

MEMORANDUM

on Power of

CONGRESSIONAL INVESTIGATING COMMITTEES

PREFATORY NOTE

The Congressional Investigating Committees have in recent years been used increasingly by both Houses of Congress as a technique for providing the factual basis for legislation. On the whole their work has been effective in uncovering abuses and quite frequently their reports have resulted in remedial legislation. Much of this legislation has made for social progress.

When such committees act in good faith and within the scope of the authority given them by Congress and so conduct their investigations and hearings that their intention to get at the truth in accordance with the established procedures is apparent, they deserve the full cooperation of all persons and organizations who are called upon to supply them with information or otherwise to assist them. An outstanding example of this type of committee is the Sub-Committee of the Senate Committee on Education and Labor, investigating the violations of civil liberties, headed by Senator LaFollette and commonly known as the LaFollette Committee.

On the other hand, when such a committee goes outside of the scope of its investigation, abuses the witnesses called before it, opens its records to rumor, hearsay and slander and gives the persons or organizations mentioned in such testimony no adequate opportunity to be heard, one may well question the advisability and propriety of giving full and voluntary cooperation to such a committee. The Special Committee on Un-American Activities (House of Representatives) headed by Martin Dies has merited such characterization. Cooperation with such a Committee may well lead to a further perversion of its functions. Persons thus cooperating may be injured by the unfair methods of the Committee in presenting the material offered or in the conduct of its hearings without being given an opportunity to present the facts which they have bearing on the subject of the investigation.

This memorandum lays down no course of action to be followed by any individual or organization when asked in any way to cooperate with or give information to a Congressional Committee. Its purpose is to point out in general what the powers of such committees are and what the duties and privileges are of persons or organizations who become the subject of a Committee's investigation. Whether an individual or an organization desires to stand absolutely on his or its rights before any Congressional Committee is a matter of individual choice. That choice may be made more intelligently with a general knowledge of what those rights are. To this end this memorandum has been prepared.

A note of caution should be added. This memorandum is not a comprehensive legal treatise on the subject. In specific situations the information contained in it should be supplemented by competent advice.

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SCOPE OF INVESTIGATION BY

CONGRESSIONAL COMMITTEE

A Congressional Investigating Committee by the mere fact of its existence does not have the right to investigate any subject which the Committee or its members determine upon. These Committees are created by Congressional resolutions. In some cases standing Congressional Committees are given special powers of investigation by such resolutions. In each case these resolutions set forth into what subjects the Committee is authorized to inquire. Thereafter it is always necessary in order to determine whether a Committee is conducting an investigation or pursuing a line of inquiry within its scope, to examine the text of the resolution authorizing the Committee to act.

Any request for information by subpoena or otherwise, any hearing or line of inquiry conducted by a Congressional Committee which is fairly beyond the scope of the enabling resolution is improper. The law does not require participation by anyone in such improper investigation. In such a case, even though individuals or records are subpoenaed, the refusal to produce the records or the refusal to testify, if the objection is properly made, constitutes no contempt of the Committee and no violation of the law.

This challenge of the propriety of a subpoena or to a line of questioning must in the first instance be made to the Committee. If the Committee overrules the challenge the person who has made it has a right to request consultation with counsel. After such consultation, if there is still conviction that the subpoenas or questions are improper, the subject of the investigation may persist in his refusal, noting on the record however that this refusal is based upon counsel's advice that the matter is outside of the scope of the investigating Committee.

On such refusal the Committee may proceed to hold the subject for contempt either before the House or Senate, as the case may be, or by a criminal proceeding in a federal court. In such a procedure a determination would be made as to the propriety of the subpoena or questioning. If the determination is against the person objecting and it is found that he should have testified, he would be held to be in contempt. Generally speaking, before the House or Senate he could purge himself of the contempt by offering to comply with the demands of the Committee. In the criminal procedure, however, while the offer to testify and the fact that counsel was relied on may be factors which will be considered in mitigation of punishment, the contempt however remains and some punishment may be inflicted.

A continued refusal to comply with the Committee's demands might result in indefinite incarceration until compliance is agreed to. In the case of the criminal proceeding the punishment would be fixed and definite.

