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STATE OF MAINE
ONE HUNDRED AND SEVENTH LEGISLATURE

COMMITTEE ON STATE GOVERNMENT

February 4, 1976

Legislative Council
107th Legislature
State House
Augusta, Maine 04333

Gentlemen:

In accordance with H.P. 1741 directing the State Government Committee to study Legislative Investigating Committees, P.L. 1975, c. 593, we enclose herein the final report and implementing legislation of the Committee.

Respectfully submitted,

Senator Theodore S. Curtis, Jr.

Rep. Leighton Cooney

REPORT OF THE STATE GOVERNMENT COMMITTEE

STUDY OF LEGISLATIVE INVESTIGATING

COMMITTEES: P.L. 1975 CHAPTER 593

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INTRODUCTION

During the Regular Session of the 107th Legislature, the State Government Committee considered L.D. 1085, "AN ACT to Establish Rules for Legislative Investigating Committees," sponsored by Representative Walter Birt of East Millinocket. The bill was given a public hearing and granted "Leave to Withdraw" by the Committee, because the Committee felt that this bill required further consideration. The Committee also, through the House Chairman Representative Leighton Cooney of Sabattus, introduced a study order to further study this subject. The bill was subsequently substituted for the report in the House and, after a floor amendment, was enacted into law, P.L. 1975, chapter 593. (A copy of the statute is attached). The Study Order, H.P. 1741, was also passed. (A copy of the Study Order is attached.) The Committee thus undertook, with the aid of the Attorney General's office, a study of possible amendments to chapter 593, to clarify and strengthen its provisions.

The purpose of P.L. 1975 chapter 593 is to provide clear and detailed rules for Legislative Investigating Committees and to establish the rights of witnesses appearing before these committees. Such procedures and rules are necessary in order to avoid forcing persons to appear and testify without sufficient protection of their rights and also to avoid potential criminal accusations being made without any recourse for the accused. As the investigatory aspect of legislative committees seems to be expanding, such rules and procedures could be required in the near future. The provisions of chapter 593, however, could not be adequately studied during the Regular Session and thus the Committee suggested that a Study Order be passed. The Study Order has allowed the Committee to closely study the provisions of chapter 593, and to offer amendments to clarify and strengthen it.

REPORT

Judicial case law has established that a legislature has the implied power and duty to investigate, as a correlary of its power to enact legislation. This investigatory power has been recognized by the Legislature by its enactment of provisions generally governing the sub-poena power and its delegation. (3 MRSA §165) The investigatory power is very broad, but it does have some limitations. (For a summary of case law limitations on legislative investigations, see an attached extract of a Council of State Governments' pamphlet.) Generally, a legislative investigation must relate to matters within the jurisdiction of the Legislature, i.e., pending or proposed legislation. The Legislature has no power to investigate a person (except in impeachment, address or confirmation proceedings) or to require testimony on purely personal matters. Thus, a legislative investigation is a fact-gathering process rather than an

adversary process, and persons appearing before it are witnesses and not parties. However, the Legislature does have the power to investigate corruption, mismanagement, etc., in the executive branch, as these relate to proposed or potential legislation. Thus the distinction between a "legislative investigation" and an adversary proceeding can become very indistinct; and obviously the legislative investigatory power can be, and has been, stretched.

However, almost all of the activities of Maine's past and present Joint Standing and Select Committees have not been investigations, but rather information gathering hearings. The in-session activities of committees are generally either working sessions or hearings for soliciting the opinions of the public concerning legislation. The interim activities of committees more nearly approach the standard for an "investigation", since the studies assigned to committees presume an in-depth examination of a problem facing the legislature. However, even such studies seem rarely to have been particularized or intense enough to be characterized as "investigations." The distinction is unclear, but probably turns on the nature of the information sought. If the information sought is general and abstract, such as the best method of certifying the results of state elections, then it would not be an investigation; but if the information sought is specific and particular, such as whether the election results in X county were correctly certified, then it would be an investigation. Obviously this abstract distinction is insufficient for determining when the rule and procedures of investigations should be applied. Thus, the provision of chapter 593 that makes the delegation of the subpoena power the crucial element of an investigation, provides a clear, simple, and essential, distinction between the usual legislative information-gathering process and the particular information-gathering process that is an investigation.

Though the sub-poena power has rarely been delegated to legislative committees in Maine, and committees have rarely undertaken "investigations", with or without it, committees have begun to expand their activities and will probably undertake investigations in the near future. The provisions of chapter 593 generally are sufficient to provide for rules and procedures for such investigations. However, after careful study, with the aid of the Attorney General's office, the Committee has drafted recommended legislation (a copy attached) containing the following general changes:

1. The proceedings under P.L. 1975 c. 593 have many procedures that create an adversary proceeding, such as cross-examination of witnesses by a party or his counsel and objections by witnesses or counsel that would entirely suppress testimony. Instead, the Committee believes that all questioning should be done by the Committee, though questions can be submitted to them.

