

Legislative Subpoenas

I. Why use subpoenas?

A. Legislatures have broad, but not unlimited, powers of investigation

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste. But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. ... Nor is the Congress a law enforcement or trial agency. ... No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.

Watkins v. United States, 354 U.S. 178, 187 (1957).

Now, an investigation into the management of the various institutions of the state and the departments of the state government is at all times a legitimate function of the legislature.

Dickinson v. Johnson, 176 S.W. 116, 117 (Ark. 1915).

B. Subpoenas are an essential tool for securing information in the course of an investigation

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; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.

McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

II. Authority to issue subpoenas

A. Express authority

Each house shall have power to ... enforce obedience to its process....

Ark. Const. art. 5, § 12.

B. Implied or inherent authority

The state courts quite generally have held that the power to legislate carries with it by necessary implication ample authority to obtain information needed in the rightful exercise of that power, and to employ compulsory process for the purpose.

McGrain, 273 U.S. at 165.

C. Delegation of authority to issue subpoenas to legislative committees

A legislative committee may be created by statute or concurrent resolution; authorized to sit during the interim between sessions for any proper purpose; empowered to take testimony, compel attendance of witnesses and punish for contempt; and report its findings to the next session.

National Conference of State Legislatures, *Mason's Manual of Legislative Procedure* § 803, para. 1 (2010) [hereinafter *Mason's Manual*].

Each committee of the Senate or of the House of Representatives or joint interim committee has the power and authority upon approval of a majority of the members of the committee to subpoena persons, documents, and records.

Ark. Code Ann. § 10-3-208.

D. Delegation of authority to issue subpoenas to legislative staff

The ascertainment of facts in its essence is not a legislative function. It is simply ancillary to legislation. ... While it may be done by the Legislature itself, it is a responsibility not infrequently placed upon committees and individuals. ... The ascertainment of pertinent facts as the basis for legislation is within the power of the law-making department of government. When a legislative body has a right to do an act, it must be allowed to select the means within reasonable bounds. It is not precluded from delegating incidental powers which it may exercise itself in aid of its primary functions but which do not partake of the nature of law-making.

Attorney General v. Brissenden, 171 N.E. 82, 86 (Mass. 1930).

(a) In connection with an audit of any entity of the state or a political subdivision of the state or an audit related to any transactions or relationships with the entities, the Legislative Auditor may subpoena records or summon and subpoena any person whose testimony may be desired or deemed necessary to appear before him or her at a time and place and with such papers, files, and records as may be named in the summons or subpoena.

Ark. Code Ann. § 10-4-421(a).

III. Some potential legal issues

A. First Amendment

[C]itizens have the First Amendment constitutional rights to privacy and to association in legitimate organizations, which may not be denegated by the chilling effect of exposure to legislative investigation, unless on balance the state interest is determined by the courts to be of heavier weight.

Camiel v. Select Comm., 324 A.2d 862, 869 (Pa. Commw. Ct. 1974).

B. Fourth Amendment

The Fourth Amendment protects a congressional witness against a subpoena that is unreasonably broad or burdensome. Therefore, there must be a legitimate legislative or oversight-related basis for the issuance of a congressional subpoena.

Morton Rosenberg, *When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry* 36 (2009) [hereinafter *Congress Calling*] (footnotes omitted).

C. Fifth Amendment

[T]he [Supreme] Court has suggested that the privilege against self-incrimination applies to witnesses in congressional investigations. ... The privilege ... generally does not protect against a subpoena for existing documentary evidence. However, where compliance with a subpoena asking for documents would effectively serve as testimony to authenticate the documents produced, the privilege may apply.

Rosenberg, *Congress Calling*, at 33 (footnotes omitted).

D. Other potential issues noted herein

1. Is there a legitimate legislative purpose or subject underlying the investigation?
2. Does the subpoena seek testimony or other evidence relevant to that purpose?
3. If a legislative committee wants to issue a subpoena, does it have that authority, and does the information sought fall within the committee's jurisdiction?
4. Similarly, is a legislative staff member authorized by law to issue a subpoena?
5. Is the subpoena too broad? Vague? Unreasonably burdensome?

IV. Drafting a subpoena

A. Keep in mind the legal standard that must be met to survive a challenge

A duly authorized legislative committee may summon persons ... to attend as witnesses any meetings it has the power to hold – provided that *the subject of investigation is within the range of legitimate legislative inquiry, and the proposed testimony of the witness called relates to that subject....*

72 Am. Jur. 2d *States, Territories, and Dependencies* § 53 (2001) (emphasis supplied) (footnote omitted); *see also Mason's Manual* § 802 (alternative formulation of legal standard).

This Court is persuaded that it does not have subject matter jurisdiction in this case as the subject of the investigation is proper for legislative inquiry and the items sought are relevant to that subject. In this case, this Court finds that the legislative subpoena is not subject to judicial control.

Order Granting Defendant's Motion to Dismiss at 4, *Arkansas Local Police and Fire Retirement System v. Roger A. Norman, Legislative Auditor*, No. CV-11-5426, Pulaski County Circuit Court, Ninth Division (June 25, 2012).

