution.

c. See also the discussion at pages 54-60 in "Congress's Contempt Power", supra, including the following:

> "If a witness refuses to answer a question, the committee must ascertain the grounds relied upon by the witness. It must clearly rule on the witness's objection, and if it overrules the witness's objection and requires the witness to answer, it must instruct the witness that his continued refusal to answer will make him liable to prosecution for contempt of Congress. By failing adequately to apprise the witness that an answer is required notwithstanding his objection the element of deliberateness necessary for conviction for contempt under 2 U.S.C. §192 is lacking, and such a conviction cannot stand." (footnotes omitted) (pp. 59-60).

(8) Quick action. As in any legal proceeding, quick action may be needed to preserve an appropriate record. See the Bernard case in the next section. Legislative staff should prepare accordingly to ensure an adequate legislative record is properly developed for future compliance or contempt proceedings.

(Note also that the "Sixth Amendment right of a criminal defendant to cross-examine witnesses and call witnesses on his or her behalf has been held inapplicable to a congressional hearing.162" (footnotes omitted) - "When Congress Comes Calling", page 63. However, in the event of inherent contempt proceedings conducted by the legislature without judicial involvement, procedural due process requiring notice and opportunity to be heard is applicable. See the next section and the Bernard case and also Groppi v. Leslie, 692 S.Ct. 582 (1972)).

## VI. CONTEMPT OF THE LEGISLATURE PROCEEDINGS AND ISSUES:

A. States vary in procedures. See the selected state materials in the Appendix, including materials for Louisiana and New York.

B. Does your state constitutionally recognize the power of the legislature to adjudicate and penalize for inherent contempt without judicial involvement?

C. If judicial action is required, is it a criminal or civil action? If both legislative and judicial action are available, does action by the legislature preclude further action by the court?

D. The legislative record must reflect sufficient evidence and actions necessary to prove contempt. Potential challenges may be made to the validity of the legislative subpoena and/or the hearing procedure if contempt arose at the hearing. A state legislative body when conducting a proceeding determining whether or not to find contempt must afford to the defendant notice and opportunity to be heard. See the materials below, including the Bernard case, and Groppi v. Leslie, 692 S.Ct. 582 (1972).

E. If judicial action is required, who is the proper entity to proceed as the party and how is the legislative record introduced into evidence?

F. How are civil/criminal penalties imposed for contempt of the legislature enforced? Is such enforcement considered a criminal or civil action? See, for example, the Valley case in Selected State Cases and Materials.

G. Authority. See materials in Section II and also below:

"Authority to punish contempt has been recognized as a necessary incident inherent in the very organization of all legislative bodies1 to protect their own processes and existence.2 The United States Constitution imposes no general barriers to the legislative exercise of the power to punish contemptuous conduct, and there is nothing in the Constitution which places greater restrictions on the states than on the federal government in this regard.3 However, it has been stated that the legislative contempt power should be limited to the least possible power adequate to the end proposed.4

A state legislature's power to punish for contempt has been upheld,5 either on the basis of a constitutional provision6 or on the basis of a statute authorizing the legislature to punish contumacious witnesses.7" (footnotes omitted) - 17 Am. Jur. 2d Contempt § 232.

H. "Congress and the state legislatures may also exercise contempt power which enables them to place in contempt persons who misbehave before legislative bodies,1 or who fail to appear,2 or who refuse to answer, without constitutional justification, queries lawfully put to them by authorized legislative representatives.3

A citizen cannot be put in contempt for failing to answer questions by legislative representatives without being reasonably informed of how the questions pertain to the authorized inquiry.4 In a proper case, the First Amendment may prevent a person from being put in contempt by a legislative body when the interest of society in freedom of speech and silence outweighs the societal interest in providing information to legislatures.5 Furthermore, the legislature cannot use its contempt power to penalize persons for "slanderous attacks which present no immediate obstruction to legislative processes."6

Under present practice, Congress does not itself hold contempt proceedings, and the paucity of adjudicated precedents can only allow the suggestion that when legislatures hold contempt hearings, at least some of the traditional constitutional rights, save grand jury indictment, should apply.7 The right to trial by jury should depend upon the nature and seriousness of the penalty imposed. Contempts of Congress are currently prosecuted by the United States Attorney in the customary criminal courts where all constitutional rights are applicable.8" (footnotes omitted) - 2 Modern Constitutional Law § 25:7 (3rd ed.).

I. "The panoply of procedural rights which are accorded a defendant in a criminal trial need not be available in legislative contempt proceedings, but reasonable notice of the charge and an opportunity to be heard is required before punishment is imposed.1 Federal due-process requirements are violated by a legislative committee in adjudicating a person in contempt for the person's refusal to answer a question after the committee leads the person to believe that he or she could refuse to answer in reliance on the claim of privilege against self-incrimination.2

Observation: In at least one opinion, the United States Supreme Court has found itself divided on the question of whether federal due-process requirements are violated by a state in compelling a witness who has been given immunity under a state statute to testify where the witness' testimony may subject him or her to federal prosecution.3 (footnotes omitted ) - 17 Am. Jur. 2d Contempt § 233.

J. "The first judicial recognition of a common law power of either House of Congress to punish for contempt was in Anderson v. Dunn.1 The Supreme Court upheld in broad terms the right of either House to attach and punish a person (other than a Member of Congress) for contempt of its authority, without using any judicial process. The prisoner, however, could still test the validity of his imprisonment by applying for a Writ of Habeas Corpus or suing the Sergeant at Arms.2

In Marshall v. Gordon,3 the Court held that Congress has an implied power of contempt but may not arrest a person who only published matter slanderous of the House of Representatives and that presented no immediate obstruction to the legislative process.4 Appellant in that case applied for habeas corpus after his arrest by the Sergeant at Arms. The Court ruled that Congress has the implied power of contempt because it has:

> The right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is inherent legislative power to compel in order that legislative functions may be performed.5

Thus, the Senate may hold in contempt a witness whom it commanded to produce papers but who instead destroyed them after receiving service of the subpoena. The punishment for a past contempt is appropriate to vindicate the "established and essential privilege of requiring the production of evidence."6 Such a witness engages in garden-variety obstruction of justice.

More recent cases have reaffirmed, in dicta, the legislature's inherent common law power of contempt. In Groppi v. Leslie,7 for example, the Court reaffirmed that: "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."8" - 1 Treatise on Const. L. § 8.2(a)

K. "Congress has the power to judge guilt or innocence of the contempts that it charges. A finding that the witness acted with willfulness is a matter that the appropriate House of Congress would judge, subject only to the limited review in common law contempt cases. To what extent the requirements read into statutory contempt proceedings, discussed below, are also a part of due process, is difficult to determine, because of the paucity of cases. To date, the courts have applied due process to legislative contempt proceedings only to the extent of requiring notice and an opportunity to be heard. It may well be the case that the courts will extend due process requirements. What we do know is that, thus far, the Court has not required a legislature to provide elaborate procedural due process guarantees or a quasi-judicial proceeding in order for the courts to uphold a contempt as valid18" (footnotes omitted) - 1 Treatise on Const. L. § 8.3(e)

L. "Although a legislative committee1 may have constitutional or statutory authority to adjudge a person in contempt or punish a person for contempt,2 the committee itself has no inherent power to adjudge a person in contempt or punish the person accordingly if the constitution forbids the exercise of judicial power of a member or members of the legislature.3

Authority of court. Except as otherwise provided by statute, the failure to

obey a subpoena issued by the legislature may not be punished by the judiciary as a contempt of court.4 The legislature, however, has authority to provide for judicial enforcement of contempt of a legislative committee by a court of competent jurisdiction.5

An application to the court for an order to commit a witness to jail until he or she answers questions asked by a legislative committee must specify the questions that the witness has refused to answer to enable the witness to answer the charges and the court to make an informed adjudication.6 Neither a court nor a legislative body has any obligation to afford a contemnor a forum to expound on personal political, economic, or social views although some brief period to present matter specifically in defense, extenuation, or mitigation is required.7" (footnotes omitted) - 81A C.J.S. States § 120.

M. See also, "When Congress Comes Calling", pages 23-32; Zuckerman, The Court of Congressional Contempt, 25 Journal of Law & Politics 41 (2009).

N. Louisiana House of Represenatives v. Bernard, 373 So.2d 188 (La. 1979) -

"State House of Representatives filed summary proceeding seeking judicial recognition and execution of its contempt adjudications against defendants. The Nineteenth Judicial District Court, Parish of East Baton Rouge, Daniel W. Leblanc, J., ruled that the contempt adjudication procedure used by the House had not denied defendants' rights to due process and entered judgment making fines imposed executory. On appeal, the Court of Appeal, First Circuit, 369 So.2d 1164, dismissed for lack of jurisdiction. On writ of certiorari, the Supreme Court, Blanche, J., held that: (1) House of Representatives is constitutionally empowered to charge, adjudicate and punish defendants for contempt of its lawful authority without regard to other two branches of government, provided that constitutional rights of defendants are not violated; (2) either Senate or House is entitled to seek to enforce contempt adjudications made by those bodies in civil courts of state; (3) such action is civil, not criminal, in nature; (4) no trial de novo is warranted in such a proceeding although defendant is entitled to raise constitutional defenses; (5) litigants have right to appeal result of such proceeding to intermediate court; (6) legislative contempt power includes power to punish summarily those persons guilty of contempt committed in legislature's immediate presence, and (7) defendants' rights to due process were not violated.
Court of Appeal reversed; trial court affirmed."

Pages 189-190: "On June 9, 1978, in response to a subpoena, Bernard and Britson appeared before the Subcommittee on Insurance Regulations of the House Commerce Committee of the Louisiana

Legislature (hereinafter referred to as “Subcommittee”). The transcript of the hearing reflects that immediately after the hearing was convened and the first witness called, Bernard approached the microphone and insisted upon reading a statement to the Subcommittee. The chair advised Bernard that he was out of order and that he would have a later opportunity to make a statement. Bernard persisted, informing the committee that they would hear the statement whether they wanted to or not. The chair then advised Bernard that if he continued to persist in making the statement he would be held in contempt of the committee. Bernard acknowledged, “Well, I am in contempt then but I am going to make the statement.” After Bernard finished reading the statement, he began to leave the hearing room. Bernard was informed that the committee intended to hold a contempt proceeding at which time he would be given an opportunity to present any defenses. He was also told that by leaving the room he was waiving any opportunity to present defenses to the charges of direct contempt. Britson was also so advised and responded that his position was the same as Bernard's. At that time, the two defendants exited the committee room.

Following this outburst, the committee voted to find both Bernard and Britson in contempt for contumacious and disorderly behavior toward the committee which interfered with the business of the committee and for failing to honor the subpoenas by staying until discharged. Each man was fined $250 for the outburst and $250 for failure to honor the subpoenas.

On June 14, 1978, the full House Committee on Commerce met to consider the actions taken by the Subcommittee in holding Bernard and Britson in contempt. The committee voted to ratify the action of the Subcommittee.

A House Resolution (Resolution 18) acknowledging, ratifying and affirming the action of the Subcommittee was subsequently filed and assigned to the Committee on House and Governmental Affairs. At the hearing, defendants appeared through counsel and filed briefs opposing the passage of the resolution. The resolution was favorably reported to the full House where it was subsequently adopted. The resolution also provided that upon the failure of the defendants to pay the fine within ten days of service of the resolution, the Clerk of the House of Representatives was authorized and instructed to take action by summary civil proceedings in the Nineteenth Judicial District Court to collect the fines plus legal interest and reasonable attorney's fees.

Thereafter, the Clerk of the House of Representatives filed this summary proceeding seeking judicial recognition and execution of its contempt adjudication."

[Question: Would the above vary under the constitution, laws, and legislative rules of your state?]

## VII. APPENDIX: SELECTED CASES/SELECTED STATE LAWS AND MATERIALS

**SELECTED CASES**:

A. Carpenter v. U.S., 138 S.Ct. 2206 (2018) - Supreme Court holds that an individual maintains a legitimate expectation of privacy, for Fourth Amendment purposes, in the record of his physical movements as captured through cell-site location information, that 7 days of historical cell-site location information obtained from defendant's wireless carrier, pursuant to an order issued under the Stored Communications Act was the product of a "search", that the government's access to 127 days of historical cell-site location information invaded defendant's reasonable expectation of privacy, and that the government must generally obtain a search warrant supported by probable cause before acquiring cell site location information from a wireless carrier.

Majority opinion states in part:

> "We therefore decline to extend Smith and Miller to the collection of CSLI. Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter's claim to Fourth Amendment protection. The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.....Having found that the acquisition of Carpenter's CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records. .....This is certainly not to say that all orders compelling the production of documents will require a showing of probable cause. The Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations. We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party." (pp. 2221-2223).

Dissent by Justice Kennedy: "Cell-site records, however, are no different from the many other kinds of business records the Government has a lawful right to obtain by compulsory process. Customers like petitioner do not own, possess, control, or use the records, and for that reason have no reasonable expectation that they cannot be disclosed pursuant to lawful compulsory process.