The information-gathering aspect of investigations should be strengthened to provide for suppression of testimony only when clear and convincing evidence exists that the potential harm outweighs the utility of such evidence. However, executive sessions may provide limited protection for sensitive testimony, and still allow the information-gathering activity to continue. Thus, the Committee's recommended bill provides detailed provisions regarding taking of testimony, questioning witnesses, objections by parties, and uses of executive sessions. These provisions strengthen the information-gathering process while maintaining the protection of witnesses, though not granting them veto-power over the use of testimony.

2. The proceedings under P.L. 1975 c. 593 provide for judicial determination of conflicts between investigatory committees and their witnesses. The Committee believes that such judicial determinations raise serious questions of the Seperation of Powers and also detract from the inherent authority of the Legislature to determine such conflicts. Thus, the Committee's recommended bill removes from the present provisions, the sections delineating the procedures for such judicial determination, leaving the Legislature to determine the issues and to enforce the procedures by legislative contempt actions.

3. Under c. 593, detailed provisions for the number of members of an investigating committee, required notice for meetings, etc., are set out to insure balanced committee actions. The Committee believes that many of these provisions are unduly restrictive; and instead, in its recommended bill, provides for a balanced political membership and quorum requirements, and removes many detailed limitations. The Committee believes that these provisions are sufficient to prevent abuse of Committee proceedings and yet will not restrict committee actions unduly.

4. Under c. 593 many procedural details are vague, particularly: the method of sub-poenaing and informing witnesses; the handling of records and transcripts; the grounds for refusing to testify; the procedures for protecting witnesses named in executive sessions; procedures for reporting suspected criminal activity; and the scope of immunity and method of granting it. The Committee believes that such details are critical and has provided them in its recommended bill.

5. There is no general purpose section in c. 593. The Committee believes that such a statement of the purpose is important and sets out the general principles of a legislative investigating committee. Such a provision is provided in the recommended bill.

The basic substantive changes of the recommended bill are stated in the Statement of Fact. In addition to these general changes, the Committee's recommended bill contains several minor changes to clarify the present provisions of c. 593.

The Committee believes that the changes contained in the recommended bill are necessary to clarify and strengthen the provisions governing investigating committees. With the adoption of these changes, legislative investigating committees will be able to effectively and impartially gather the information required of them, and the rights of persons called before them will be properly protected.

Attachments.

1. P.L. 1975, c. 593
2. Study Order H.P. 1741
3. Summary of Case law.
4. Draft legislation.

APPROVED

JUL 27 '75

BY GOVERNOR

CHAPTER

593

PUBLIC LAW

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED SEVENTY-FIVE

H. P. 898 — L. D. 1085

AN ACT to Establish Rules for Legislative Investigating Committees.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. 3 MRSA § 165, sub-§ 7, first sentence, as enacted by PL 1973, c. 590, § 8, is amended to read:

When the duties assigned to a committee so require, the Legislature may grant to it the power to administer oaths, issue subpoenas, compel the attendance of witnesses and the production of any books, accounts, documents and testimony, and to cause the deposition of witnesses, whether residing within or without the State to be taken in the manner prescribed by law for taking depositions in civil actions in the Superior Court.

Sec. 2. 3 MRSA § 165, sub-§ 7, as enacted by PL 1973, c. 590, § 8, is amended by adding a new sentence to follow the first sentence, to read:

When the Legislature grants this power to a joint standing committee on joint select committee, such committee shall function as an investigating committee and shall be subject to the provisions of chapter 21.

Sec. 3. 3 MRSA c. 21 is enacted to read:

CHAPTER 21

LEGISLATIVE INVESTIGATING COMMITTEES

SUBCHAPTER I

GENERAL PROVISIONS

§ 401. Short title

This Act may be called "Rules for Legislative Investigations."

§ 402. Definitions

As used in this chapter, unless the context otherwise indicates, the following words shall have the following meanings.

1. Chairman. The "chairman" is the presiding officer of the investigating committee. He may be the permanent chairman or another member designated as temporary chairman in the absence of the chairman.

2. Executive session. An "executive session" is a session at which only members of the investigating committee, staff of the committee, counsel to the committee, the witness and his counsel shall be present.

3. Interested party. An "interested party" is any person who learns that he has been specifically identified in testimony taken before an investigating committee and who reasonably believes that he has been adversely affected by such testimony.

4. Investigating committee. An "investigating committee" is any committee of the Legislature which has been granted by the Legislature the power to administer oaths, issue subpoenas and take depositions, as authorized by section 165, subsection 7. "Investigating committee" shall include the Legislative Council when it exercises the authority granted under section 162, subsection 4, but shall not include the Committee on Legislative Ethics when it exercises the authority granted under section 381-A, subsection 2, paragraph D.

5. Investigating committee action. An "investigating committee action" is any decision arrived at formally by an investigating committee.

6. Members. The "members" of an investigating committee are the legislators appointed by the Legislature to serve on the committee.

7. Quorum. A "quorum" is a majority of the members of a legislative investigating committee.

8. Testimony. "Testimony" is any form of evidence received by an investigating committee.

9. Witness. A "witness" is any person who testifies before an investigating committee or who gives a deposition. "Witness" shall include an interested party who requests permission to testify.