If convicted by reason of refusal to produce documents or to answer any questions on any matter pertaining to the inquiry, the punishment is a fine of not less than \$100. nor more than \$1000., and imprisonment of not less than one month nor more than 12 months.

In making any decision of whether or not request for information or to testify on any particular point is beyond the scope of the investigation of a Congressional Committee, it must be borne in mind that the powers of such Committees are broadly construed by the courts. Any matter directly affecting the subject of the investigation as well as collateral matters, may properly be investigated by a Congressional Committee if the information to be elicited by such investigation might be reasonably considered to assist Congress in legislating on the subject matter of the inquiry. There is need for careful study and competent advice before decisions are made to refuse to answer subpoenas or questions when testifying before a Committee.

The above relates only to subpoenas properly issued by the Committee and to questions put to a witness who is testifying before the Committee in session, whether under subpoena or otherwise. It does not apply to any requests or demands made by members, agents or other officials acting informally. More will be said concerning this hereinafter.

THE METHODS OF OPERATION OF CONGRESSIONAL COMMITTEES

A. The Committee itself.

The Committee itself can only act when it is officially in session. A Committee may not require any person to appear before it except when it is in official session and then only after service of formal subpoena. This rule applies with equal force to the production of books, records or other documents. The Committee has power only to require their production at official sessions and in response to proper subpoenas. Any order by the Committee or any of its members, agents or officers to appear before any member, officer or agent of the Committee or to produce documents or records, or demanding examination of the same, may be ignored as a matter of strict right.

As has already been pointed out, the wisdom of insisting on strict right is a question for decision by each subject of examination in each case.

B. The Subpoena.

The subpoenas used by Congressional Committees are governed by the general rules governing subpoenas issued out of courts.

1. The subpoena must call for an appearance at a session of the Committee; it may not legally call for appearance before any agent of the committee.

2. The proper person must be served personally. Service by mail or by leaving at the person's office, etc. is not valid service.

3. Documents or records subpoenaed must be specifically described; only documents or records so specifically described must be produced.

4. The context of the subpoena must be definite and clear. General demands for all records, documents, etc., have no legal force.

5. Sufficient time for allowance of the person to appear at the Committee session or for the production of records must be given.

6. All necessary expenses for personal appearance or transportation costs for documents to the place of the Committee's session must be furnished (Generally the customary federal fees apply).

In many cases a person whose testimony is required or who is asked to furnish documents will receive an informal invitation to do so. As a practical matter, before subpoena issues, where a person is willing to testify and comply reasonably with the demand for documents, an informal arrangement can be made as to the time and place of hearing, as to what documents should be produced, as to what costs are involved, so that the issuance of a subpoena and any contest over its form or demands may be avoided.

Even after subpoena has been issued informal objection may be made to the Committee or its representatives and through negotiations an agreement may be reached in similar fashion. Of course if no agreement is reached the subject subpoenaed may have an ultimate court test of the Committee's right under its subpoena.

Only those documents which are actually in existence at the time of service of the subpoena are subject to it. Their non-existence at the time of service is an absolute defense to their non-production. Subpoenaed documents need only be produced at Committee sessions and may, if the subject of the investigation insists, be examined only at such session.

A subpoena does not give the agent serving it the power to seize any records or documents. It merely requires that the subject produce those documents at the time stated in the subpoena. At any time on preliminary investigations by agents a subject may cease voluntary cooperation, may refuse to answer any question or allow further access to books or documents.

C. Committee agents.

A Congressional Committee has the right to designate agents to act in its behalf in various activities. The actual power of these agents is extremely limited. They have no right to have access to the records, documents, files, property or premises of any subject under investigation. Their actual power does not extend beyond serving subpoenas to testify or to produce records before the Committee. Their function under customary practice, however, is much broader. They are often armed with credentials which authorize them to make preliminary investigations on behalf of the Committee. Such authorizations, however, are only of value if the person to whom they are presented is willing voluntarily to cooperate with the agent. A person may refuse to do so and in doing so is completely within his rights.

Upon the visit of any alleged agent proof should be required of his authority. Thereafter the amount of information given to him

or the documents or records which are submitted to him for inspection are matters for the decision of the subject. He may absolutely refuse to discuss anything with the agent or to show him anything.