The Court today disagrees. It holds for the first time that by using compulsory process to obtain records of a business entity, the Government has not just engaged in an impermissible action, but has conducted a search of the business's customer. The Court further concludes that the search in this case was

unreasonable and the Government needed to get a warrant to obtain more than six days of cell-site records." (p. 2224).....

"[B]y invalidating the Government's use of court-approved compulsory process in this case, the Court calls into question the subpoena practices of federal and state grand juries, legislatures, and other investigative bodies, as Justice ALITO's opinion explains. See post, at 2247 - 2257 (dissenting opinion). Yet the Court fails even to mention the serious consequences this will have for the proper administration of justice." (p. 2234)

Dissent by Justice Alito: "Hale, however, did not entirely liberate subpoenas duces tecum from Fourth Amendment constraints. While refusing to treat such subpoenas as the equivalent of actual searches, Hale concluded that they must not be unreasonable. And it held that the subpoena duces tecum at issue was "far too sweeping in its terms to be regarded as reasonable." Id., at 76, 26 S.Ct. 370. The Hale Court thus left two critical questions unanswered: Under the Fourth Amendment, what makes the compulsory production of documents "reasonable," and how does that standard differ from the one that governs actual searches and seizures?

The Court answered both of those questions definitively in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946), where we held that the Fourth Amendment regulates the compelled production of documents, but less stringently than it does full-blown searches and seizures. Oklahoma Press began by admitting that the Court's opinions on the subject had "perhaps too often ... been generative of heat rather than light," "mov[ing] with variant direction" and sometimes having "highly contrasting" "emphasis and tone." Id., at 202, 66 S.Ct. 494. "The primary source of misconception concerning the Fourth Amendment's function" in this context, the Court explained, "lies perhaps in the identification of cases involving so-called 'figurative' or 'constructive' search with cases of actual search and seizure." Ibid. But the Court held that "the basic distinction" between the compulsory production of documents on the one hand, and actual searches and seizures on the other, meant that two different standards had to be applied. Id., at 204, 66 S.Ct. 494.

Having reversed Boyd 's conflation of the compelled production of documents with actual searches and seizures, the Court then set forth the relevant Fourth Amendment standard for the former. When it comes to "the production of corporate or other business records," the Court held that the Fourth Amendment "at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." Oklahoma Press, supra, at 208, 66 S.Ct. 494. Notably, the Court held that a showing of probable cause was not necessary so long as "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." Id., at 209, 66 S.Ct. 494.

Since Oklahoma Press, we have consistently hewed to that standard. See, e.g., Lone Steer, Inc., 464 U.S., at 414-415, 104 S.Ct. 769; United States v. Miller, 425 U.S. 435, 445-446, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976); California Bankers Assn. v. Shultz, 416 U.S. 21, 67, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974); United States v. Dionisio, 410 U.S. 1, 11-12, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); See v. Seattle, 387 U.S. 541, 544, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967); United States v. Powell, 379 U.S. 48, 57-58, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964); McPhaul v. United States, 364 U.S. 372, 382-383, 81 S.Ct. 138, 5 L.Ed.2d 136 (1960); United States v. Morton Salt Co., 338 U.S. 632, 652-653, 70 S.Ct. 357, 94 L.Ed. 401 (1950); cf. McLane Co. v. EEOC, 581 U.S. ----, ----, 137 S.Ct. 1159, 1169-1170, 197 L.Ed.2d 500 (2017). By applying Oklahoma Press and thereby respecting "the traditional distinction between a search warrant and a subpoena," Miller, supra, at 446, 96 S.Ct. 1619, this Court has reinforced "the basic compromise" between "the public interest" in every man's evidence and the private interest "of men to be free from officious meddling." Oklahoma Press, supra, at 213, 66 S.Ct. 494.

Today, however, the majority inexplicably ignores the settled rule of Oklahoma Press in favor of a resurrected version of Boyd. That is mystifying. This should have been an easy case regardless of whether the Court looked to the original understanding of the Fourth Amendment or to our modern doctrine.

As a matter of original understanding, the Fourth Amendment does not regulate the compelled production of documents at all. Here the Government received the relevant cell-site records pursuant to a court order compelling Carpenter's cell service provider to turn them over. That process is thus immune from challenge under the original understanding of the Fourth Amendment." (pp. 2254-2255).....

"Holding that subpoenas must meet the same standard as conventional searches will seriously damage, if not destroy, their utility. Even more so than at the founding, today the Government regularly uses subpoenas duces tecum and other forms of compulsory process to carry out its essential functions. See, e.g., Dionisio, 410 U.S., at 11-12, 93 S.Ct. 764 (grand jury subpoenas); McPhaul, 364 U.S., at 382-383, 81 S.Ct. 138 (legislative subpoenas); Oklahoma Press, supra, at 208-209, 66 S.Ct. 494 (administrative subpoenas). Grand juries, for example, have long "compel[led] the production of evidence" in order to determine "whether there is probable cause to believe a crime has been committed." Calandra, 414 U.S., at 343, 94 S.Ct. 613 (emphasis added). Almost by definition, then, grand juries will be unable at first to demonstrate "the probable cause required for a warrant." Ante, at 2221 (majority opinion); see also Oklahoma Press, supra, at 213, 66 S.Ct. 494. If they are required to do so, the effects are as predictable as they are alarming: Many investigations will sputter out at the start, and a host of criminals will be able to evade law enforcement's reach." (p. 2256).

B. Milardo v. Kerilikowske, United States District Court, D. Connecticut. April 01, 2016, Not Reported in F.Supp.3d ,WL 1305120, - "Petitioners Paolina Milardo ("Milardo") and Arnaldo Giammarco ("Giammarco") seek writs of habeas corpus ad testificandum to enable them to return to the United States to testify in person before the Judiciary Committee of the Connecticut General Assembly (the "Judiciary Committee") and for Milardo to testify in person in support of her state habeas petition. For the reasons that follow, the Court determines that it lacks jurisdiction to grant Petitioners the relief they seek. Accordingly, the Defendants' motion is GRANTED."....

"Petitioners are each former U.S. residents who lived in the country for 50 years and who have been deported to Italy. [Dkt. #1-2, Pet'rs' Mem. at 34]. On February 25, 2016, Connecticut Representative William Tong and Senator Eric Coleman, co-chairs of the Judiciary Committee, issued legislative subpoenas to both Petitioners. See [Dkt. #5-1, Ex. 1 to Wishnie Decl. at 7-8]. The subpoenas compel their attendance at "an informational hearing" on April 4, 2016, for the purpose of giving "testimony on what [they] know regarding the ... impact of Connecticut criminal convictions on immigrant households, including [the Petitioners'] famil[ies], affected by deportation or threat of deportation." [Id.]. The Committee determined that their "presence is necessary for committee members to evaluate [their] credibility, as well as [their] acceptance of responsibility and remorse for the specific events that occurred in [Connecticut] which resulted in [their] deportation." [Id.]."

"While the Court fully recognizes and honors the sovereignty of the Connecticut General Assembly, the importance of its proceedings to citizens of the State of Connecticut and the nation as a whole, and the advantages of live testimony when it is reasonably available, here, in denying parole, ICE did not misapply the law, misstate facts, or otherwise fail to validly exercise its discretion. Its conclusion that Petitioners' physical presence in the United States was not necessary because (i) videoconferencing technology was available in Italy, (ii) such testimony is permissible under the Federal Rules of Civil Procedure, and (iii) ICE might be able to assist Petitioners with obtaining ICE video teleconferencing resources at their request was not irrational or otherwise unlawful based on the information presented for its consideration by the Petitioners." (See also, Giammarco v. Kerlikowske, 665 Fed.Appx. 24 (2016))

C. Valley v. Pulaski County Circuit Court, Third Div., 431 S.W.3d 916 (Ark. S. Ct. 2014) - Appeal from court order finding person in criminal contempt and imposing a fine for his failure to appear and testify at a meeting after being subpoenaed by the Legislative Auditor. Held, affirmed. Person received fair notice of the contempt charge against him as required by due process, subpoena issued by Legislative Auditor was valid, prior notification by person to committee that he was not going to appear failed to show good cause for noncompliance with subpoena, and such noncompliance formed adequate basis for a criminal contempt finding. Included discussion that under applicable law the payment of a witness fee was not required to be included with legislative subpoena.

D. Guam Memorial Hospital Authority v. Superior Court, 2012 WL 6013059 (2012) 2012 Guam 17 - "The Committee on Health & Human Services of the 31st Guam Legislature ("Committee") issued a legislative subpoena to the Interim Administrator of the Guam Memorial Hospital Authority ("GMHA"). The subpoena required the Interim Administrator to appear at a legislative committee hearing and to bring particular documents with him by a specified deadline. Prior to that deadline, GMHA filed in the trial court an application for an ex parte order to quash the legislative subpoena. That same day, the matter was dismissed sua sponte by the trial court for lack of subject matter jurisdiction. The Committee then issued an amended subpoena that limited the scope of the initial subpoena to the production of information it believed to be nonconfidential. Three days later, GMHA filed a writ of mandamus, asking this court to order the trial court to exercise its jurisdiction to hear GMHA's application for an ex parte order to quash the legislative subpoena. During the elapsed time following the writ filing, GMHA fully complied with the amended legislative subpoena. As a result, the amended subpoena was vacated and there are no longer any outstanding legislative subpoenas directed to GMHA. For the following reasons, we hold that a writ of mandamus shall not issue and deny GMHA's petition."..... "Again, GMHA was not confronted with contempt proceedings, either legislative or judicial, when it chose to comply with the Committee's legislative subpoena. Were the facts of this case different, such that GMHA did not comply with the subpoena and instead chose noncompliance, the outcome could arguably differ. See, e.g., United States v. Ryan, 402 U.S. 530, 533-34 (1971) (holding full judicial review of claim available to litigant upon noncompliance with subpoena). In this sense, by choosing to comply with the subpoena, however, GMHA caused its own injury in fact and left the trial court with no choice but to dismiss the action for lack of subject matter jurisdiction. Accordingly, GMHA has not established causation."

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." (emphasis added).

"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 language of LSA–R.S. 24:513, as set forth in LSA–R.S. 24:513 I, refers to 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 666, 677 (D.C.Cir.1981). (note: footnotes omitted).

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).

(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."

F. State ex rel. Dann v. Taft, 109 Ohio St.3d 364 (2006) ("Dann I" - "Background: State senator brought action in his individual capacity against governor, seeking writ of mandamus ordering governor to disclose, pursuant to Public Records Act, certain weekly reports prepared for governor by executive branch officials. Governor sought protective order relative to senator's discovery request. Senator sought to compel discovery. Holdings: The Supreme Court held that: [1] constitutional provision granting governor the authority to require information from the officers in the executive department does not create an absolute privilege for gubernatorial communications; [2] governor has a qualified gubernatorial-communications privilege protecting communications to or from the governor when the communications were made for the purpose of fostering informed and sound gubernatorial deliberations, policymaking, and decisionmaking; and [3] privilege is overcome when a requester demonstrates a particularized need to review the communications and that need outweighs the public's interest in according confidentiality to communications made to or from the Governor." Two lengthy dissents.

The entire case opinion, together with dissents, should be reviewed. After discussion of federal and state laws and cases concerning executive privilege, the Ohio Supreme Court stated, "The separation-of-powers doctrine requires that each branch of government be permitted to exercise its constitutional duties without interference from the other two branches of government.3 The gubernatorial-communications privilege protects the public by allowing the state's chief executive the freedom that is required to make decisions. Recognition of a qualified gubernatorial-communications privilege advances the same interests advanced by the analogous presidential privilege, including the "public interest in candid, objective, and even blunt or harsh opinions" in executive decisionmaking. Nixon, 418 U.S. at 708, 94 S.Ct. 3090, 41 L.Ed.2d 1039. Our decision in this case will thus affect the quality of decisionmaking by the highest executive officer of

Ohio government.

We agree with the unassailable premise established in Nixon, and reiterated in federal and state case law, that the public interest is served by allowing a chief executive officer of a state or the federal government to receive information, advice, and recommendations unhampered by the possibility of compelled disclosure of every utterance made, and every piece of paper circulating, in the governor's office.

The people of Ohio have a public interest in ensuring that their governor can operate in a frank, open, and candid environment in which information and conflicting ideas, thoughts, and opinions may be vigorously presented to the governor without concern that unwanted consequences will follow from public dissemination. It is for the benefit of the public that we recognize this qualified privilege and not for the benefit of the individuals who hold, or will hold, the office of governor of the state of Ohio.

Consequently, and in accordance with the persuasive weight of authorities that have addressed these issues, we recognize a qualified gubernatorial-communications privilege in Ohio. Because communications to or from an Ohio governor are qualifiedly privileged, a governor's initial assertion that a communication is within the scope of this privilege is not conclusive. It is ultimately the role of the courts to determine, on a case-by-case basis, whether the public's interest in affording its governor an umbrella of confidentiality is outweighed by a need for disclosure.

