Oversight Hearings and Witnesses

I. Scope of this discussion

A. Defining terms

Throughout its history, Congress has engaged in oversight – broadly defined as the review, monitoring, and supervision of the implementation of public policy – of the executive branch.


Committees hold legislative hearings on measures or policy issues that may become legislation. …

Oversight hearings review or study a law, an issue or an activity, often focusing on the quality of federal programs and the performance of government officials. Hearings also help ensure that the execution of laws by the executive branch complies with legislative intent, and that administrative policies reflect the public interest. Oversight hearings often seek to improve the efficiency, economy, and effectiveness of government operations. …

Investigative hearings share some of the characteristics of legislative and oversight hearings. The difference lies in Congress’s stated determination to investigate, usually when there is a suspicion of wrongdoing on the part of public officials in governmental operations or of private citizens in business or other activities. …


B. The distinction between oversight hearings in general, and investigative hearings in particular

The adversarial, often confrontational, and sometimes high profile nature of congressional investigations sets it apart from the more routine, accommodative facets of the oversight process experienced in authorization, appropriations or confirmation exercises. While all aspects of legislative oversight share the common goals of informing Congress so as to best accomplish its tasks of developing legislation, monitoring the implementation of public policy, and of disclosing to the public how its government is performing, the inquisitorial process also sustains and vindicates Congress’ role in our constitutional scheme of separated powers and checks and balances.


II. Legislative authority to investigate, call witnesses, and compel the production of documents

A. Oversight authority in general
The power of inquiry – with the power to enforce it – is an essential and appropriate auxiliary to the legislative function. Legislative bodies have the inherent power to conduct investigations in aid of prospective legislation and for the purpose of securing information needed for the proper discharge of their functions and powers.


The power to investigate is an essential corollary of the power to legislate. The scope of this power of inquiry extends to every proper subject of legislative action.


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.


B. The power to call witnesses and compel the production of documents

The law-making power given to the Legislature authorizes it, by inquiry, to ascertain facts which affect public welfare and the affairs of government. Such power of inquiry, with process to enforce it, is an essential auxiliary to the legislative function. “A legislative body may act upon common knowledge or information voluntarily contributed. At times it stands in need of more. There is then power to investigate by subpoena under the sanction of an oath.” Upon such inquiries the Legislature may compel the attendance of witnesses and the production of documentary evidence to the end that it may perform its constitutional functions by the enactment of laws to correct public dangers – either real or apprehended. This power may be delegated to a committee.

In re Joint Legislative Committee to Investigate the Educational System of the State of New York, 32 N.E.2d 769, 771 (N.Y. 1941) (citations omitted).

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.


C. Duty of all citizens to cooperate

It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice.

Upon grounds of public policy … courts have not tolerated the setting up of the judgment of the witness, as to the necessity for his attendance, or as to the legality of the committee, for the purpose of excusing his non-attendance.

So, a witness cannot excuse his failure to attend on the ground that the pleadings in the case are insufficient.

Or that the testimony is immaterial or irrelevant.


III. Limitations on legislative oversight authority

A. General limitations on legislative oversight

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. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.


The General Court has no power through itself or any committee or any agency to make inquiry into the private affairs of the citizen, except to accomplish some authorized end.


B. Relevance of legislative inquiry or questions

… Information in the form of documents called for by 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 at the beginning, know exactly its own limits.⁵

… At the edge of relevancy, when the value to the investigation of a piece of demanded information is seen to be marginal, courts have been prepared to assess and allow as a counterweight "the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of [a witness's] personal and private affairs" – a privacy interest to which we return at point (d) below. …

5. Hence our cases speak of a legislative committee's power to compel production of documents not “plainly irrelevant” to the authorized investigation.

It has been held that due process of law guaranteed by the Fourteenth Amendment is denied by the contempt conviction of a witness before a state legislative committee for refusal to answer the committee’s questions, where the committee did not inform the witness in what respect its questions were relevant to the subject under inquiry.