Don't load the subpoena down with extraneous citations. But if you move to dismiss a challenge to your subpoena prior to filing a responsive pleading, the trial court may not be able to consider matters outside of the pleadings and attachments (which should include your subpoena). Therefore, your subpoena must have enough information to demonstrate a legitimate subject of inquiry, relevance of the evidence sought, and legal authority.

B. Specific considerations

A congressional subpoena identifies the name of the committee or subcommittee; the date, time, and place of the hearing a witness is to attend; and the particular kind of documents sought. A subpoena may state that if the documents are delivered by a particular date, the person who has custody over the documents need not appear.

Louis Fisher, Cong. Research Serv., RL 31836, *Congressional Investigations: Subpoenas and Contempt Power* 7-8 (2003).

1. State the subject or purpose of the underlying investigation.

[A witness trying to decide whether to answer legislative questions] is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense.

Watkins, 354 U.S. at 208-09 (reversing criminal contempt conviction of witness that refused to respond to Congressional committee's questions).

Although a subpoena must be issued for a valid legislative purpose, the Supreme Court has made it clear that Congress does not have to state explicitly what it intends to do as a result of an investigation. ... The subpoena may simply include an open-ended statement that it seeks information that may provide a basis for whatever legislation Congress may deem appropriate. ... It can be helpful to include in the statement of purpose a reference to "specific problems which in the past have been, or in the future could be, the subjects of appropriate legislation."

Rosenberg, *Congress Calling*, at 10 (footnote omitted).

2. Demonstrate the relevance of evidence or testimony sought to the subject or purpose.

Information in the form of documents called for by [legislative] Commission process, like information sought from a witness on oral examination, must be relevant to the subject of investigation as defined by the resolve. But in testing relevance it must be understood that too rigid or exacting an approach might unduly trammel the Commission's enterprise which, on its investigatory side, could not, at least in the beginning, know exactly its own limits.

Ward v. Peabody, 405 N.E.2d 973, 978 (Mass. 1980) (citations and footnote omitted).

3. Cite legal authority to issue the subpoena.
4. If you are serving a subpoena duces tecum, specify the items that must be produced; see the sample Congressional subpoena – consider using definitions and lists.
5. Specify when and where the testimony is to be given or the items produced.
6. Warn recipient of the penalty for failure to comply.
7. Ensure that the proper authority signs the subpoena.

(a) All process issued by the House of Representatives and subpoenas and other process for witnesses when attendance may be required in the House of Representatives or before a committee of the House of Representatives shall be under the hand of the Speaker of the House of Representatives and attested by the Chief Clerk of the House of Representatives.

(b) All process issued by the Senate shall be under the hand of the President Pro Tempore of the Senate and attested by the Secretary of the Senate.

(c) All process issued for a joint meeting of the Senate and the House of Representatives shall be under the hand of the:

(1) Speaker of the House of Representatives and attested by the Chief Clerk of the House of Representatives if the process was requested by a member of the House of Representatives or the Speaker of the House of Representatives; or

(2) President Pro Tempore of the Senate and attested by the Secretary of the Senate if the process was requested by:

(A) A member of the Senate;

(B) The President Pro Tempore of the Senate; or

(C) The party accused if the party accused is not a member of the House of Representatives, a member of the Senate, the Speaker of the House of Representatives, or the President Pro Tempore of the Senate.

Ark. Code Ann. § 10-2-303.

8. Provide a return of service.

V. Practical concerns

A. At some point, a fee may be payable to the subpoenaed witness

(a) Every witness attending either house or a committee thereof or a joint meeting of both houses, being summoned, shall be allowed the same fees as allowed by law to witnesses for their attendance in any court, to be paid as other costs.

Ark. Code Ann. § 10-2-304(a).

B. Arrange for service of the subpoena

The committee so empowered may issue its subpoena signed by its chair or acting chair for the attendance of witnesses and the production of papers or records, and the subpoena may be served by any officer authorized to serve process in civil cases.

Ark. Code Ann. § 10-2-307.

(e)(1)(A) Subpoenas issued by the Legislative Auditor shall be served by the sheriff of the county in which the person, books, records, or documents subpoenaed are located.
(B) The sheriff shall be entitled to the same fees for the service of process as provided by law for service of process issued by the circuit court.
(2) However, at his or her option the Legislative Auditor may direct the Department of Arkansas State Police to serve any subpoena.

Ark. Code Ann. § 10-4-421(e).

VI. Challenges to a legislative subpoena

A. Depending on the timing of litigation, a challenge may be premature

At the present time, Mr. Gillespie has merely been served with a subpoena. ... Mr. Gillespie has not even made an appearance as a witness at the hearing about which we are asked to speculate. He has not been questioned. At the present stage of the proceedings of the subcommittee, no specific individual rights of Mr. Gillespie appear to us to have been violated. In the case before us, as it is now presented, we will not speculate in advance as to what might happen. We will not presume that the subcommittee is going to act in an irregular or illegal manner.

Washington ex rel. Hodde v. Superior Court, 244 P.2d 668, 674 (Wash. 1952).