Accordingly, we hold that a governor of Ohio has a qualified gubernatorial-communications privilege that protects communications to or from the governor when the communications were made for the purpose of fostering informed and sound gubernatorial deliberations, policymaking, and decisionmaking. This qualified gubernatorial-communications privilege is overcome when a requester demonstrates that the requester has a particularized need to review the communications and that need outweighs the public's interest in according confidentiality to communications made to or from the governor.....When a governor's invocation of gubernatorial-communications privilege is legally challenged, a three-step process ensues to determine whether the privilege applies: First, the governor must formally assert the privilege, resulting in a presumption that the requested documents are legally protected and confidential. Second, to overcome the presumptive privilege, the party seeking disclosure must demonstrate a particularized need for disclosure of the material deemed confidential by the governor. When both of these conditions have been met, the court shall order the governor to provide the material at issue for in camera review. The court must then determine whether the communications to the governor were, in fact, made for the purpose of fostering informed and sound deliberations, policymaking, and decisionmaking. If the court determines that the communications were made for the purpose of fostering informed and sound deliberations, policymaking, and

decisionmaking, it will balance the requester's need for disclosure against the public's interest in ensuring informed and unhindered gubernatorial decisionmaking. The qualified privilege is overcome only where that balancing weighs in favor of disclosure.....A requester with the authority and obligation to investigate criminal or civil matters may demonstrate a particularized need when documents are required to fully prosecute civil or criminal matters. Thus, for example, an authorized legislative committee or a grand jury may demonstrate a particularized need to obtain communications to or from the governor. Similarly, a court may find a particularized need when disclosure is sought by a uniquely qualified representative of the general public who demonstrates that disclosure of particular information to it will serve the public interest. Particularized need, however, does not exist when privileged information can be obtained elsewhere. Whether a requester's asserted need is sufficient is a matter of law.....Where both of the first two steps have been satisfied, the court will undertake an in camera review of the requested materials and either uphold or reject the governor's claim of confidentiality. In conducting the balancing of the competing public interests of gubernatorial confidentiality and the demonstrated, particularized need for disclosure, a court may uphold, or reject, the claim of privilege in its entirety. It may require disclosure of some, but not all, of the materials sought." (excerpts, pages 373-380).

[Note: See also, Freedom Foundation v. Gregoire, 310 P.3d 1252, 178 Wash.2d 686 (2013); State, Dept. of Transp. v. Figg Bridge Engineers, Inc., 79 A.3d 259 (2013); and materials in outline concerning claims of privilege.]

G. Brodsky v. New York Yankees, 891 N.Y.S.2d 590, 26 Misc.3d 874 (2009) - "Legislature commenced action, by order to show cause, seeking to compel baseball team and its president to comply with a subpoena duces tecum seeking documents regarding construction of baseball stadium. Defendants moved for an order to quash the subpoena. [Holding:] The Supreme Court, Albany County, John Egan, J., held that the subpoena was overly broad and would be quashed."..... "There are essentially two questions before the Court: 1) did petitioners have the legal authority to serve a subpoena; and 2) if they had the authority, was the subpoena that was issued overbroad?.....However, a finding that the Committee has power to conduct an investigation does not mean it has unlimited power to issue subpoenas and obtain voluminous business records..... The power to issue a subpoena compelling document production comes with it the obligation to tailor any document requests with specificity so that the recipient can reasonably ascertain what documents to produce. Subpoenas should not be used as fishing expeditions.....Mr.

Brodsky has raised a very good point. We see around this Country a growing practice of using public moneys to help fund the construction of stadiums used by privately owned sports teams. The propriety of using tax dollars for such purposes or granting "tax breaks" is certainly debatable, and Mr. Brodsky is right to bring this issue to the floor of the Legislature for public debate. The fact of the matter is, however, that the Yankees did not invent this practice-they are merely the latest in a long line of teams to apply for publically backed financing for new stadiums. The new Yankee Stadium was approved years ago by various public bodies, has been constructed, and is up and running. Requiring the Yankees to pack up every last document relating to the construction of the new stadium, amounting to hundreds of thousands of pages, load them literally into a tractor trailer and deliver them to the Legislature is neither reasonable nor productive of this goal. The Subpoena is simply overly broad in its reach and should be quashed." (pp. 600-601).

H. Sullivan v. McDonald (Sullivan 1), Not Reported in A.2d, 41 Conn. L. Rptr. 618 (2006) - "Former Chief Justice of the Connecticut Supreme Court filed an action to quash subpoena filed by the co-chairmen of the Judiciary Committee of the General Assembly. Holding: The Superior Court, Judicial District of Waterbury, Dennis G. Eveleigh, J., held that as a matter of first impression, the Judiciary Committee lacked the power to require sitting judge to testify before the committee by way of subpoena. Subpoena quashed."..... "The issue before this court is whether a legislative committee, acting in a non-impeachment setting, has the power to obligate a sitting judicial officer to testify before that committee by way of subpoena. The issue is one of first impression in the State of Connecticut. In fact, this court has been unable to locate a similar case in the United States. The separation of powers "is one of the fundamental principles of the American and Connecticut Constitutional systems." Stolberg v. Caldwell, 175 Conn. 586, 598, 402 A.2d 763 (1978), appeal dismissed sub.nom. Stolberg v. Davidson, 454 U.S. 958, 102 S.Ct. 496, 70 L.Ed.2d 374 (1981). As stated in the United States Supreme Court case of Loving v. United States, 517 U.S. 748, 757, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996), "it remains a basic principle of our constitutional scheme that one branch of government may not intrude upon the central prerogatives of another." Former Chief Justice of the United States Supreme Court Warren Burger wrote in his concurring opinion in Nixon v. Fitzgerald, 457 U.S. 731, 760-61, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982) that "the essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches." The Separation of Powers provision is contained in Article Second of the Connecticut Constitution of 1818. The provision states that "The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which ate legislative, to

one; those which are executive, to another, and those which are judicial, to another." Concern over the separation of powers, specifically about legislative encroachment on the judicial power, appears to be one of the important factors in the adoption of the Constitution of 1818. State v. Clemente, 166 Conn. 501, 513, 353 A.2d 723 (1974). The adoption of the Separation of Powers clause in 1818 constituted a fundamental change in the governmental structure of the State of Connecticut. It was noted in Norwalk Street Ry. Co. Appeal, 69 Conn. 576, 37 A. 1080, 1084 (1897) that "A government of men has been superseded by a government of laws ... Distinct and independent bodies of magistracy have been constituted; their powers and duties defined, limited and separated." Thus, in the Norwalk Street Railway case a legislative enactment conferring upon judges certain non-judicial functions concerning approval of plans for the operation of street railways was ruled unconstitutional on the basis of separation of powers. It appears to the court that there have only been two prior reported instances, in the history of the country, in which a legislative body has ever attempted to subpoena a judge. Both instances occurred in 1953, during the McCarthy era. Both judges refused to testify. One instance involved a subpoena, issued by the House Un-American Activities Committee, for the appearance of United States Supreme Court Justice Tom C. Clark. Justice Clark responded by letter in which he stated that he declined to appear based on the separation of powers. See N.Y. Times, Nov. 14, 1953, at p. 9, 37 A. 1080, col. 5. In his letter Justice Clark stated: "The independence of the three branches of our Government is the cardinal principle on which our constitutional system is founded. This complete independence of the judiciary is necessary to the proper administration of justice." In the second incident, Judge Louis Goodman declined to testify, and instead read a statement from the Judges for the Northern District of California to a House Sub-Committee indicating that, based on separation of powers grounds, no judge could "testify with respect to any Judicial proceedings." See Statement of Judges, 14 F.R.D. 335, 335-36 (N.D.Cal.1953).

It is clear to the court that Connecticut law would allow the issuance of a subpoena, and compel the attendance of a person served by a subpoena, by a duly authorized legislative committee acting pursuant to an impeachment investigation. In Office of the Governor v. Select Committee, 271 Conn. 540, 578, 858 A.2d 709 (2004) the Connecticut Supreme Court held that the separation of powers doctrine does not prevent the legislative subpoena of a governor in an impeachment proceeding." (pp. 1-4).....

"The independence of the Judicial Branch would be gravely undermined if a legislative body, in its discretion, possessed the authority, outside of constitutional authority, to compel the appearance of a judicial officer to answer questions relating to his official duties or the performance of judicial functions. The potential for harm under such a regimen is manifest, even assuming that the legislature utilizes such power to pursue otherwise legitimate objectives. In the absence of express constitutional authority, the legal authority of the Legislative

Branch to subpoena members of the judiciary cannot be coterminous with the broad scope of the legislature's constitutional authority to enact legislation or otherwise conduct hearings on matters of public interest. Otherwise, the legislature's authority to compel the testimony of a judicial officer would be virtually limitless. If the members of the judiciary operated under the constant threat of being brought before the legislature to give testimony concerning their judicial decisions and proceedings, the Judicial Department would be at a serious risk of losing its identity as an independent branch of government, and its judicial officers would be inhibited from effectively discharging their constitutional duties without fear of political intimidation. This cannot be what the framers of our Constitution intended. There must be a constitutional separation of powers by recognizing that the legislature may not subpoena a judicial official to give testimony relating to his official duties or the performance of judicial functions, except where the Constitution expressly contemplates such a direct legislative encroachment into judicial affairs." (p. 6) (Also, see next case).

[Later: Sullivan v. McDonald, 913 A.2d 403, 281 Conn. 122 (2007) - "Former chief justice of state Supreme Court brought action for injunction quashing subpoena by state senator and representative to compel former chief justice to appear and give testimony. The Superior Court, Judicial District of Waterbury, Eveleigh, J., granted temporary injunction. Senator and representative petitioned for certification. Former chief justice then wrote letter stating willingness to appear before judiciary committee. [Holding:] The Supreme Court held that staying the injunction was most appropriate response to former justice's agreement to appear before the committee. Ordered accordingly."]

I. Anaya v. CBS Broadcasting, Inc., 251 F.R.D. 645 (United States District Court, D. New Mexico)(2007) - Discussion of cases as to whether production of documents to Congress waives the attorney-client privilege and work-product protection for those documents.

"The Court need not decide, as some courts have, that to preserve the attorney-client privilege and/or the work-product protection, a party resisting discovery must go to the point of risking contempt of Congress. According to Judge Scullin's articulation of the applicable standard, to maintain the privileged status of the documents at issue, LANS and the University "must show not only what steps [they] took to challenge the congressional subpoena, but also that those steps represent the fullest extent of options available." Tompkins v. R.J. Reynolds Tobacco Co., 92 F.Supp.2d at 77-78 (stating that, to maintain the privileged status of documents presented to Congress, "a party may need to risk standing in contempt by refusing to comply with the subpoena, thereby causing the legislators to seek a contempt citation...."). See Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, 35 F.Supp.2d at 594-95 ("In short, a party must do more than

merely object to Congress' ruling. Instead, a party must risk standing in contempt of Congress."). While the Court agrees that the objecting party must show what steps it took to protect the attorney-client privilege and work-product protection, the Court here need not decide whether LANS and the University must have gone so far as to risk contempt. The Court need only decide whether LANS' and the University's production to Congress was voluntary or coerced." (p. 11)

J. D'Amato v. Government Admin. and Elections Committee, Not Reported in A.2d, 41 Conn. L. Rptr. 82 (2006) - "Witnesses filed complaint for injunctive and declaratory relief, seeking protection against enforcement of legislative subpoenas issued by joint legislative committee and its co-chairs. Defendants filed motion to dismiss. Holding: The Superior Court, Judicial District of Hartford, Freed, J.T.R., held that activities of joint legislative committee in conducting hearings and issuing subpoenas were absolutely protected from judicial review by state constitution's speech or debate clause."

K. Ellef v. Select Committee of Inquiry, Not Reported in A.2d (2004), 36 Conn. L. Rptr. 841 -

"The court must decide whether to grant the defendant Select Committee's motion to dismiss on the ground that the court does not have subject matter jurisdiction to decide the plaintiffs' motions to quash subpoenas duces tecum and for injunctive relief. As a threshold matter, the court finds it necessary to articulate the specific issue before it. The plaintiffs assert that the Select Committee's actions violate particular constitutional rights that are guaranteed to them under both the federal and state constitution. The issue before this court, however, is not whether the plaintiffs have a right to assert these rights, for the court agrees that they do, and that the Select Committee must respect such rights. Rather the court must decide whether the plaintiffs' assertion of their rights in this forum is proper at this stage in the proceedings. At this time, the Select Committee has not attempted to force compliance with the subpoenas duces tecum.