Annotation, \textit{Validity under Federal Constitution of state contempt conviction of a witness before a state legislative committee} – Supreme Court cases, 6 L. Ed. 2d 1357, 1358 (1962).

C. Otherwise confidential information

In opposing the subpoena, the Department of Probation stresses the confidentiality the law imparts to the records of juvenile proceedings. …

It is not suggested that A.M.’s records are to be used in evidence against him. They are the subject of a proposed inquiry in a legislative hearing. Accessibility to juvenile court records is not barred under all circumstances – those records are to be protected from “indiscriminate” public inspection. The court has the power to permit inspection in an appropriate case. Neither the confidentiality of the juvenile record nor the legislative prerogative is absolute. Section 62-a of the legislative law empowers a legislative committee to issue a subpoena, but it is still for the court to determine whether the information sought is material and relevant to a matter of legitimate legislative inquiry, and whether a case for inspection of otherwise confidential materials has been made.

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


IV. Constitutional protections for witnesses

Broad as it is, however, the legislature’s investigative role, like any other governmental activity, is subject to the limitations placed by the Constitution on governmental encroachments on individual freedom and privacy.


The Bill of Rights is applicable to [Congressional] investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.

A. First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

This Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments. ... And it is equally clear that the guarantee encompasses protection of privacy of association in organizations [here, the NAACP]....

....

When, as in this case, the claim is made that particular legislative inquiries and demands infringe substantially upon First and Fourteenth Amendment associational rights of individuals, the courts are called upon to, and must, determine the permissibility of the challenged actions; “The delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights[.]” ... 

....

... [I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest. ... 

....

... [T]he record in this case is insufficient to show a substantial connection between the Miami branch of the N.A.A.C.P. and Communist activities which the respondent Committee itself concedes is an essential prerequisite to demonstrating the immediate, substantial, and subordinating state interest necessary to sustain its right of inquiry into the membership lists of the association.

....

... The respondent Committee has laid no adequate foundation for its direct demands upon the officers and records of a wholly legitimate organization for disclosure of its membership; the Committee has neither demonstrated nor pointed out any threat to the State by virtue of the existence of the N.A.A.C.P. or the pursuit of its activities or the minimal associational ties of the 14 asserted Communists. ...


An additional reason for limiting the subpoena is that the Legislature is treading on the right of political association which is protected by the First Amendment. When such right is implicated, the government’s quest for information is precluded unless it shows “that there are governmental interests sufficiently important to outweigh the possibility of infringement [of First Amendment rights.]” Our review of the record discloses that respondents have not made such a showing with respect to the precluded materials, thereby shielding them from disclosure.

The interest of the Appellants in their associational privacy having been asserted, we have for decision the question of whether the public interest overbalances conflicting private ones. Whether there was justification for the investigation turns on the substantiality of Florida’s interest in obtaining the identity of the members of The Governor’s Club when weighed against the individual interest which the Appellants assert. …

We cannot simply assume, however, that every legislative investigation is justified by a public need that overbalances any private rights affected. …

Receipts and disbursements of candidates for public office have always been regarded as an appropriate subject for statutory regulation and public disclosure. …

The record … is sufficient to show a substantial connection between The Governor’s Club and the activities of the Government of the State of Florida. The record amply demonstrates the substantial State interest necessary to sustain the right of the committee to inquire into the membership list of the association.

_Hagaman v. Andrews_, 232 So. 2d 1, 7-8 (Fla. 1970).

**B. Fourth Amendment**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

It is well established that the protections against unreasonable searches and seizures found in the Fourth Amendment apply to congressional investigations. As noted by the court in _United States v. Fort_, “an unreasonable search and seizure is no less illegal if conducted pursuant to a subpoena of a congressional subcommittee than if conducted by a law enforcement official.”


Consequently, it would appear that if a committee employs a dragnet seizure of private papers, with the hope that something might turn up, or issues a subpoena duces tecum which lacks particularity, or subpoenas papers without legislative authority, the [Fourth] amendment will be available as a defense.