Agents will, by the show of authority and by persuasion induce the subject of the investigation to answer questions and to examine records, very often on the ground that otherwise the subpoena power would be invoked which would cause the subject much inconvenience.

Long preliminary investigations are often conducted by Committee agents. In many cases the Committee agent may be the counsel for the Committee, but he too, has no power to compel appearance, testimony or the production and examination of records, etc. These long and sometimes very exhaustive examinations form the basis of action by the Committee at its sessions.

A Congressional Committee would have great difficulty in achieving a successful investigation if in each case it is compelled to resort to its subpoena power and formal sessions to elicit information.

D. Cooperation with agents.

As the agent of a Congressional Committee plays a very important part in the Committee's work and as he can play this part only with the voluntary cooperation of the people he investigates, it becomes in each case important to consider the degree of cooperation offered to such agents and the terms under which such cooperation is given.

In deciding the degree of cooperation the subject under investigation might consider the following points:

(1) The nature of the subject investigated by the Committee.

(2) The methods therefore used by the Committee in taking testimony and in conducting hearings.

(3) The fact that the agent's investigation in many cases is only a "fishing expedition" conducted merely in the hope of finding evidence of value.

(4) That giving the agent access to documents and files may give him information about the work or business of the subject which may have no bearing on the investigation and which neither the Committee nor its agents has any right to know, and that such information may, depending upon the character of the Committee, its members or agents, be put to improper use.

(5) That such preliminary investigations may lay a basis for future issuance of subpoenas.

(6) That if such investigation is not allowed the subject of the investigation determines for himself which of his documents and records are reasonably called for by the subpoena and consequently knows exactly which documents and records are in the Committee's possession.

Where the subject of the investigation gives testimony which generally would not be under oath, he should in advance ask that a record be taken of his testimony and that a copy of that record be submitted to him for correction before it is published in any way.

Again it must be pointed out that the question of full or limited cooperation or of refusal to cooperate with a Congressional Committee through its agents depends entirely upon a choice to be made by the subject of investigation in the light of all the circumstances which exist at the time.

E. Records not in the possession of the subject of investigation.

It is not unusual for typical investigating Committees to subpoena and get access to the following records of subjects under examination which are not in his possession:

(1) All telegrams, sent over any of the well known communication systems (Western Union usually destroys copies of all wires after one year.)

(2) Complete records of all bank accounts. Copies of all checks are also usually available because of the typical practice of photographing all checks. (Sometimes a bank will notify the subject and sometimes it will not.)

(3) Records of all long distance telephone calls.

F. Procedure at hearings

It has already been pointed out that the witness must testify and produce his documents only to the Committee when it is officially in session. The following additional matters should be borne in mind:

(1) The witness may request and is usually permitted to be represented by counsel. He may generally confer with counsel at any stage of the hearing before continuing his examination.

(2) The rules of evidence are not followed and the witness must answer all questions except those which are beyond the scope of the Committee's investigation. (This has already been discussed at length).

(3) A Committee is not obligated to allow witnesses to make statements on their own behalf which are not in answer to specific questions. However this permission is usually granted, particularly when the witness insists upon it.

(4) Prepared documentary evidence on behalf of a subject under investigation should be prepared in advance and offered for the record. The Committee will, as a rule only put in those documents which it considers relevant. In some cases that decision is made in such a way as to present an incomplete picture on the record concerning the subject under examination. It is therefore well for the subject under examination to offer those documents, etc. which will fully round out his position in respect to the investigation.

(5) A witness under the federal law may not refuse to testify or answer any question pertinent to the inquiry upon the ground that the answers would "tend to disgrace him or otherwise render him infamous." In such case the witness should state his objections, but when ordered to answer over his objection he must do so. The law provides further, however, that no testimony given by any witness shall be used as evidence against him in any criminal proceeding in any court except for a prosecution of perjury arising out of that testimony. Official papers and records are excluded from this immunity. This immunity applies, however, only to federal courts. It does not apply to state courts.

Finally, in each case of doubt as to procedure competent advice should be obtained.

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