The court grants the Select Committee's motion to dismiss for lack of subject matter jurisdiction. The court finds that the Select Committee's issuance of the subpoenas to the plaintiffs is immune from judicial review at this stage in the proceedings pursuant to the Speech or Debate Clause of the Connecticut constitution, article third, § 15. Furthermore, article ninth of the Connecticut constitution gives the General Assembly exclusive jurisdiction over impeachment proceedings. Kinsella v. Jaekle, 192 Conn. 704, 475 A.2d 243 (1984). There is no present showing of the type of egregious and irreparable harm to federal or state constitutional rights necessary for judicial intervention in the impeachment process." (p. 1)

L. Office of Governor v. Select Committee of Inquiry, 271 Conn. 540, 858 A.2d 709 (2004) - "In proceedings to determine whether grounds for impeachment existed against Governor, Office of the Governor moved to quash subpoena issued by the House of Representatives' Select Committee of Inquiry. The Superior Court, Judicial District of Hartford, Langenbach, J., denied motion, and Office of the Governor appealed. After expedited briefing and argument schedule, the Supreme Court, 269 Conn. 850, 850 A.2d 181, affirmed. Holdings: In a full opinion, the Supreme Court, Borden, Norcott, Katz, Palmer, and Vertefeuille, JJ., held that: [1] the appeal was not moot; [2] Connecticut Constitution's Speech or Debate Clause did not preclude courts from exercising subject matter jurisdiction; [3] the action was ripe for judicial review; [4] the action did not present a nonjusticiable political question; and [5] Governor was not categorically immune, on separation of powers principles, from the legal obligation to testify before Committee, pursuant to subpoena."

"In reaching that decision, this court recognized two instances in which judicial review of controversies arising out of impeachment proceedings would be appropriate: (1) the legislative action was clearly outside the confines of its constitutional impeachment authority; and (2) egregious and otherwise irreparable violations of state or federal constitutional guarantees were being or had been committed. Id., at 723, 475 A.2d 243." (pp. 718-719)....."Turning to the present appeal, we now are called upon to consider a set of circumstances markedly different from the factual and legal focuses of Kinsella. Accordingly, although we reaffirm Kinsella within its analytical context, we recast, for application in the present case, the standard by which we consider the extent to which judicial review of impeachment proceedings against a sitting governor is authorized by our constitutional structure. More particularly, two factors compel our reformulation of the Kinsella standard: (1) the status of the party challenging the legislature's exercise of its impeachment authority; and (2) the nature of the constitutional challenge being raised.

With regard to the first factor, our state constitution confers upon the legislature the impeachment authority over "[t]he governor, and all other executive and judicial officers ...." Conn. Const., art. IX, § 3. Although the legislative impeachment authority therefore extends by its plain terms to all executive and judicial officials, our constitution treats the exercise of the impeachment authority, as against the governor, uniquely." (pp. 719-720).....With regard to the second factor in Kinsella, we are mindful that, in that case, Judge Kinsella's constitutional challenge to the legislative conduct was based on the procedural components of the due process clauses of the federal and state constitutions. As we indicated in that case, such a claim, by its very nature, could have passed from the realm of speculation to tangible harm only upon Judge Kinsella's conviction in the Senate following a procedurally infirm trial, and we were unwilling to assume that either the House or the Senate would comport itself in that manner. Kinsella v. Jaekle, supra, 192 Conn. at 731, 475 A.2d 243.

By contrast, the plaintiff in the present case has advanced a constitutional challenge based upon the separation of powers. We long have recognized that the separation of powers "is one of the fundamental principles of the American and Connecticut constitutional systems." (pp. 720-721).....In sum, taking into account the impeachment authority that has been constitutionally conferred upon the legislature, the historical development discussed in Kinsella v. Jaekle, supra, 192 Conn. at 714-21, 475 A.2d 243, the vital principle of judicial review and with due regard for the principle of the separation of powers, we conclude that the appropriate standard by which to determine whether judicial review of the legislative exercise of the impeachment authority in connection with a sitting governor is warranted is whether the plaintiff has asserted, in good faith, a colorable claim of a constitutional violation. The striking of this balance, expresses due regard for both the legislative impeachment authority and the plaintiff's interest in raising a meaningful challenge to impeachment proceedings prior to the point of irreparability, that is, upon the presentment of articles of impeachment to the Senate. Applying this standard, we conclude that the plaintiff has asserted, in good faith, a colorable claim of a constitutional violation and that we, as did the trial court, have subject matter jurisdiction over this matter with regard to: (1) the plaintiff's claim that, by seeking to compel the governor's testimony, the defendant compromised the independent function of the executive branch; and (2) the defendant's claim of exclusive legislative jurisdiction over its issuance of the subpoena to the governor." (pp. 721-722).....

"The defendant next claims, pursuant to the speech or debate clause of our state constitution; Conn. Const., art. III, § 15; see footnote 5 of this opinion; that the constitutional validity of its issuance of the subpoena to the governor is immune from judicial review. We disagree with the defendant and conclude that our speech or debate clause does not immunize from judicial review a colorable constitutional claim, made in good faith, that the legislature has violated the separation of powers by exceeding the bounds of its impeachment authority and, therefore, has conducted itself outside the sphere of legitimate legislative activity.....We conclude that the immunity conferred by the speech or debate clause, however, does not extend to a colorable claim, brought in good faith, that the legislature has conducted itself in violation of the principle of the separation of powers during the exercise of its impeachment authority. We reach this conclusion for the following reasons. First, it is important to note that the speech or debate clause is itself part of article third of our constitution, governing the powers of the legislative branch. It cannot be viewed, therefore, as categorically trumping the separation of powers provision, which forms the very structure of our constitutional order and which governs, therefore, all three coordinate branches of government. Second, as discussed with relation to the federal speech or debate clause, the primary purpose of the speech or debate clause, whether on a federal or state constitutional level, is to protect legislative

independence, thereby furthering the principle of the separation of powers. It would be paradoxical to allow the clause to be used in a manner that categorically forecloses judicial inquiry into whether the legislature itself violated the separation of powers. Permitting the shield to extend that far would allow the clause to swallow the very principle that it seeks to advance. The clause is designed to protect legislative independence, not to install legislative supremacy. Third, this construction is in harmony with our decision in Kinsella, and with several decisions of the United States Supreme Court interpreting the federal speech or debate clause. These cases collectively recognize that, however broad the legislative prerogative regarding impeachments may be, there are limits, and judicial review must be available in instances in which the impeaching authority has been exceeded." (pp. 723-725).

"The defendant contends that the plaintiff's challenge to the defendant's issuance of the subpoena is premature unless and until the governor resists the subpoena and the defendant thereafter either sanctions him or otherwise attempts to force compliance, pursuant to General Statutes §§ 2-1c,15 2-46(a)16 and 2-48.17 We disagree, and conclude that judicial review of the plaintiff's challenge to the subpoena is appropriate at this time."....."Thus, as a functional matter, the plaintiff's current challenge is the only occasion on which the plaintiff could obtain meaningful review of the constitutional validity of the defendant's issuance of a subpoena. To require the plaintiff to wait until the defendant imposed a sanction by means of an article of impeachment would render the plaintiff's challenge a nonjusticiable political question." (pp. 728-729)

"We next turn to the defendant's claim that the plaintiff's constitutional challenge to the defendant's issuance of the subpoena presents a nonjusticiable political question....."It is true that underlying this matter was a discretionary decision by the defendant to issue the subpoena to the governor. Our consideration of whether that decision comports with constitutional principles, however, does not require us to evaluate the wisdom of that decision, but only whether that decision exceeded constitutional limitations." (pp. 729-730)

"The plaintiff's first claim on the merits is that, by virtue of article second of our state constitution, as amended by article eighteen of the amendments; see footnote 4 of this opinion; which embodies the principle of the separation of powers, the governor is categorically immune from the obligation to testify, pursuant to the subpoena in the present case, before a legislative committee on matters concerning the performance of his official duties.....It is useful to begin by stating what the plaintiff does not claim. It does not claim that the doctrine of executive privilege, which in general shields the chief governmental executive and certain other high executive officials from being obligated to testify regarding certain subjects, creates a categorical immunity. Nor does the plaintiff claim that the governor is immune from being subpoenaed by the defendant by virtue of any other recognized testimonial privilege. Thus, the

plaintiff's claim is based, not on notions of privilege, but on broad and categorical notions of immunity derived, in the plaintiff's view, from the separation of powers doctrine. We conclude, contrary to the plaintiff's claim, that the separation of powers provision of our state constitution does not provide the governor with categorical immunity from being subpoenaed to testify before the defendant engaged in its investigative, fact-finding and advisory duties regarding possible impeachment of the governor. We base this conclusion on the nature of the defendant's task, on the text of our constitution regarding an impeachment of a governor, on analogous federal case law, on the historical record regarding legislative powers in impeachment proceedings at the federal level, and on constitutional policy." (pp. 731-732)

"As we have suggested, serious policy concerns also support the validity of the subpoena in the present case. The compelling governmental need for all of the relevant information, not just from third parties but from the governor whose conduct and intentions are under scrutiny, so that a decision by the defendant is based on as much information as it can reasonably gather, supports the right of the defendant to compel the testimony of the governor. The categorical immunity proposed by the plaintiff would place a serious impediment on the legislative branch's ability to discharge effectively its own core constitutional duty to exercise *586 the impeachment power with which it has been entrusted. We recognize that the impeachment power is a strong legislative weapon and that, if left unchecked, the legislature could abuse its authority. The existence, however, of constitutional safeguards-a division of impeachment power between the House and the Senate, and the two-thirds supermajority vote requirement for conviction in the Senate-provide sufficient protection against such abuse. Nixon v. United States, 506 U.S. 224, 236, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993). Our state constitution provides the same structural protection. Conn. Const., art. IX, § 2; see Kinsella v. Jaekle, supra, 192 Conn. at 720, 475 A.2d 243. In addition, under our law, as we have explained, there is some recourse to the courts for judicial protection from constitutional abuse by the legislature. In sum, it would be constitutionally perverse to conclude that it would be a violation of the separation of powers doctrine for the legislature to discharge its constitutional responsibilities. Our state's impeachment process is reserved for the legislature to demand an accounting from the governor regarding alleged abuses of his power. The rejection by the framers of our constitution of the British practice of insulating the king from impeachment was to ensure that the chief executive would not be above the law. See Kinsella v. Jaekle, supra, 192 Conn. at 718-19, 475 A.2d 243. Allowing the chief executive officer to withhold information from the defendant on the basis of the separation of powers doctrine undercuts that goal by hindering the only constitutionally authorized process by which the legislature may hold him accountable for his alleged misconduct. See M. Gerhardt, supra, p. 115." (pp. 736-737)

"To the contrary, we think that, precisely because the present case is

related to the impeachment process, the legislature is acting at the height of its powers and the plaintiff's claim to categorical immunity is at its nadir. Thus, we believe that alleged misconduct of a chief executive that is sufficient to warrant an impeachment inquiry should not, as the plaintiff's contention suggests, present a reason for exempting him from accountability; rather, it should have the opposite effect.....Moreover, the plaintiff's contention that the subpoena violates the separation of powers because having to testify will take the governor away from his duties as chief executive is sufficiently answered by the Supreme Court's decision in Clinton v. Jones, supra, 520 U.S. 681, 117 S.Ct. 1636, 137 L.Ed.2d 945. If the separation of powers doctrine does not give the president categorical immunity from suit by a private party while in office, it does not, a fortiori, do so with respect to a legislative subpoena to the governor by a duly authorized impeachment investigative committee. Indeed, the concern expressed in Clinton v. Jones, supra, at 691-92, 117 S.Ct. 1636, namely, that the president should not be exposed to undue and prolonged distraction from his official duties by a private lawsuit arising out of his prepresidential conduct, is particularly inapt in the present context. In this respect, there is no evidence in the record that suggests that the defendant would unduly prolong the governor's attendance **740 in compliance with the subpoena, nor can it reasonably be maintained that the procedure would be overly burdensome in a spatial sense-the plaintiff and the defendant are located in the same building. Given our constitutional order, and given that the impeachment process is part and parcel of the separation of powers, designed to check abuses of power, it is part of the governor's official duties to respond to demands for his testimony by a duly authorized legislative impeachment panel." (pp. 739-740)

M. State ex rel. Joint Committee on Government and Finance of West Virginia Legislature v. Bonar, 159 W.Va. 416, 230 S.E.2d 629 (Supreme Court of Appeals of West Virginia 1976) - "A joint committee formed by the West Virginia Legislature for the purpose of making a comprehensive study of the administration and personnel policies of the Department of Public Safety brought an action in mandamus to enforce a subpoena for certain records of the Department. The Circuit Court, Kanawha County, Robert K. Smith, J., awarded the writ, and the superintendent of the Department of Public Safety appealed. The Supreme Court of Appeals, Wilson, J., held that the subpoena would not be enforced except upon a showing of the relevancy and materiality of the documents requested and a showing that the information sought was not otherwise practically available. Reversed and remanded. Neely, J., dissented and filed opinion.".....

"Appellant contends that the records which are sought are privileged and confidential and that the information sought violates the rights of employees of the Department of Public Safety.....Other instances of constitutional confrontations have concerned clashes between individual rights and legislative powers; individual rights and executive privilege; legislative

powers and judicial powers; and executive privilege and judicial process.

Many of these conflicts come to the courts in the context of the effect to be given to legislative or judicial subpoena powers.

When such conflicting claims must be judicially resolved, courts must endeavor to balance competing interests in such a manner as to do no violence either to the separate integrity of any branch of government or to the successful conjoinder of powers necessary to the formation of a governmental entity or to the individual rights of a free people.

This balancing of interests has produced some well-recognized and workable guidelines for those whose competing interests are, in the final analysis, defined and determined by the courts.