It is established law that a subpoena which is unreasonably broad in its demand and general in its terms constitutes an unreasonable search and seizure in violation of the State and Federal constitutions. One from whom the production of documents is demanded is required to choose between producing them or refusing to do so at the risk of being adjudged in contempt. In making his choice he ought not to be required to

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speculate as to which or what documents are required but is entitled to a reasonably informative description of that which is sought.


… Standards governing a decision as to whether the instant subpoenas are too broad in their coverage must rest upon a balancing of the interests of the legislature versus the interest of individuals in maintaining privacy.

…

Concern with protecting the privacy interest in cases such as this reflects an awareness that legislative investigations may, through inquisitions into private affairs, assume a character that is of questionable relevance to legitimate legislative purposes. Such investigations may appear, at times, to have as their real object an investigation of the personal affairs of particular individuals rather than the collection of information for legislative purposes. …

…

… Thus, when the legislature undertakes to investigate a matter, and in the course thereof it seeks to obtain records in which one has a reasonable expectation of privacy, a subpoena therefor should not issue except upon a showing of probably cause that the particular records sought contain evidence of civil or criminal wrongdoing.


[W]e know of no constitutional restraint upon the power of the State to inquire into the conduct of State, county and municipal officials in their management of public affairs and to examine the public records in their possession. Assurance of Article 1, Section 7, of the [Tennessee] Constitution against unreasonable searches and seizures is not involved in a public inquiry into official conduct and the examination of official records. No provision of the Constitution can be invoked by public officials to enable them to suppress facts connected with public business under their control.


C. Fifth Amendment

No person … shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law….

U.S. Const. amend. V.

Although the Self-Incrimination Clause of the Fifth Amendment mentions incrimination only in the context of a “criminal case,” it is well established that a witness also may invoke the privilege before a congressional committee. Furthermore, when ascertaining the meaning of the Self-Incrimation Clause, the Supreme Court has observed that the clause “must have a broad construction in favor of the right which it was intended to secure.” Thus, whether a witness’s “admissions by themselves would support a conviction under a criminal statute is immaterial”; the privilege extends to admissions “which would furnish a link in the chain of evidence needed to prosecute [the witness] for a federal crime.”
Congress, of course, cannot hold a witness in contempt simply because the witness invokes his privilege against self-incrimination. In order to compel testimony from such a witness, Congress must provide the witness with immunity. …


There is no required verbal formula for invoking the Fifth Amendment privilege. …

A committee may question the validity of a witness’ assertion of his or her Fifth Amendment privilege; however, the committee cannot require witnesses to articulate the precise criminal repercussions they may fear. …

The privilege against self-incrimination may be waived by failing to assert it, specifically disclaiming it, or previously testifying on the same matters as to which the privilege is later asserted. …


…[I]t is obvious that if the privilege [against self-incrimination] were limited to a criminal prosecution in which the witness was the defendant, it would fail entirely of its fundamental purpose. Hence it is uniformly held that the privilege is one which may be invoked in any legal investigation, whether judicial or quasi judicial; that is to say, it applies to examinations before any tribunal or other body that has power to subpoena and compel the attendance of witnesses. …

In view of the plenary powers conferred on this [legislative] committee in the performance of its official duties, it inevitably follows that the privilege intended to guarantee a witness against self-incriminating evidence applies fully to a hearing before such a tribunal. …

*In re Hearing Before Joint Legislative Committee*, 196 S.E. 164, 167 (S.C. 1938).

**D. Due Process**

[N]or shall any State deprive any person of life, liberty, or property, without due process of law….

U.S. Const. amend. XIV, § 1.

Courts have recognized that a witness’s right to due process in the context of a congressional investigation differs significantly from that of a criminal investigation. For example, witnesses appearing before congressional committees typically are not afforded the opportunity to present evidence or to cross-examine other witnesses who they believe may have defamed them.

