

## Opinion No. 38-2037

August 29, 1938

**BY:** FRANK H. PATTON, Attorney General

**TO:** Honorable A. D. Brownfield, Chairman, House Committee on Investigation of Bribery Charges, Santa Fe, New Mexico

{\*266} The following is in answer to certain questions propounded by your committee in connection with your proposed investigation of alleged bribery charges, and also includes certain observations in connection with matters discussed during my conversation with your committee on the afternoon of August 26th in the office of the Speaker of the House of Representatives.

Your written questions will be answered according to the number in which they appear.

1. Is a majority vote of the committee required before any witness may be summoned?

The answer to this question is an emphatic no. Any member of the committee has the right to request the appearance of any witness he may desire to question, or from whom it is desired to elicit testimony.

2. May a member of the press appearing before the committee, voluntarily or otherwise, be compelled to divulge the source of his information which he received as a newspaper man?

Chapter 33 of the Session Laws of 1933 enumerates and specifies those matters which are commonly known as privileged communications, and I find that the subject-matter of your question is not included within this enumeration. This being true, there is evidenced an intent of the legislature to make the matters specified as all-inclusive and for this reason it is my opinion that this question should be answered in the affirmative, a newspaper man not being {\*267} under the immunity as set forth in the statute.

3. What procedure must the committee adhere to in summoning witnesses by subpoena?

Rule 86 of the Rules of the House of Representatives of this state provides that all writs, warrants and subpoenas issued by order of the House shall be under the hand of the Chief Clerk.

It is my belief that under this provision when any member of the committee desires the attendance of any witness or desires to have issued a subpoena duces tecum, the process should be issued under the hand of the Chief Clerk.

However, I note in connection with this proceeding Mr. Brownfield's motion, which is as follows: "Now that this committee has been authorized, I move that the committee be given the same power that the House has in summoning and putting under oath any who desire to come before them to testify."

It is submitted that this motion is indefinite, but I believe it was the intention of Mr. Brownfield that in order to facilitate progress process should issue by the committee in substantially the same manner as by the House. This being true, in all probability process issued under the hand of the chairman of the committee and attested by the clerk would be sufficient.

4. What power does the committee have in regard to the issuance of a subpoena duces tecum?

In my opinion the committee has the same right to issue a subpoena duces tecum as it has to issue a subpoena for the attendance of a witness and the same method of process should be followed.

5. What laws of evidence govern legislative proceedings in committee?

Broadly speaking, the matter of an investigation before a legislative committee is wide and open. The legislature has the power to investigate any subject respecting which it may desire information in aid of the proper discharge of its function to make or unmake written laws. 59 C. J., page 96, Sec. 78.

The powers of the investigating committee subject to limitations upon the investigating power of the legislature are in general, as broad as the resolution constituting it. The powers of a legislative committee are necessarily exceedingly of wide latitude and these powers may include a search into the subject-matter of the investigation beyond the scope of a judicial trial, but it must be confined to facts such as would be relevant to the inquiry. Briefly speaking, I would say that any fact which is material and relevant to the inquiry would be the subject of ascertainment and that the scope of the investigation is not limited to the strict rules of evidence as used in a judicial inquiry. 59 C. J., Page 98, Section 80.

Under this numbered question you also desire information as to self-incrimination and immunity. About the only answer I can give as to this without a concrete set of facts at hand is to refer your committee to the Constitution of the United State, the Fifth Amendment, and Section 15, Article II of our State Constitution, both of which provide in effect that no person shall be compelled in any criminal case to be a witness against himself.

Of course, this raises the question as to whether or not we are here confronted with a criminal case, but it is my belief that these provisions have been liberally construed and interpreted by the courts and in all probability if there is showing made that the answer

to any question would be incriminating a refusal of the witness to answer would perhaps be sustained by the court.

6. What procedure must the committee follow in asking questions?

{\*268} I find in consulting both our statutes, the Constitution and the adopted rules of the House of Representatives, that no procedure has been set forth in matters of this kind other than by Rule 93 of the House of Representatives, which provides that the rules and parliamentary practice now enforced in the House of Representatives of the United States Congress, shall govern in all cases to which the same are applicable and in which they are not inconsistent with the standing rules and order of business.

I regret that I do not have copies of Rules of the House of Representatives of the United States Congress before me and I am, therefore, unable to determine at this time just what same provide.

I imagine, however, that your committee is interested primarily in an orderly procedure and it would be my suggestion that the chairman of the committee conduct the investigation and upon conclusion by him he may ask any other member of the committee if they desire to ask any questions, or the committee may select an attorney to conduct the investigation, and upon conclusion by him any member of the committee might be permitted to interrogate the witness.