The judiciary has always guarded its own subpoena powers against any claim of executive privilege. See *421 United States v. Burr, 25 Fed.Cas.No.14,692d, p. 30 (C.C.D.Va.1807); and United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

Likewise, the courts go far to protect the rights of the Legislature in the pursuit of a legitimate legislative purpose by pertinent inquiries against any claim of privilege by individuals, other than the privilege against self-incrimination. See Barenblatt v. United States, 360 U.S. 109, 79 S.Ct. 1081, 3 L.Ed.2d 1115 (1959); Wilkinson v. United States, 365 U.S. 399, 81 S.Ct. 567, 5 L.Ed.2d 633 (1960); and Braden v. United States, 365 U.S. 431, 81 S.Ct. 584, 5 L.Ed.2d 653 (1961).

Similarly, the judiciary will not interfere with the legislative exercise of a subpoena power when such issuance is within a specific constitutional grant Eastland v. United States Servicemen's Fund, 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975).

However, the courts will not assume that every legislative investigation is justified by a public need that overbalances private or executive rights or privileges. See Watkins v. United States, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957); and Sinclair v. United States, 279 U.S. 263, 49 S.Ct. 268, 73 L.Ed. 692 (1929). A less precise formula for the balancing of interests prevails in civil litigation. Cases can be found in which the courts have refused to require a department head to disclose information in civil actions. **632 State v. Bouchelle, 122 W.Va. 498, 11 S.E.2d 119 (1940); and Gardner v. Anderson, 9 Fed.Cas.No.5,220, p. 1158 (C.C.D.Md.1876). On the other hand, the courts will sometimes require production of documents, at least for In camera inspection. Smith v. Schlesinger, 168 U.S.App.D.C. 204, 513 F.2d 462 (1975); and Sun Oil Company v. United States, 514 F.2d 1020, 206 Ct.Cl. 742 (1975).

From the above authorities, with specific reference to the judicial or legislative subpoena power, it is apparent that the courts jealously guard their own subpoena powers and equally jealously guard the legislative subpoena power.

However, neither subpoena power is subject to unquestioned enforcement. The courts will, on proper motion, refuse to enforce a judicial subpoena duces tecum calling for the production of documents in the absence of a showing that

the documents sought are relevant and material to the matter in controversy and that proof is not otherwise practically available. Ebbert v. Bouchelle, 123 W.Va. 265, 14 S.E.2d 614 (1941). A similar standard should prevail when the courts are asked to enforce a legislative subpoena duces tecum, and this would require the Legislature to show: (1) that a proper legislative purpose exists; (2) that the subpoenaed documents are relevant and material to the accomplishment of such purpose; and (3) that the information sought is not otherwise practically available.

The Joint Committee chose in this instance not to use legislative power to enforce obedience to its subpoena by attachment, fine or imprisonment. See W.Va.Code, Chapter 4, Article 1, Section 5; and Sullivan v. Hill, supra.

Instead, the Joint Committee chose to attempt to have the courts enforce its subpoena by mandamus. It might have sought the assistance of the courts under the W.Va.Code, Chapter 4, Article 3, Section 4, which provides as follows:

> '. . . If any witness subpoenaed to appear at such hearing shall refuse to appear or to answer inquiries there propounded, or shall fail or refuse to produce books, papers, documents or records within his or her control when the same are demanded, the committee shall report the facts to the circuit court of Kanawha county or any other court of competent jurisdiction and such court may compel obedience to the subpoena as though such subpoena had been issued by such court in the first instance. . . .'

Consequently, in considering the enforcement of a legislative subpoena duces tecum, the courts will apply principles long used by them in determining whether to enforce a judicial subpoena duces tecum.

In the instant case, the broad legislative purpose as proclaimed by the Legislature is not open to question and should not generally be resisted by any claim of executive or other privilege by the Superintendent of the Department of Public Safety. However, the relevancy and materiality of the documents requested, namely the originals of certain Activity Reports and Rating Sheets, have not been established. The Joint Committee made no effort, in its petition filed below, to set forth facts showing such necessity. It did not otherwise endeavor to make such a showing. Likewise, not only did it fail to establish that the information sought was not otherwise practically available, but indeed it appears from the face of the record that much of the requested material had previously been supplied in the form of copies. Some parts of the Joint Committee's subpoena here in issue seem more dictated by local rather than legislative interests. Further, some of the Joint Committee's arguments sound more in prosecutorial than in legislative concerns.

Perhaps the most pertinent case having a bearing on the issues involved in the instant case is Senate Select Committee v. Nixon, 162 U.S.App.D.C. 183, 498 F.2d 725 (1974). The court held that it would not enforce a Congressional subpoena ducestecum served on the President of the United States for the production of tape recordings of conversations between the President and a presidential aide. The rationale of the court's decision was that the court could find

no merit in the argument that the Committee needed to resolve conflicting testimony and that such resolution was critical to the Committee's performance of its legislative function. The court frankly acknowledged that fact-finding by a legislative committee was undeniably a part of its task. However, it pointed out that Congress frequently legislated on the basis of conflicting information provided in its hearings. The court further rejected any comparison between the proceedings of a legislative committee and the proceedings of a grand jury. It pointed out that the proper discharge of the responsibility of a grand jury would turn entirely on its ability to determine whether there was probable cause to believe that certain named individuals committed certain specific crimes. Such judicial need for a showing of probable cause, the court contended, was much different from the legislative need for information which might very well be expected to be conflicting without interfering with the proper legislative purpose of legislating.

In the absence of a showing by the Joint Committee of the relevancy and materiality of the specific documents to a proper legislative as opposed to some other purpose, and in the absence of a showing that the information sought was not otherwise practically available, the court below should have denied access to such material, particularly when the Superintendent of the West Virginia Department of Public Safety raised such questions based on the protection of whatever rights employees of the Department might have against unnecessary disclosure of personal and confidential information concerning them.

For the reasons above stated, the order of the Circuit Court of Kanawha County, West Virginia, issuing a writ of mandamus compelling the production of the originals of certain specified documents from the Superintendent of the West Virginia Department of Public Safety, is reversed, and the case is remanded to that court with directions to dismiss the proceeding.

Reversed and remanded." (footnotes omitted) (pp. 420-424).

**(APPENDIX CON'T) SELECTED STATE LAWS AND MATERIALS**:

A. **Arizona:**

A.R.S. § 41-1151-1155

"§ 41-1151. Issuance and service of legislative subpoena

A subpoena may be issued by the presiding officer of either house or the chairman of any committee before whom the attendance of a witness is desired. The subpoena is sufficient if it states whether the proceeding is before the senate, house of representatives or a committee, is addressed to the witness, requires the attendance of the witness at a certain time and place, and is signed by either presiding officer or a committee chairman. The subpoena may be served and returned in like manner as civil process.

§ 41-1152. Immunity of witnesses

Testimony or evidence produced pursuant to this article may not be admitted in evidence or used in any manner in any criminal prosecution against a natural person sworn and examined before either house of the legislature or any committee of either house, except for perjury, false swearing, tampering with physical evidence or any other offense committed in connection with an appearance required by § 41-1151 if it constitutes either the compelled testimony or the private papers of such person which would be privileged evidence pursuant to the fifth amendment of the Constitution of the United States or article II, § 10 of the Constitution of Arizona and such person claimed the privilege against self-incrimination and a majority of the committee, after consultation with the attorney general, votes to order such person to testify or produce such papers.

§ 41-1153. Disobedience of subpoena as legislative contempt

A. If a witness neglects or refuses to obey a legislative subpoena, or, appearing, neglects or refuses to testify, the senate or the house may, by resolution entered in the journal, commit him for contempt.

B. A witness neglecting or refusing to attend in obedience to a subpoena may be arrested by the sergeant-at-arms and brought before the senate or house upon authority of a copy of the resolution signed by the president or speaker, and countersigned by the secretary or chief clerk.

§ 41-1154. Disobedience of legislative subpoena or refusal to give testimony or produce papers; classification

A person who, being subpoenaed to attend as a witness before either house of the legislature or any committee thereof, knowingly fails or refuses without lawful excuse to attend pursuant to such subpoena, or being present knowingly refuses to be sworn or to answer any material or proper question, or to produce,

upon reasonable notice, any material and relevant books, papers or documents in his possession or under his control, is guilty of a class 2 misdemeanor.

§ 41-1155. Offenses punishable by legislature; limitation on imprisonment

A. Each house of the legislature may punish as a contempt, and by imprisonment, a breach of its privileges, or the privileges of its members, but only for one or more of the following offenses:

1. Arresting a member or officer of the house, or procuring such member or officer to be arrested, in violation of his privilege from arrest.

2. Disorderly conduct in immediate view of the house, and directly tending to interrupt its proceedings.

3. Refusing to attend, or to be examined as a witness, either before the house or a committee, or before any person authorized by the house or by a committee to take testimony in legislative proceedings.

4. Giving or offering a bribe to a member, or attempting by menace, or other corrupt means or device, directly or indirectly, to control or influence a member in giving or preventing his vote.

B. No term of imprisonment shall extend beyond final adjournment of the session."

B. **California**:

"Legislative bodies have inherent power to conduct investigations in aid of prospective legislation, and to secure information requisite to the proper discharge of their functions and powers. This investigative power may be exercised directly or through properly constituted legislative committees.1

The power to conduct investigations carries with it the power to require and compel the attendance of witnesses and the production of books and papers by means of legal process.2 Thus, the president of the Senate, the speaker of the house, or the chairman of any committee before whom attendance of a witness is desired may issue a subpoena requiring the attendance of the witness before the Senate, the Assembly, or the committee, providing permission has been secured from the rules committee of the respective house.3 In addition, members of any legislative committee may administer oaths to witnesses in a matter under examination.4

Any witness who neglects or refuses to obey a subpoena, or who appears but neglects or refuses to testify or to produce on reasonable notice any material and proper books, papers, or documents in his or her possession or under his or her control, commits a contempt.5 Persons who commit such contempt without lawful excuse are guilty of a misdemeanor. A member of the legislature convicted of contempt, in addition to the prescribed punishment, forfeits his or her office and is forever disqualified from holding any state office.6

If the contempt is committed before the Senate or the Assembly, either

body may commit the person for contempt by resolution entered on its respective journal.7 If the contempt is committed before a committee during a legislative session, the committee must report the contempt to the Senate or to the Assembly for action as the Senate or Assembly deem necessary.8 If the contempt is committed before a committee when the legislature is not in session, the superior court in the county in which any inquiry, investigation, hearing, or proceeding may be held by the committee may compel the witness' attendance, testimony, and production of books, papers, documents, and accounts as required by the committee subpoena, on filing by the committee of a petition asking that the witness be so compelled.9" (footnotes omitted) - "Investigations; witnesses; contempt", 42A Cal. Jur. 3d Legislature § 29.

C. **Louisiana**:

La. Const. Art. III, §7(B)

"§7. Judging Qualifications and Elections; Procedural Rules; Discipline; Expulsion; Subpoenas; Contempt; Officers

* * *

(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. R.S. 24:2-6 -

"§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."

La. R.S. 24:513(M) -
"§513. Powers and duties of legislative auditor; audit reports as public records; assistance and opinions of attorney general; frequency of audits; subpoena power

* * *

M.(1) In the performance of his duties the legislative auditor, or any member of his staff designated by him, may compel the production of public and private books, documents, records, papers, films, tapes, and electronic data processing media. For such purpose the legislative auditor and the chairman of the Legislative Audit Advisory Council may jointly issue a subpoena for the production of documentary evidence to compel the production of any books, documents, records, papers, films, tapes, and electronic data processing media regarding any transaction involving a governmental entity. The subpoena may be served by registered or certified mail, return receipt requested, to the addressee's business address, or by representatives appointed by the legislative auditor, or shall be directed for service to the sheriff of the parish where the addressee resides or is found.

(2) If a person refuses to obey a subpoena issued under any Section of this Part, a judicial district court, upon joint application by the legislative auditor and the chairman of the Legislative Audit Advisory Council, may issue to the person an order requiring him to appear before the court to show cause why he should not be held in contempt for refusal to obey the subpoena. Failure to obey a subpoena may be punished as a contempt of court."

La. R.S. 24:554(A) and (B) - (Legislative Audit Advisory Council)
"§554. Powers

A.(1) The council shall have the power and authority to hold hearings, to subpoena witnesses, administer oaths, compel the production of books, documents, records, and papers, public and private, to order the compiling and furnishing to the legislative auditor of the sworn statements and actuarial valuations which are required by R.S. 24:514, to petition directly, or through a representative authorized by the council, the courts for writs of mandamus to order the compiling and furnishing of the sworn statements and actuarial valuations required by R.S. 24:514, and to do all other things necessary to advise, aid, and assist the legislative auditor in carrying out the duties and responsibilities of his office.

(2) It shall also have the full power and authority of the legislature inherent in that body and conferred by law to take testimony at public or private hearings, and upon failure of any person to comply with an order of the council, to punish for contempt.