But this is not to say that due process has no place in congressional investigations. In particular, regarding hearings and holding witnesses in contempt, “when Congress seeks to enforce its investigating authority through the criminal process administered by the federal judiciary, the safeguards of criminal justice become operative.” …
Certain procedural rights for witnesses have been established by case law. A witness is entitled to know what subject is under inquiry, what legislative purpose is being furthered, and what connection exists between the questions asked and the subject under inquiry. If he objects to a question on grounds of pertinency, the committee must inform him that his answer is wanted regardless of the objection. …


…[W]e think the record discloses an unmistakable cloudiness in the testimony of the Committee Chairman as to what was sought of Scull, as well as why it was sought. Scull was therefore not given a fair opportunity, at the peril of contempt, to determine whether he was within his rights in refusing to answer and consequently his conviction must fall under the procedural requirements of the Fourteenth Amendment.

…. 

…. [T]he record shows that the purposes of the inquiry, as announced by the Chairman, were so unclear, in fact conflicting, that Scull did not have an opportunity of understanding the basis for the questions or any justification on the part of the Committee for seeking the information he refused to give. To sustain his conviction for contempt under these circumstances would be to send him to jail for a crime he could not with reasonable certainty know he was committing. This Court has often held that fundamental fairness requires that such certainty exist. Certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press, and association for fear of violating an unclear law. …


… The appellants were informed by the Commission that they had a right to rely on the privilege against self-incrimination afforded by … the Ohio Constitution. The Ohio Supreme Court, however, held that the appellants were presumed to know the law of Ohio – that an Ohio immunity statute deprived them of the protection of the privilege – and that they therefore had committed an offense by not answering the questions as to which they asserted the privilege. We hold that in the circumstances of these cases, the judgments of the Ohio Supreme Court affirming the convictions [for contempt] violated the Due Process Clause of the Fourteenth Amendment. …

…. 

…. A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them. … Here there were more than commands simply vague or even contradictory. There was active misleading. … We cannot hold that the Due Process Clause permits convictions to be obtained under such circumstances.


Carcaci also attacks the procedure by which he was found in contempt of the House of Representatives. He contends that, in order to comply with the requirements of due process of law, any such finding of contempt must be made in a judicial forum. This
contention is without merit. The power of the Houses of the General Assembly to vindicate their authority and processes by punishing acts of contempt committed in their presence is inherent in the legislative function. The decisions of the United States Supreme Court leave no doubt that the Federal Constitution imposes no general barriers to the exercise of this power. …

Of course, the manner in which a legislative body exercises its inherent power to vindicate its authority and processes must satisfy the requirements of procedural due process. … There is no basis in the record for a claim of inadequate notice. On three separate occasions, Carcaci refused to answer questions propounded to him by the committee. He was expressly warned that his continued refusal to testify could result in a citation for contempt. House Resolution No. 152, summoning Carcaci to appear at the bar of the House, recited in detail the facts and circumstances leading up to its adoption. The relator was given full opportunity to justify his failure to testify. His counsel appeared with him at the bar of the House, and filed an extensive brief on his behalf. Carcaci might have avoided any penalty by answering the questions put to him before the assembled representatives, but he refused to do so. It was this contumacy, rather than his earlier conduct at the committee hearings, for which the House forthwith invoked the sanction authorized by the Act. … In sum, we conclude that the House of Representatives showed a scrupulous regard for the rights of the witness, who was afforded ample "notice and opportunity for hearing appropriate to the nature of the case."


V. Common law evidentiary privileges

A. Defining terms

[PR]ivilege. … 3. An evidentiary rule that gives a witness the option to not disclose the fact asked for, even though it might be relevant; the right to prevent disclosure of certain information in court, esp. when the information was originally communicated in a professional or confidential relationship.

attorney-client privilege. … The client’s right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney.


Privileges are governed by common law, except as modified by statute or court rule. The common law insulated certain confidential information from disclosure at trial, and, eventually, special categories of confidential communications were deemed by statute to be entitled to a privilege against disclosure. When a privilege is based on a statute, the terms of the statute define the reach of the privilege.