Courts should not interfere with the investigatory powers of the Legislature necessary to carry out its legislative function until some citizen's constitutional rights are affected and asserted as a reason for noncompliance or refusal to honor a legislative subpoena.

Camiel, 324 A.2d at 866.

B. If the challenge is premature, file a motion to dismiss for lack of subject matter jurisdiction

1. Separation of powers principles can deprive a court of jurisdiction.

Preliminarily we have grave reservations concerning the jurisdiction of this Court to entertain a petition to quash a subpoena issued by a Select Committee of the House of Representatives of our General Assembly before a citizen's constitutional rights are actually affected. We view this point to be of a very serious nature. If there is any one principle of constitutional law which supports and protects our form of government, including all of our constitutional rights, it is the separation of powers among the three branches of government.

Camiel, 324 A.2d at 865.

2. A "speech or debate" clause can deprive a court of jurisdiction.

A witness seeking to challenge the legal sufficiency of a subpoena has only limited remedies to raise objections. The Supreme Court has ruled that courts may not block a congressional subpoena, holding that the Speech or Debate Clause of the Constitution provides “an absolute bar to judicial interference” with such compulsory process. As a consequence, a witness’ sole remedy generally is to refuse to comply, risk being cited for contempt, and then raise the objections as a defense in a contempt prosecution.

Rosenberg, *Congress Calling*, at 9 (footnotes omitted).

We conclude that the Speech or Debate Clause provides complete immunity for the Members for issuance of this subpoena. ... Since the Members are immune because the issuance of the subpoena is “essential to legislating,” their aides share that immunity.

Eastland v. United States Servicemen’s Fund, 421 U.S. 491, 507 (1975).

C. If the challenge is timely, argue the legal standard noted above

A duly authorized legislative committee may summon persons ... to attend as witnesses any meetings it has the power to hold – provided that *the subject of investigation is within the range of legitimate legislative inquiry, and the proposed testimony of the witness called relates to that subject....*

72 Am. Jur. 2d *States, Territories, and Dependencies* § 53 (2001) (emphasis supplied) (footnote omitted); *see also Mason’s Manual* § 802 (alternative formulation of legal standard).

Hopefully, you’ve prepared for any possible challenges raised in III. above, as well.

VII. Enforcement of a legislative subpoena

A. The legislature has the right to enforce its own process

Each house shall have power to ... enforce obedience to its process....

Ark. Const. art. 5, § 12.

[T]he legislature has the power to institute and carry to the extent of punishment, contempt proceedings in order to compel the attendance of such witnesses and the production of such documentary evidence as may be legally called for in the course of such proceedings, whether conducted by the legislative body or a branch thereof, directly or through its properly constituted committees.

Mason’s Manual § 795, para. 5.

Under the inherent contempt power, the individual is brought before the House or Senate by the Sergeant-at-Arms, tried at the bar of the body, and can be imprisoned in the Capitol jail. ... When a witness is cited for contempt under the inherent contempt process, prompt judicial review is available by means of a petition for a writ of *habeas*

corpus. ... The inherent contempt power has not been exercised by either House in over sixty years because it has been considered to be too cumbersome and time consuming for a modern Congress with a heavy legislative workload that would be interrupted by a trial at the bar.

Morton Rosenberg, Cong. Research Serv., 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry* 11 (1995).

B. Statutory provisions may provide for an alternative means of enforcement, in court

(b)(1) If a person subpoenaed to appear before the Senate, the House of Representatives, or a Senate or House committee or joint interim committee fails to appear or produce subpoenaed material, the fact of the refusal to appear or produce subpoenaed material shall be certified to the circuit court of the county in which the hearing is held.

(2) The circuit court shall punish the person for contempt of the General Assembly under subdivision (b)(1) of this section in the same manner as punishment for contempt is imposed for failure to respond to a subpoena or directive of the circuit court.

Ark. Code Ann. § 10-2-306(b).

(d)(1) If any person subpoenaed to appear by the Legislative Auditor fails to appear or to produce books, documents, or records subpoenaed, the fact shall be certified to the circuit court of the county in which the hearing is held, and the circuit court shall punish the person for contempt in the same manner as punishment for contempt is imposed for failure to respond to a subpoena or directive of the circuit court.

Ark. Code Ann. § 10-4-421(d)(1).

The *Miers* case, I believe, is the dog that hasn't barked. It is a two-edged sword. While it recognizes the House's right to seek judicial assistance to vindicate its constitutionally based institutional right to secure information from the Executive ... it leaves open the door for Executive judicialization of the congressional subpoena enforcement power. ... DOJ currently has the potential power to string out your investigation, to refuse to obey it, and then, when the time for contempt comes, can say, "No, you can't go to court for criminal contempt; you can't use inherent contempt power. All you can do is to bring a civil action." *And a civil action will extend and delay your constitutional ability to enforce ... your powers.*

Obstruction of Justice: Does the Justice Department Have to Respond to a Lawfully Issued and Valid Congressional Subpoena?: Hearing Before the H. Comm. on Oversight and Government Reform, 112th Cong. 10 (2011) (statement of Morton Rosenberg, Fellow, The Constitution Project) (emphasis supplied).

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