B.(1) If the council determines based upon its review and investigation that, without appropriate cause, an auditee has not complied with the recommendations contained in an audit report of such auditee, the council shall forward its determination of noncompliance to the Joint Legislative Committee on

the Budget and the appropriate oversight committees of the House of Representatives and the Senate.

(2) If the council determines based upon its review and investigation that, without appropriate cause, a local auditee as defined in R.S. 24:513 has failed for three consecutive years to sufficiently resolve the findings contained in an audit report of such local auditee, the council may, after notice to and a public hearing with the local auditee, make a determination that the local auditee has failed or refused to comply with the provisions of R.S. 24:513, and upon two-thirds vote of the entire membership of the council, may direct the treasurer to withhold funds in accordance with R.S. 39:72.1."

La. R.S. 24:655(A) (Joint Legislative Committee on the Budget)
"§655. Powers

A. The committee shall have the power and authority to hold hearings, subpoena witnesses, administer oaths, require the production of books and records, and do all other things necessary to discharge its duties and responsibilities, including the power to punish for contempt and to initiate the prosecution, in accordance with the laws of this state, of any individual who refuses to testify or is charged with false swearing or perjury before the committee."

La. Code of Evidence 1101(A)(2)
"Art. 1101. Applicability

A. Proceedings generally; rule of privilege.

(1) Except as otherwise provided by legislation, the provisions of this Code shall be applicable to the determination of questions of fact in all contradictory judicial proceedings and in proceedings to confirm a default judgment. Juvenile adjudication hearings in delinquency proceedings shall be governed by the provisions of this Code applicable to civil cases. Juvenile adjudication hearings in delinquency proceedings shall be governed by the provisions of this Code applicable to criminal cases.

(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." (emphasis added).

D. **Minnesota**:

M.S.A. § 3.153

"3.153. Legislative subpoenas

Subdivision 1. Commissions; committees. A joint legislative commission established by law and composed exclusively of legislators or a standing or interim legislative committee, by a two-thirds vote of its members, may request the issuance of subpoenas, including subpoenas duces tecum, requiring the appearance of persons, production of relevant records, and the giving of relevant testimony. Subpoenas shall be issued by the chief clerk of the house of representatives or the secretary of the senate upon receipt of the request. A person subpoenaed to attend a meeting of the legislature or a hearing of a legislative committee or commission shall receive the same fees and expenses provided by law for witnesses in district court.

Subd. 2. Service. Service of a subpoena authorized by this section shall be made in the manner provided for the service of subpoenas in civil actions at least seven days before the date fixed in the subpoena for appearance or production of records unless a shorter period is authorized by a majority vote of all the members of the committee or commission.

Subd. 3. Counsel. Any person served with a subpoena may choose to be accompanied by counsel if a personal appearance is required and shall be served with a notice to that effect. The person shall also be served with a copy of the resolution or statute establishing the committee or commission and a general statement of the subject matter of the commission or committee's investigation or inquiry.

Subd. 4. Attachment. To carry out the authority granted by this section, a committee or commission authorized by subdivision 1 to request the issuance of subpoenas may, by a two-thirds vote of its members, request the issuance of an attachment to compel the attendance of a witness who, having been duly subpoenaed to attend, fails to do so. The chief clerk of the house of representatives or the secretary of the senate upon receipt of the request shall apply to the district court in Ramsey County for issuance of the attachment.

Subd. 5. Failure to respond. Any person who without lawful excuse fails to respond to a subpoena issued under this section or who, having been subpoenaed, willfully refuses to be sworn or affirm or to answer any material or proper question before a committee or commission is guilty of a misdemeanor."

E. **Nevada**:

N.R.S. 218E.035
"218E.035. Contents and service of subpoenas; legal force and effect

1. To be properly issued, a legislative subpoena must:

(a) Be addressed to the witness;

(b) Describe the nature of the legislative proceedings for which the legislative subpoena is being issued;

(c) Require the attendance and testimony of the witness at a definite time and place fixed in the legislative subpoena or require the production of the documentary evidence at a definite time and place fixed in the legislative subpoena, or both;

(d) State particular reasons why the attendance and testimony of the witness or the production of the documentary evidence is pertinent to legislative business or possible future legislative action; and

(e) Be signed, as applicable, by the President of the Senate, the Speaker of the Assembly or the chair of the committee who issued the legislative subpoena.

2. A legislative subpoena may be served by any person who is 18 years of age or older.

3. If a legislative subpoena is properly issued to and served on a witness pursuant to this section:

(a) The legislative subpoena has the same legal force and effect as a subpoena or order issued by the district court; and

(b) The witness shall comply with the provisions of the legislative subpoena in the same manner as a subpoena or order issued by the district court."

F. **New Mexico**:

Constitution of New Mexico
Article IV
"Sec. 11. [Rules of procedure; contempt or disorderly conduct; expulsion of members.]

Each house may determine the rules of its procedure, punish its members or others for contempt or disorderly behavior in its presence and protect its members against violence; and may, with the concurrence of two-thirds of its members, expel a member, but not a second time for the same act. Punishment for contempt or disorderly behavior or by expulsion shall not be a bar to criminal prosecution.

2-1-2. [Power of officers to administer oaths to witnesses.] (1912)

The presiding officer of the senate, the speaker of the house of representatives, or the chairman of any committee of either house, or the chairman of any joint committee of both houses of the legislature, shall have power to

administer an oath to any witness who may appear to testify at any investigation being had by either of said houses of the legislature, or any committee or joint committee thereof.

2-1-10. Legislative subpoenas; form; issuance; penalty. (1959)

A. During any regular or special session of the legislature upon request of a standing committee of either house of the legislature and approval by a majority vote of the elected members of the house of which such committee is a part, the presiding officer of the senate or the speaker of the house of representatives shall issue subpoenas to compel the attendance of any witnesses or command the person to whom directed to produce any books, papers, documents or tangible items designated therein, at any investigation or hearing before the body issuing the subpoena.

B. Every subpoena shall be issued by the duly authorized legislative officer, under the name of the house or senate, and shall command each person to whom it is directed to attend and give testimony, or to produce documents or other designated articles at a time and place therein specified. Service of process may be made by any person designated by the officer issuing the subpoena.

C. Witnesses who may be subpoenaed to appear before any body of the legislature, or to produce any designated books, papers, documents or tangible items shall receive as compensation the sum of five dollars ($5.00) a day for each day they are in actual attendance in obedience to the subpoena, and eight cents ($.08) for each mile actually and necessarily traveled in coming to or going from the place of examination, but nothing shall be paid for traveling expenses when the witnesses have been subpoenaed at the place of examination.

D. Any person who shall refuse or neglect to comply with a subpoena, duly issued by the proper officer of the legislature, shall upon conviction be guilty of contempt of the legislature, and punished by a fine of not more than five hundred dollars ($500) or by imprisonment in the county jail for not more than six months or by both such fine and imprisonment in the discretion of the judge.

30-25-1. Perjury. (2009)

A. Perjury consists of making a false statement under oath, affirmation or penalty of perjury, material to the issue or matter involved in the course of any judicial, administrative, legislative or other official proceeding or matter, knowing such statement to be untrue.

B. Whoever commits perjury is guilty of a fourth degree felony.

30-25-2. Refusal to take oath or affirmation. (1963)

Refusal to take oath or affirmation consists of the refusal of any person, when legally called upon to give testimony before any court, administrative proceeding, legislative proceeding or other authority in this state, authorized to

administer oaths or affirmations, to take such oath or affirmation.

Whoever commits refusal to take oath or affirmation is guilty of a petty misdemeanor."

G. **New York**:

"Each house of the legislature has the power to punish, as for contempt, a neglect to attend or to be examined as a witness before the house or a committee thereof or to produce, on reasonable notice, any material books, papers, or documents when duly required to give testimony, or to produce such books, papers, or documents required for a legislative proceeding, inquiry, or investigation.1 The provisions of the Civil Practice Law and Rules in relation to enforcing obedience to a subpoena lawfully issued by a judge, arbitrator, referee, or other person in a matter not arising in an action in a court of record apply to a subpoena issued by a legislative committee.2 A witness cannot be committed for refusal to answer questions before a legislative committee unless the questions are pertinent to the matter under investigation by the committee.3" (footnotes omitted), "Legislative Subpoenas", 58A N.Y. Jur. 2d Evidence and Witnesses § 828.

New York Consolidated Laws, Penal Law - PEN "§ 215.60 Criminal contempt of the legislature -

A person is guilty of criminal contempt of the legislature when, having been duly subpoenaed to attend as a witness before either house of the legislature or before any committee thereof, he:

1. Fails or refuses to attend without lawful excuse; or
2. Refuses to be sworn; or
3. Refuses to answer any material and proper question; or
4. Refuses, after reasonable notice, to produce books, papers, or documents in his possession or under his control which constitute material and proper evidence.

Criminal contempt of the legislature is a class A misdemeanor."

4A West's McKinney's Forms Civil Practice Law and Rules § 12:72:

§ 12:72. Subpoena requiring attendance before legislative committee [Form: CPLR 2301]
THE PEOPLE OF THE STATE OF NEW YORK
To: [Name of summoned party]
GREETINGS:

WE COMMAND YOU and each of you to appear in person before [name of committee] of the State of New York, [OPTIONAL: created pursuant to a resolution duly passed on the [ordinal number of day] day of [name of

month][identification of year],] at [address of committee], in the City of [name of city], on the [ordinal number of day] day of [name of month] [identification of year], at [time of hearing], in the [fore/after]noon of that day or at any recessed or adjourned date thereof, to testify and give evidence as a witness in a certain matter now pending, i.e., [description of investigation or other matter pending] and you are further commanded to bring with you and produce at the time and place aforesaid, all [description of documents sought with reasonable precision], now in your custody and control and all other writings which you have in your custody concerning the above premises; and for a failure to attend you will be liable for the penalties prescribed by law.
Dated: [date of subpoena]

_____
[Name of chairman]
Counsel for Committee
[Address of committee]
[Telephone number of committee]"

(Notes: See discussion in § 12:67 herein.)

1 Charges to Jury & Requests to Charge in Crim. Case in N.Y. § 23:10:

§ 23:10. Legislature-Refusing to be sworn-Model charge
The defendant, [name of defendant], is charged in the [number of count] count of the information with criminal contempt of the legislature as follows:
[recitation of count]
Penal Law Section 215.60(2) defines the crime of criminal contempt of the legislature as follows: A person is guilty of criminal contempt of the legislature when, having been duly subpoenaed to attend as a witness before either house of the legislature or before any committee thereof, he refuses to be sworn.

You would only be entitled to find the defendant, [name of defendant], guilty of this charge if the People have proven to your satisfaction beyond a reasonable doubt each of the following elements:

1. That the defendant, [name of defendant], was duly subpoenaed to attend as a witness before either house of the legislature or before any committee thereof. A subpoena is a process of court directing the person to whom it is addressed to attend and appear as a witness in a designated action or proceeding in such court, on a designated date and any recessed or adjourned date, of the action or proceeding. The legislative house or committee must have been authorized by law to issue the subpoena. The subpoena must have been served upon the defendant, [name of defendant], by a person over 18 years old.

The person serving the subpoena must have either delivered the subpoena personally to the defendant, [name of defendant]; or left it with a person of

suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the defendant, [name of defendant], and also mailed a copy to the defendant, [name of defendant], at [his/her] last known residence; or by delivering it within the state to a person or official whom the defendant,[name of defendant], has designated as [his/her] agent for the service of process; or, where service cannot be effected by any of the foregoing means, despite due diligence by the process server to do so, by affixing a copy of the subpoena to the door of either the actual place of business, dwelling place or usual place of abode within the state of the defendant, [name of defendant], and by mailing a copy of the subpoena to[his/her] last known residence; or by serving it in such manner as the court, upon motion without notice, may direct, if service by all the other means just described is impracticable.

In addition to serving the witness with a copy of the subpoena, the process server must have tendered or offered [him/her] payment of a fee of two dollars for each day's attendance plus travel expenses of eight cents per mile from the place where [he/she] was served to the place where [he/she] was subpoenaed to attend and return. However, if the travel is wholly within a city, then the witness is not entitled to any mileage fee. A witness is a person who gives evidence.

2. That the defendant,[name of defendant], refused to be sworn.

A witness is sworn when he takes an oath or makes an affirmation or other mode authorized by law attesting to the truth of that which is stated.

To "refuse" means to decline or reject a demand as a result of a positive intention to disobey.

Again in order for you to convict the defendant of criminal contempt of the legislature, the People are required to prove to your satisfaction beyond a reasonable doubt each of the following two elements:

1. That the defendant, [name of defendant], was duly subpoenaed to attend as a witness before either house of the legislature or before any committee thereof; and

2. That the defendant,[name of defendant], refused to be sworn.

Therefore, with respect to count[number of count] of the information, if you find that the People have proven to your satisfaction beyond a reasonable doubt each of the foregoing elements, then you would be justified in finding the defendant, [name of defendant], guilty of the criminal of criminal contempt of the legislature.

On the other hand, if you find that the People have failed to prove to your satisfaction beyond a reasonable doubt any one or more of the foregoing elements, or if you have a reasonable doubt of the defendant's guilt based upon the evidence or lack of evidence, then you must find the defendant, [name of defendant], not guilty of the crime of criminal contempt of the legislature."