B. The argument against recognizing privileges in legislative hearings
Each house shall have power to determine the rules of its proceedings; and punish its members, or other persons, for contempt or disorderly behavior in its presence; enforce obedience to its process.


Because the courts cannot dictate the rules of Congress’s proceedings, parties must realize that the discretion to compel production of privileged material lies with Congress.


The general rule is that privileges apply in any proceeding in which testimony can be compelled. A few privileges have a peculiar, limited scope. … Moreover, in a large number of states and in federal practice, the privileges recognized by the courts do not apply to hearings conducted by legislative committees. However, with such rare exceptions, privileges apply in all legal proceedings.


C. Some states do recognize privileges in legislative hearings

[A state statute required that, prior to punishing contempt before a legislative committee]:

The witness shall be given the benefit of any privilege which he could have claimed in court as a party to a civil action, provided that the committee chairman may direct compliance with any request for testimony to which claim of privilege has been made. However, the chairman’s direction may be overruled by investigating committee action.

… It is well established that where a privilege is asserted by a witness before an investigatory committee, the privilege must be outweighed by the committee’s need for the information before the witness can be held in contempt. …

In the instant case, two of the “privileges” asserted by Dr. Potholm are not among the more compelling privileges long recognized and protected by the courts, such as executive privilege, the privilege against self-incrimination, attorney-client privilege, or the marital. Dr. Potholm asserts a proprietary or contractual privilege, and a privilege to maintain trade secrets. …

The Law Court’s decision in *Maine Sugar Industries* suggests that while the less compelling privileges … are entitled to some protection from the Court, the interests in nondisclosure protected by such privileges may be outweighed by the public interest in the subject matter of a legislative investigation.

*Joint Select Committee v. Potholm*, 1984 Me. Super. LEXIS 191, ___ (Superior Court of Maine, Kennebec County).

… Information in the form of documents called for by 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 at the beginning, know exactly its own
limits.

… [C]are must be taken to allow legitimate claims of standard privileges against even
demand for relevant information: important here are the privilege against self-
incrimination and the attorney-client privilege. …

… [S]everal factors cumulate to render “work product” an inadequate basis for excusing
the production. In reaching this conclusion, we are not to be understood as saying that
the work product idea, or some implication from it, can never apply in a legislative
investigation. It is fair to add, however, that we have not yet seen a decision where work
product has been applied in that context.


… [T]he 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.

… 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. 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.

… 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.

…

Neely, Justice, dissenting:

I respectfully dissent from the majority opinion. Under the Constitution and the laws of
this State the West Virginia Legislature is absolutely entitled to subpoena every scrap of
paper from every official file of every officer, agent, employee, and servant of the State
of West Virginia. …

omitted).

VI. Counsel for the witness in legislative hearings
I’m not a potted plant. I’m here as the lawyer. That’s my job.


A. The Sixth Amendment does not apply to congressional hearings

In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

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.


… In a congressional hearing, a witness has no right to counsel, confrontation of witnesses, or cross-examination. It has been suggested that this result is correct because such a witness should have no greater rights than a witness in a court of law. As a practical matter, however, witnesses are usually allowed to confer with counsel, inside and outside the committee room.


B. Likewise, the “right to counsel” should not apply in state legislative hearings

His refusal to be further examined, or to remain in attendance, was placed upon the ground that the committee refused to recognize his right to be attended by counsel and act under his advice in answering questions, but we are of opinion that he had no constitutional or legal right to the aid of counsel on such examination. The constitutional provision on the subject is that "in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions." This provision has been very liberally construed and held to apply to trials before any authority having jurisdiction to try…. But here the relator was not on trial, nor was he a party, but he was a mere witness called upon to testify in relation to charges against another person, and there was no trial pending against any one. As well might a witness, examined before a grand jury conducting an investigation of a charge against another person, with a view to his indictment, claim the right to be attended by counsel. We do not think that a mere witness has that right.