7. How are witnesses to be paid and from what source?

I find that the House of Representatives in its Rules has made no provision for a matter of this kind, being different in that respect from the Senate, which by its Rule 82 has provided that witnesses may receive as compensation the sum of \$ 2.00 per day and 12 1/2c per mile each way for travel expense.

However, it is within the power of the Legislature to make an appropriation for an expense of this kind if it so desires. Also, no doubt, there is a fund already appropriated for the legislature as an incidental expense fund and it is my belief if any portion of this is available same could be used for the payment of witnesses testifying in an investigation of this nature.

You have also requested this office to prepare forms of subpoenas and oaths for witnesses and same will be available for use by your committee when desired.

In addition to the foregoing, there are other matters which must, of necessity, be called to the attention of your committee and which, in my opinion, are vital insofar as the future activities of your committee are concerned.

Some discussion has been had as to the power of the committee to punish for contempt. It has been held in many cases that the legislature is possessed of an inherent power to punish for contempt in the absence of a constitutional provision.

Our constitution, however, contains a provision cited as Section 11 of Article IV, to the effect that each house may determine its rules of procedure and punish its members or others for contempt or disorderly behavior in its presence.

In addition to this constitutional provision we have the broad provision in said Article IV, Section 2 to the effect that in addition to the powers enumerated the legislature shall have all powers necessary to the legislature of a free state.

I think a liberal interpretation of the provision first cited would be that each house may punish its members or others for contempt committed either within or without its presence. The punishment for disorderly behavior being limited to an occurrence of same within its presence. However, your committee has absolutely no power to punish anyone for contempt. Its procedure being in such cases merely to refer the matter to the House, together with the pertinent facts constituting same. Upon such reference the House would then issue a citation to {\*269} the offending person requiring him to [Illegible Word] at a date and time [Illegible Words] show cause why he should not [Illegible Word] punished for contempt. This is a matter which is procedural in its nature and full details can be worked out if and when the occasion arises.

Some discussion has also been had as to whether or not the life of this committee would expire upon an adjournment sine die of the legislature. I have numerous authorities to support the premise that such would be the case and that upon an adjournment of the legislature sine die this committee would have no further powers.

Now, again making reference to the matter of punishment for contempt, I wish to say that the actual method of enforcement of the constitutional provisions granting the power to punish for contempt is debatable due to the absence of specific rule and regulation, or of statutory enactment.

In the case of *Burnham vs. Morrissey*, 74 American Decisions, 676, I find a statute which provided that the common jail was to be used as a prison for the confinement of "all persons duly committed for any cause authorized by law." In this case the House of Representatives had committed a certain person to jail for contempt and the question was as to the authority for the commitment and an interpretation of the words "committed for any cause authorized by law."

It was held that the commitment was proper and that the commitment was authorized by law and that the accused was lawfully held by the sergeant-at-arms therein in the custody of the sheriff or the deputy jailer.

New Mexico has a statute which is similar to the one in the case cited and it is found in Section 75-102, New Mexico Statutes Annotated, 1929 Compilation. This provision is to the effect that the jail in each county shall be used for the retention of persons who within the same county shall be charged with any crime, or properly committed for trial, or for the imprisonment of persons who in conformity with sentence upon conviction have been sentenced "and for the safekeeping of every person who shall be committed

by competent authority and according to law." Following the holding in the Morrissey case, we could perhaps be safe in saying that the commitment by the legislature for contempt was a commitment by competent authority and according to law, and therefore one adjudged guilty of contempt could be by the sergeant-at-arms lodged in the county jail to be held in the custody of the sheriff.

However, our entire law is absolutely silent as to what punishment may be imposed for a contempt of the legislature. Certainly, we have no authority for the imposition of any fine and no term is specified for confinement in any jail. Any confinement under the general state of the law of any person committed to jail for contempt would cease upon the adjournment of the legislature and such person would be entitled to release upon a writ of habeas corpus.

At best, I can only say that the procedure for enforcement of contempt provisions is vague and indefinite and that therefore such powers or attempted powers should be exercised with the greatest of care by this committee and by the House of Representatives.

Further, I may say that I am unable to determine from the motion which I have before me the objects of the investigation. The general rule of law is that a committee only has such powers as are conferred upon it by the resolution and in this case I fail to find any resolution whatsoever.

{\*270} In my opinion, if this committee is to function properly, legally, and with full authority of the House of Representatives, the proper resolution should be adopted defining the scope of the duties and powers of the investigating committee and conferring upon that committee such powers as are necessary and incidental to the full and complete performance of its contemplated duties.