1 Charges to Jury & Requests to Charge in Crim. Case in N.Y. § 23:9:

§ 23:9. Legislature-Refusing to attend-Model charge

The defendant, [name of defendant], is charged in the [number of count] count of the information with criminal contempt of the legislature as follows: [recitation of count]

Penal Law Section 215.60(1) defines the crime of criminal contempt of the legislature as follows: A person is guilty of criminal contempt of the legislature when, having been duly subpoenaed to attend as a witness before either house of the legislature or before any committee thereof, he fails or refuses to attend without lawful excuse.

You would only be entitled to find the defendant, [name of defendant], guilty of this charge if the People have proven to your satisfaction beyond a reasonable doubt each of the following elements:

1. That the defendant, [name of defendant], was duly subpoenaed to attend as a witness before either house of the legislature or before any committee thereof.

A subpoena is a process of court directing the person to whom it is addressed to attend and appear as a witness in a designated action or proceeding in such court, on a designated date and any recessed or adjourned date of the action or proceeding.

The legislative house or committee must have been authorized by law to issue the subpoena.

The subpoena must have been served upon the defendant, [name of defendant], by a person over 18 years old.

The person serving the subpoena must have either delivered the subpoena personally to the defendant, [name of defendant]; or left it with a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the defendant, [name of defendant] and also mailed a copy to the defendant, [name of defendant], at [his/her] last known residence; or by delivering it within the state to a person or official whom the defendant,[name of defendant], has designated as [his/her] agent for the service of process; or, where service cannot be effected by any of the foregoing means, despite due diligence by the process server to do so, by affixing a copy of the subpoena to the door of either the actual place of business, dwelling place or usual place of abode within the state of the defendant, [name of defendant], and by mailing a copy of the subpoena to[his/her] last known residence; or by serving it in such manner as the court, upon motion without notice, may direct, if service by all the other means just described is impracticable.

In addition to serving the witness with a copy of the subpoena, the process server must have tendered or offered [him/her] payment of a fee of two dollars for each day's attendance plus travel expenses of 8 cents per mile from the place where [he/she] was served to the place where [he/she] was subpoenaed to attend

and return. However, if the travel is wholly within a city, then the witness is not entitled to any mileage fee.
A witness is a person who gives evidence.

2. That the defendant,[name of defendant], failed or refused to attend. To "fail" means to fall short of a duty; to leave undone; to neglect; to be deficient or wanting. To "refuse" means to decline or reject a demand as a result of a positive intention to disobey. The difference between "fail" and "refuse" is that the latter involves an act of the will, while the former may be an act of inevitable necessity.

3. That the defendant's failure or refusal to attend was without lawful excuse. A lawful excuse is a legitimate excuse sanctioned by law for doing or not doing an act.

Again in order for you to convict the defendant of criminal contempt of the legislature, the People are required to prove to your satisfaction beyond a reasonable doubt each of the following three elements:

1. That the defendant, [name of defendant], was duly subpoenaed to attend as a witness before either house of the legislature or before any committee thereof; and

2. That the defendant,[name of defendant], failed or refused to attend; and

3. That the defendant's failure or refusal to attend was without lawful excuse.

Therefore, with respect to count [number of count] of the information, if you find that the People have proven to your satisfaction beyond a reasonable doubt each of the foregoing elements, then you would be justified in finding the defendant, [name of defendant], guilty of the crime of criminal contempt of the legislature.

On the other hand, if you find that the People have failed to prove to your satisfaction beyond a reasonable doubt any one or more of the foregoing elements, or if you have a reasonable doubt of the defendant's guilt based upon the evidence or lack of evidence, then you must find the defendant, [name of defendant], not guilty of the crime of criminal contempt of the legislature."

H. **Pennyslvania**:

101 Pa. Code § 19.505
"§ 19.505. Subpoena issued by legislative committee.
COMMONWEALTH OF PENNSYLVANIA
SS:
COUNTY OF DAUPHIN
To _____ , _____ and WE COMMAND YOU AND EACH OF YOU, That laying aside all business and excuses whatsoever, you and each of you be and appear before a Committee of the Senate (House of Representatives) (Joint Committee of the General Assembly) of the Commonwealth of Pennsylvania, to

(state purpose briefly) at their office in _____ on _____ the _____ day of _____ , 19 ___ , between the hours of ___ and ___ o'clock in the ___ noon of said day, to testify truth and give evidence in the investigation before the committee then and there to be heard, bringing with you the following books, papers and records _____ in pursuance of a resolution passed by the Senate (House of Representatives) (concurrent resolution passed by both Houses of the General Assembly) adopted ___ , 19 ___ , Senate (House) Resolution No. ___ ,
Wherein fail not, under the penalty which may ensue.
WITNESS my hand and seal at ___ the ___ day of ___ , 19 ___ .
_____ (SEAL)
Chairman of Committee."

I. **Tennessee**:

"Tenn. Op. Atty. Gen. No. 77-426 (Tenn.A.G.), 1977 WL 28550
Office of the Attorney General

State of Tennessee
Opinion No. 77-426
December 14, 1977

Honorable Bill Carter
Representative
108 War Memorial Building
Nashville, Tennessee 37219

Dear Representative Carter:

This is in response to your letter of December 5, 1977 wherein you requested a written opinion from this office regarding several questions relating to legislative committee contempt powers.

Your first question asks what is the proper procedure that a legislative committee should follow in issuing an arrest warrant if the legislative committee has the authority to issue such a warrant?

As pointed out in our letter of December 6, 1977, T.C.A. § 3–311 indicates that a legislative committee has the right and power to issue and enforce the process of arrest or attachment for the contempts outlined in T.C.A. § 3–310. It authorizes the arrest process in the event that persons who have been validly served with a subpoena willfully fail to appear, or having appeared, willfully refuse to answer questions pertinent to matters under investigation.

It a person has been validly served with a subpoena, and the legislative committee determines that the facts justify the issuance of an arrest warrant, it would appear that an arrest warrant, issued over the signature of the committee chairman and directed to any law enforcement official possessing the power of arrest granted

under the various provisions of the Tennessee Code, would be the proper procedure to follow. T.C.A. § 3–309. As to form, an arrest warrant drawn similar to that issued by a court of record in Tennessee would seem to be appropriate in light of T.C.A. § 3–311.

Your second question asks that if the procedure provided in T.C.A. § 3–321 is followed by the committee for the offense of evasion of service of a subpoena, as set forth in T.C.A. § 3–315, is it necessary to show that the person willfully left or absented himself from the county when, after knowing a subpoena has been issued for him, he willfully refuses to make his whereabouts known in a city of 1,000,000 people?

T.C.A. § 3–315 which sets forth the penalty for evasion of service of a subpoena specifically requires that for a person to be guilty of the criminal offense of evasion of service, that person must 'willfully leave and absent himself from the county of his usual residence for the purpose of evading the service upon him of any subpoena . . .'.

It is our opinion that a person must, therefore, willfully leave and absent himself from the county of his usual residence in order to meet one of the criteria necessary for that person to be guilty of the criminal offense of evasion of service as defined by T.C.A. § 3–315.

In your third question you ask if a person and records relating to a certain subject have been properly subpoenaed by a legislative committee, is there any privilege or immunity which would lawfully allow a person to refuse to reveal or testify as to the contents of police information or records within his knowledge or possession which the person terms 'confidential'? Further, does refusal to reveal such records or testify as to such information constitute contempt under T.C.A. § 3–310

There are certain privileges which lawfully allow a person to refuse to reveal or testify concerning the contents of police information or records within his knowledge or possession. One such privilege is usually referred to as the informer's privilege, but in reality it is the privilege of the Government to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); Roberts v. State, 489 S.W.2d 263, (C.C.A. 1972); Cert. Den., Tenn. S.Ct. (1972).

As to the production of documents, a witness will not be held in contempt for failure to produce documents which he does not have unless he is responsible for their unavailability, or is impeding the legislative inquiry by not explaining what happened to them. United States v. Bryan, 339 U.S. 323, 70 S.Ct. 724 (1950).

The scope of the informer privilege is limited by its underlying purpose. The purpose being the furtherance and protection of the public interest and effective law enforcement by recognizing the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials. Where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Roviaro, supra, at 627.

As indicated above the legislative power to investigate is not absolute. Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d. The legislature is bound to observe all provisions of the Constitution designed to protect the individual in the enjoyment of life, liberty and property and from inquisitions into private affairs. Wallace v. Brewer, 315 F.Supp. 431.

Aside from the informer privilege discussed above, there are other privileges which may be asserted by a witness relating to testimony and documents sought by a legislative committee. They include marital communication, Burton v. State, 501 S.W.2d 814, (Tenn.Crim.App. 1973), T.C.A. § 24–103; the attorney-client privilege, T.C.A. § 29–305; the psychiatristpatient privilege, T.C.A. § 63–1117; and others.

The question of whether or not refusal to reveal or testify regarding police information and records might constitute contempt under the provisions of T.C.A. § 3–310 can only be answered in the context of the specific facts surrounding the alleged contempt.

A person cannot be punished for contumacy as a witness unless his testimony relates to a matter into which the legislature has the jurisdiction to inquire and where the questions are pertinent to matters under inquiry. Sinclair v. United States, 279 U.S. 263, 49 S.Ct. 268 (1929). The evidence sought by the legislative committee must be willfully withheld. McGrain v. Daugherty, 273 U.S. 135, 47 S.Ct. 319 (1927).

In determining whether a witness should be committed for contempt, the test is not whether or not he has answered every question put to him, but whether on its face and without collateral inquiry, the testimony is a bona fide effort to answer the question at all, and in light of a privilege which can be validly asserted. 81A C.J.S. States 60.

An additional factor which should be borne in mind during a legislative inquiry which seeks testimony relating to police informers in an ongoing police investigation is the requirement that testimony given before a legislative committee must ultimately be made available for public inspection in accordance with T.C.A. § 3–304 and T.C.A. § 15–304. Legislative committee meetings cannot be held in camera. T.C.A. § 8–4401 et seq.

Lastly, you asked under what circumstances is the issuance of an attachment appropriate under T.C.A. § 3–317, and whether a person actually has to be served with a subpoena and violate same to make attachment appropriate? Further, if attachment is appropriate, what is the proper procedure in terms of how long a person can be held in custody of the Sergeant-at-Arms under the authority of such process.

T.C.A. § 3–317 provides that an attachment may be served on all persons who willfully violate any subpoena, rule or order, made or promulgated by a legislative investigating committee.

Since, historically, an attachment commands the sheriff to take the body and bring the person into court to give evidence, see Caruthers, History of a Lawsuit, § 281 (8th Ed. 1963), it seems clear that refusal to obey a committee subpoena to appear and give testimony would authorize the committee to issue an attachment to

be served by the committee Sergeant-at-Arms on the offending person, who would then be kept in custody of the Sergeant-at-Arms and brought before the committee.

The length of time that a person should be held in custody of the Sergeant-at-Arms, under the authority of a Writ of Attachment, should be no longer than absolutely necessary to produce a witness before the committee, in keeping with the constitutional requirement to infringe as little as necessary upon the individual citizen's right to liberty. In RE Hague, 144 A. 546, 104 N.J.Eq. 31, affirmed 145 A. 618, 104 N.J.Eq. 369; see also 81A C.J.S. States 59.

It is hoped that the above information may be of assistance.

Sincerely,
Donald S. Caulkins
Deputy Attorney General

Tenn. Op. Atty. Gen. No. 77-426 (Tenn.A.G.), 1977 WL 28550"

J. **Utah**:

Utah Code:

Chapter 14

Legislative Subpoena Powers

"36-14-1 Definitions.

As used in this chapter:

(1) "Issuer" means a person authorized to issue a subpoena by this chapter.

(2) "Legislative body" means:

(a) the Legislature;

(b) the House or Senate; or

(c) any committee or subcommittee of the Legislature, the House, or the Senate.

(3) "Legislative office" means the Office of Legislative Research and General Counsel, Office of the Legislative Fiscal Analyst, and the Office of the Legislative Auditor General.

(4) "Legislative staff member" means an employee or independent contractor of a legislative office.

(5) "Legislative subpoena" means a subpoena issued by an issuer on behalf of a legislative body or legislative office and includes:

(a) a subpoena requiring a person to appear and testify at a time and place designated in the subpoena;

(b) a subpoena requiring a person to:

(i) appear and testify at a time and place designated in the subpoena; and

(ii) produce accounts, books, papers, documents, electronically stored information, or tangible things designated in the subpoena; and

(c) a subpoena requiring a person to produce accounts, books, papers, documents, electronically stored information, or tangible things designated in the subpoena at a time and place designated in the subpoena.

(6) "Special investigative committee" is as defined in Subsection 36-12-9(1).

36-14-2 Issuers.