People ex rel. McDonald v. Keeler, 2 N.E. 615, 626 (N.Y. 1885) (citations omitted).

…[R]espected treatise writers have noted that:

Since a committee hearing is not a trial, nor even a judicial proceeding in which a citizen’s rights may be affected, there is no recognized constitutional right to
counsel. In practice, Congressional committees have come to permit witnesses to be accompanied and advised by counsel.

In may be true that in many committee hearings there is little need for legal advice, but such is hardly the case where a committee is inquiring into various types of misconduct. A witness who is subjected to a searching inquiry as to past deeds, and who is liable to prosecution for contempt for improper refusal to answer, or perjury for answering falsely needs legal advice. Exposing a witness to the rigors of such proceedings and denying him the right to competent guidance would something less than fair play. But whether it would be so lacking in fundamental fairness as to violate the guaranty of due process of law is another question which has not been put to the test.

Letter from Robert A. Zarnoch, Assistant Attorney General, Office of Counsel to the General Assembly, the Attorney General of Maryland, to the Honorable J. Lowell Stoltzfus (August 2, 2005).

C. Some states limit or define counsel’s role by statute

§ 21-11 Right to counsel and submission of questions. (a) Every witness at a hearing of an investigating committee may be accompanied by counsel of the witness' own choosing, who may advise the witness as to the witness' rights, subject to reasonable limitations which the committee may prescribe to prevent obstruction of or interference with the orderly conduct of the hearing.  
(b) Any witness at a hearing, or the witness' counsel, may submit to the committee proposed questions to be asked of the witness or any other witness relevant to the matters upon which there has been any questioning or submission of evidence, and the committee shall ask such of the questions as are appropriate to the subject matter of the hearing.

Haw. Rev. Stat. § 21-11 (___).

Sec. 3. Right to counsel. Any witness summoned to appear at a hearing shall have the right to be accompanied by counsel, who shall be permitted to advise and counsel the witness at any time.


D. Counsel’s role might also be addressed in legislative rules

The right of a witness to be accompanied by counsel is recognized by House and Senate rules. The House rule limits the role of counsel as solely “for the purpose of advising them concerning their constitutional rights.” Some committees have adopted rules specifically prohibiting counsel from “coaching” witnesses during their testimony. Oral arguments and counsel objections to member questions and chair rulings can be deemed out of bounds. Many Senate committees have adopted more lenient rules in allowing counsel advice with respect to the witness’ “legal rights.” Both houses have rules that authorize chairs to maintain the decorum and integrity of a hearing, and a few committees have adopted rules that allow chairs to exclude counsel for improper conduct or for apparent conflicts of interest that would preclude the candid, unintimidated testimony of the witness.
VII. Perjury

A. General rule

A person who willfully gives false testimony before a congressional committee is guilty of perjury, assuming the proper administration of the oath and the proper establishment and composition of the committee.


B. Examples – Arkansas Code sections

(2) If a person placed under oath or subpoenaed by the Legislative Auditor, his or her authorized assistants, or the Legislative Joint Auditing Committee knowingly gives false testimony that is material to an audit, that person shall be deemed guilty of perjury upon conviction by a court of competent jurisdiction.


(4)(A) “Official proceeding” means a proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath, including any referee, hearing examiner, parole revocation judge, commissioner, notary, or other person taking testimony or depositions in any such proceeding.


(a) A person commits perjury if in any official proceeding he or she makes a false material statement, knowing it to be false, under an oath required or authorized by law.
(b) Lack of knowledge of the materiality of the statement is not a defense to a charge of perjury.
(c) Perjury is a Class C felony.


VII. Contempt

A. General rule

1. Each house of the legislature may punish breaches of its authority when they are committed in its presence and may equally punish a witness for contempt of the house for the witness’ refusal to appear or testify before a properly empowered committee or to produce books and papers.

The power of the legislature to punish for contempt without reliance on the executive or judicial branches of government is of great importance to the maintenance of the legislature as a coordinate branch of government.