(1) Any of the following persons is an issuer, who may issue legislative subpoenas by following the procedures set forth in this chapter:

(a) the speaker of the House of Representatives;

(b) the president of the Senate;

(c) a chair of any legislative standing committee;

(d) a chair of any legislative interim committee;

(e) a chair of any special committee established by the Legislative Management Committee, the speaker of the House, or the president of the Senate;

(f) a chair of any subcommittee of the Legislative Management Committee;

(g) a chair of a special investigative committee;

(h) a chair of a Senate or House Ethics Committee;

(i) a chair of the Executive Appropriations Committee as created in JR3-2-401;

(j) a chair of an appropriations subcommittee as created in JR3-2-302;

(k) the director of the Office of Legislative Research and General Counsel;

(l) the legislative auditor general;

(m) the director of the Office of Legislative Fiscal Analyst; and

(n) the legislative general counsel.

(2) A legislative body, a legislative office, an issuer, or a legislative staff member designated by an issuer may:

(a) administer an oath or affirmation; and

(b) take evidence, including testimony.

36-14-3 Contents.

Each legislative subpoena shall include:

(1) the name of the legislative body or office on whose behalf the subpoena is issued;

(2) the signature of the issuer;

(3) a command to the person or entity to whom the subpoena is addressed to:

(a) appear and testify at the time and place set forth in the subpoena;

(b) appear and testify at the time and place designated in the subpoena and produce accounts, books, papers, documents, electronically stored information, or tangible things designated in the subpoena; or

(c) produce accounts, books, papers, documents, electronically stored information, or tangible things designated in the subpoena at the time and place designated in the subpoena.

36-14-4 Service.

Legislative subpoenas may be served:

(1) within the state, by the sheriff of the county where service is made, or by his deputy, or by any other person 18 years old or older who is not a member of the entity issuing the subpoena;

(2) in another state or United States territory, by the sheriff of the county where the service is made, or by his deputy, or by a United States marshal or his deputy;

(3) in a foreign country:

(a) by following the procedures prescribed by the law of the foreign country;

(b) upon an individual, by any person 18 years old or older who is not a member of the entity delivering the subpoena to him personally, and upon a corporation or partnership or association, by any person 18 years old or older who is

not a member of the entity delivering the subpoena to an officer, a managing or general agent of the corporation, partnership, or association; or

(c) by any form of mail requiring a signed receipt, to be addressed and dispatched by the legislative general counsel to the party to be served.

36-14-5 Legislative subpoenas -- Enforcement.

(1) If any person disobeys or fails to comply with a legislative subpoena, or if a person appears pursuant to a subpoena and refuses to testify to a matter upon which the person may be lawfully interrogated, that person is in contempt of the Legislature.

(2)

(a) When the subject of a legislative subpoena disobeys or fails to comply with the legislative subpoena, or if a person appears pursuant to a subpoena and refuses to testify to a matter upon which the person may be lawfully interrogated, the issuer may:

(i) file a motion for an order to compel obedience to the subpoena with the district court;

(ii) file, with the district court, a motion for an order to show cause why the penalties established in Title 78B, Chapter 6, Part 3, Contempt, should not be imposed upon the person named in the subpoena for contempt of the Legislature; or (iii) pursue other remedies against persons in contempt of the Legislature.

(b)

(i) Upon receipt of a motion under this subsection, the court shall expedite the hearing and decision on the motion.

(ii) A court may:

(A) order the person named in the subpoena to comply with the subpoena; and

(B) impose any penalties authorized by Title 78B, Chapter 6, Part 3, Contempt, upon the person named in the subpoena for contempt of the Legislature.

(3)

(a) If a legislative subpoena requires the production of accounts, books, papers, documents, electronically stored information, or tangible things, the person or entity to whom it is directed may petition a district court to quash or modify the subpoena at or before the time specified in the subpoena for compliance.

(b) An issuer may respond to a motion to quash or modify the subpoena by pursuing any remedy\ authorized by Subsection (2).

(c) If the court finds that a legislative subpoena requiring the production of accounts, books, papers, documents, electronically stored information, or tangible things is unreasonable or oppressive, the court may quash or modify the subpoena.

(4) Nothing in this section prevents an issuer from seeking an extraordinary writ to remedy contempt of the Legislature.

(5) Any party aggrieved by a decision of a court under this section may appeal that action directly to the Utah Supreme Court.

36-14-6 Fees and mileage.

> Except state officers and employees, witnesses appearing pursuant to a legislative subpoena shall receive witness fees and mileage as provided by law for attendance before the district courts of this state."

K. **Wisconsin**:

"13.26 Contempt.

(1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members; but only for one or more of the following offenses:

(a) Arresting a member or officer of the house, or procuring such member or officer to be arrested in violation of the member's privilege from arrest.

(b) Disorderly conduct in the immediate view of either house or of any committee thereof and directly tending to interrupt its proceedings.

(c) Refusing to attend or be examined as a witness, either before the house or a committee, or before any person authorized to take testimony in legislative proceedings, or to produce any books, records, documents, papers or keys according to the exigency of any subpoena.

(d) Giving or offering a bribe to a member, or attempting by menace or other corrupt means or device to control or influence a member's vote or to prevent the member from voting.

(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature.

> [The legislature cannot sentence a person to confinement for contempt without notice and without giving an opportunity to respond to the charge. Groppi v. Leslie, 404 U.S. 496, 92 S. Ct. 582, 30 L. Ed. 2d 632 (1972).

Power of a legislature to punish for contempt. Boer, 1973 WLR 268.]

13.27 Punishment for contempt.

(1) Whenever either house of the legislature orders the imprisonment of any person for contempt under s. 13.26 such person shall be committed to the Dane County jail, and the jailer shall receive and detain the person in close confinement for the term specified in the order of imprisonment, unless the person is sooner discharged by the order of such house or by due course of law.

(2) Any person who is adjudged guilty of any contempt of the legislature or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefor in Dane County, and may be fined not more than $200 or imprisoned not more than one year in the county jail."

13.31 Witnesses; how subpoenaed.

The attendance of witnesses before any committee of the legislature, or of either house thereof, appointed to investigate any subject matter, may be procured by subpoenas signed by the presiding officer and chief clerk of the senate or assembly. Such subpoenas shall state when and where, and before whom, the witness is required to appear, and may require such attendance forthwith or on a future day named and the production of books, records, documents and papers therein to be designated, and may also require any officer of any corporation or limited liability company, or other person having the custody of the keys, books, records, documents or papers of any such business entity, to produce the same before such committee. Such subpoenas may be served by any person and shall be returned to the chief clerk of the house which issued the same as subpoenas from the circuit court are served and returned.

13.32 Summary process; custody of witness.

(1) Upon the return of a subpoena issued under s. 13.31, duly served, and upon filing with the presiding officer of the house from which the subpoena issued a certificate of the chairperson of the committee certifying that any person named therein failed or neglected to appear before the committee in obedience to the mandate of such subpoena, summary process to compel the attendance of such person shall be issued.

(2) Such summary process shall be signed by the presiding officer and chief clerk of the house which issued the subpoena, and shall be directed to the sergeant at arms thereof commanding the sergeant at arms “in the name of the state of Wisconsin" to take the body of the person so failing to attend, naming that person, and bring the person forthwith before the house whose subpoena the person disobeyed. When so arrested the person shall be taken before the committee desiring

to examine the person as a witness, or to obtain from the person books, records, documents or papers for their use as evidence, and when before such committee such person shall testify as to the matters concerning which the person is interrogated.

(3) When such person is not on examination before such committee the person shall remain in the custody of the sergeant at arms or in the custody of some person specially deputed for that purpose; and the officer having charge of the person shall from time to time take the person before such committee until the chairperson of the committee certifies that the committee does not wish to examine such person further. Thereupon such witness shall be taken before the house which issued the summary process and that house shall order the release of the witness, or may proceed to punish the witness for any contempt of such house in not complying with the requirement of this chapter or of any writ issued or served as herein provided.

13.33 Service of process.

Either house ordering any summary process may also direct the sergeant at arms to specially depute some competent person to execute the same, and such deputation shall be endorsed on such process in writing over the signature of the sergeant at arms to whom the same is directed. The person so deputed shall have the same power as the sergeant at arms in respect thereto, and shall execute the same according to the mandate thereof, and for that purpose the sergeant at arms or the deputy may call to his or her aid the power of the county wherein such writ is to be executed the same as the sheriff of such county could do for the purpose of arresting a person charged with crime under process issued by a court of competent jurisdiction; and any sergeant at arms having any person in custody by virtue of any such summary process may depute any other person to have charge of the person so in custody, and the person so deputed shall have the same power over such person as is conferred upon the sergeant at arms.

13.34 Refusal to testify.

Every refusal to testify or answer any question, or to produce keys, books, records, documents or papers before any committee included within s. 13.31 shall be forthwith certified to the proper house by the chairperson of such committee. Such certificate shall be transmitted, and the person so refusing taken, by the sergeant at arms or an assistant to the sergeant at arms, before such house to be dealt with according to law.

13.35 Liability of witness.

(1) No person who is required to testify before either house of the legislature or a committee thereof, or joint committee of the 2 houses, and is examined and so testifies, shall be held to answer criminally in any court or be subject to any penalty or forfeiture for any fact or act touching which the person is required to testify and

as to which the person has been examined and has testified, and no testimony so given nor any paper, document or record produced by any such person before either house of the legislature or any such committee shall be competent testimony or be used in any trial or criminal proceeding against such person in any court, except upon a prosecution for perjury committed in giving such testimony; and no witness shall be allowed to refuse to testify to any fact, or to produce any papers, documents or records touching which the person is examined before either house or any such committee, for the reason that the testimony touching such fact, or the production of such papers, documents or records may tend to disgrace the person or otherwise render the person infamous.

(2) The immunity provided under sub. (1) is subject to the restrictions under s. 972.085.

13.36 Witness fees.

The compensation of all witnesses who are subpoenaed and appear pursuant to s. 13.31 shall be $2 for each day's attendance and 10 cents per mile, one way, for travel to attend as such witness. The department of administration shall audit the accounts of such witnesses upon the certificate of the chairperson of the committee before which any such witness has attended, stating the number of days' attendance and the distance the witness has traveled, and the accounts so audited shall be paid out of the state treasury and charged to the appropriation for the legislature."

L. **American Samoa**:

"2.0106 Contempt of the Legislature

Cite as [A.S.C.A. § 2.0106 ]

(a) For the purposes of this section, contempt of the Legislature shall consist of any of the following acts:

(1) knowingly arresting a member or officer of the Senate or the House, or procuring such member or officer to be arrested in violation of his privilege from arrest;

(2) disorderly conduct in the immediate view of the Senate, the House, or any legislative committee, directly tending to interrupt its proceedings;

(3) refusing to be examined as a witness before the Senate, the House, or any legislative committee, or before any person authorized to take testimony in legislative proceedings;

(4) giving or offering a bribe to a legislator, or attempting, by menace or other corrupt means or devise, directly or indirectly, to control or influence a legislator’s vote, or to prevent his giving the same.

(b) A person who is found in contempt of the Legislature is guilty of a class D felony."

**ADDITIONAL RESEARCH MATERIALS:**

A. For discussion of the congressional powers of investigation, subpoena, hearing procedures, punishment for contempt, and applicable constitutional limitations, see Zuckerman, The Court of Congressional Contempt, 25 Journal of Law and Politics 41 (2009); Wright, Congressional Due Process, 85 Mississippi Law Journal 401 (2016); 91 C.J.S. United States §32; Iraola, Self-Incrimination and Congressional Hearings, 54 Mercer Law Review 939 (2003); Keenan, Executive Privilege as Constitutional Common Law: Establishing Ground Rules in Political-Branch Information Disputes, 101 Cornell Law Review 223 (2015).

B. Regarding legislative investigations generally, see 1 Sutherland Statutory Construction § 12:2-14 (7th ed.); 72 Am. Jur. 2d States, Etc. § 51-55; 1 Search & Seizure § 1.7(g) (5th ed.); 16 C.J.S. Constitutional Law § 404; 81A C.J.S. States § 119; 9 A.L.R. 1341; 42A Cal. Jur. 3d Legislature §30; 58A N.Y. Jur. 2d Evidence and Witnesses § 828; 17 Am. Jur. 2d Contempt §§238 and 239; 81A C.J.S. States §§113 and 114; 2 Modern Constitutional Law §25:7 (3d ed.); 65 A.L.R. 1518; "The Federal supremacy limit: No jurisdiction to subpoena federal records or federal employees to testify concerning knowledge acquired in their official duties", California Subpoena Handbook § 3:5; DiPippa, "Your Honor, You Are Hereby Commanded to Appear....": When a Legislative Committee Subpoenas a Sitting Judge", 47 University of Memphis Law Review 1193 (2017); Construction and Application of Federal and State Constitutional and Statutory Speech or Debate Provisions, 24 A.L.R.6th 255; The Constitution of the United States of America: Analysis and Interpretation, Congressional Research Service (2013), www.gpo.gov/constitutionannotated, pages 96-112.

C. Regarding subpoenas generally , see 7C Carmody-Wait 2d § 54:74-115; Practice or procedure for testing validity or scope of the command of subpoena duces tecum, 130 A.L.R. 327 and cumulative supplements;.