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

*House of Representatives v. Bernard*, 373 So. 2d 188, 192 (La. 1979) (citation omitted).

**B. Basis for contempt power – inherent, Constitutional, or statutory?**

Each house shall have power to … punish its members, or other persons, for contempt or disorderly behavior in its presence; enforce obedience to its process….


… The power of the Houses of the General Assembly to vindicate their authority and processes by punishing acts of contempt committed in their presence is inherent in the legislative function. The decisions of the United States Supreme Court leave no doubt that the Federal Constitution imposes no general barriers to the exercise of this power. …

Of course, the manner in which a legislative body exercises its inherent power to vindicate its authority and processes must satisfy the requirements of procedural due process. …


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

The broad and non-exclusive right to punish for contempt is provided in Article III, Section 11 of the Constitution of Louisiana. In addition to the constitutional provision, there is a statutory provision made for the punishment of contempt of the legislature or any committee constituted by it. ...

....

The power of the Legislature to punish for contempt was not in any way or manner impaired, delimited or restricted by the enactment of [the contempt statute]. Any person who is in contempt of the legislature may be punished by the House or Senate, which ever one the contempt was committed against, and the same act will give rise to a prosecution under the provisions of [the contempt statute]. The one act may be a statutory offense under the penal clause of the statute and also a violation of the inherent authority of the legislature.

C. Due process in legislative contempt proceedings

The past decisions of this Court expressly recognizing the power of the Houses of the Congress to punish contemptuous conduct leave little question that the Constitution imposes no general barriers to the legislative exercise of such power. There is nothing in the Constitution that would place greater restrictions on the States than on the Federal Government in this regard. We are therefore concerned only with the procedures that the Due Process Clause of the Federal Constitution requires a state legislature to meet in imposing punishment for contemptuous conduct committed in its presence.

... Courts must be sensitive to the nature of a legislative contempt proceeding and the "possible burden on that proceeding" that a given procedure might entail. 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. ...

... Here, the Wisconsin Assembly, two days after the conduct had occurred, found petitioner in contempt and sentenced him to confinement without giving him notice of any kind or opportunity to answer. There is no question of his having fled or become otherwise unavailable for, as we have noted, he was confined in the county jail at the time, and could easily have been given notice, if indeed not compelled, to appear before the Assembly. We find little in our past decisions that would shed light on the precise problem, but nothing to give warrant to the summary procedure employed here, coming as it did two days after the contempt. Indeed, we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are "basic in our system of jurisprudence." ...


D. Using the judiciary to vindicate legislative contempt findings

(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.


Carcaci also attacks the procedure by which he was found in contempt of the House of Representatives. He contends that, in order to comply with the requirements of due process of law, any such finding of contempt must be made in a judicial forum. This contention is without merit. The power of the Houses of the General Assembly to vindicate their authority and processes by punishing acts of contempt committed in their presence is inherent in the legislative function. ...

[S]ince a contempt adjudication by the House or Senate is no more than a judgment rendered by a co-equal branch of government pursuant to express constitutional authority, we see no reason why the adjudicating body would be less entitled to enforce that judgment in the courts of our state than a party who seeks to have a judgment in one district enforced in another....


... Since the courts of this state are forbidden from exercising legislative authority of any kind, the statutory framework pursuant to which the Committee has applied to this Court to enforce obedience to its subpoena must be considered to invoke only whatever *judicial* authority the Court has. Consequently, in considering the enforcement of the Committee's subpoena duces tecum, this Court must apply principles long used by the judicial branch in determining whether to enforce a judicial subpoena duces tecum.

Constitutional considerations dictate that the court is not bound by the Committee's finding that Dr. Potholm is in contempt of its proceedings. Indeed, this Court is obligated to make an independent inquiry into whether, by judicial standards, Dr. Potholm's conduct amounts to contempt.

*Joint Select Committee v. Potholm*, 1984 Me. Super. LEXIS 191, ___ (Superior Court of Maine, Kennebec County).

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.*


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