SUBCHAPTER II

LEGISLATIVE INVESTIGATING COMMITTEES

§ 411. Creation

Whenever the Legislature delegates to a committee the power to administer oaths, issue subpoenas and take depositions in connection with any study or investigation, such committee shall automatically become an investigating committee for the purpose of such study or investigation and shall be subject to the provisions of this chapter, whether or not such power is utilized by the committee in the course of such study or investigation.

§ 412. Scope of study or investigation

The authorization creating an investigating committee shall clearly state, and thereby limit, the subject matter and scope of the study or investigation. No investigating committee shall exceed the limits set forth in such authorization.

§ 413. Number of members

No investigating committee shall consist of fewer than 3 members.

SUBCHAPTER III

RULES OF PROCEDURE FOR LEGISLATIVE INVESTIGATING COMMITTEES

§ 421. Investigating committee action

Any investigating committee action shall require the affirmative votes of a majority of the committee members.

§ 422. Order of procedure

The decision as to the order of procedure in making a study or an investigation shall be an investigating committee action.

§ 423. Issuance of a subpoena

The decision to issue a subpoena shall be an investigating committee action.

§ 424. Notice to witnesses

A reasonable time before they are to testify, all prospective witnesses shall be notified of the subject matter of the investigation and shall be provided with a copy of this chapter. When a subpoena is served, the information required by this section shall be presented at the time of service.

§ 425. Notice to members

Notice of the date and time of any meeting of the committee and of any hearing to be held by the committee shall be given to all members of the investigating committee at least 3 days in advance.

§ 426. Oaths

All testimony of subpoenaed witnesses shall be under oath. A voluntary witness may be required to testify under oath by legislative committee action. Oaths shall be administered by the chairman.

§ 427. Testimony

Taking of testimony shall be by the investigating committee's counsel, or other staff personnel or the members of the committee. A quorum shall be present. Unless otherwise decided by investigating committee action, all testimony shall be taken in open session. However, if any witness so requests, his testimony shall be taken in executive session, unles otherwie decided by investigating committee action.

§ 428. Records

A complete record shall be kept of all investigating committee action, including a transcript of all testimony taken.

§ 429. Release of testimony

1. Release. The decision to release testimony and the decision as to the form and manner in which testimony shall be released shall be investigating committee action. However, no testimony shall be released without first affording the witness who gave such testimony, or his counsel, an opportunity to object to the proposed release.

A. The witness or his counsel may, by such objection, require that testimony given in open session, if it is released at all, be released in the form of a full, consecutive transcript.

B. The witness or his counsel may, by such objection, require that testimony given in executive session not be released in any form or manner whatsoever.

2. Transcript. The witness or his counsel, upon payment of the cost of preparation, shall be given a transcript of any testimony taken. However, the witness or his counsel shall not be entitled to obtain a transcript of the executive session testimony of other witnesses. The release of a transcript under this subsection is not the release of testimony within the meaning of subsection 1.

§ 430. Request for court to compel obedience

The decision to apply to the Superior Court to compel obedience to a subpoena issued by the committee shall be by investigating committee action.

SUBCHAPTER IV

RULES GOVERNING WITNESSES

§ 451. Counsel

The witness may have counsel present to advise him at all times. The witness or his counsel may, during the time the witness is giving testimony, object to any investigating committee action detrimental to the witness' interests and is entitled to have a ruling by the chairman on any such objection.

§ 452. Questioning of adverse witnesses

The witness or his counsel may question adverse witnesses whose testimony is being taken in open session. However, the chairman of the investigating committee may reasonably limit the right to so question. The chairman's ruling is final, unless otherwise decided by investigating committee action.

§ 453. Pertinency of requested testimony

The witness or his counsel may challenge any request for his testimony as not pertinent to the subject matter and scope of the investigation, in which case the relation believed to exist between the request and the subject matter and scope of the investigation shall be explained.

§ 454. Who can compel testimony

The committee chairman may direct compliance with any request for testimony to which objection has been made. However, the chairman's direction may be overruled by investigating committee action.

§ 455. Television, films, radio

Any decision to televise, film or broadcast testimony shall be investigating committee action. If the witness or his counsel objects to a decision to televise, film or broadcast his testimony, his testimony shall not be televised, filmed or broadcast.

§ 456. Statements and form of answers

The witness or his counsel may insert in the record sworn, written statements of reasonable length relevant to the subject matter and scope of the investigation. In giving testimony, the witness may explain his answers briefly.

§ 457. Privileges

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.

§ 458. Rights of interested parties

Any interested party may request an opportunity to appear before the investigating committee. The decision on this request shall be investigating committee action. If such request is granted, the interested party shall appear before the committee as a witness.

SUBCHAPTER V

SANCTIONS FOR ENFORCEMENT OF RULES

§ 471. Legislative responsibility

The Legislature has primary responsibility for insuring adherence to these rules.

§ 472. Erroneously compelled testimony

Testimony compelled to be given over a proper claim of privilege, or testimony released in violation of section 429, or any evidence obtained as a result of such improper procedure is not admissible in any subsequent criminal proceeding.

§ 473. Contempt

No witness shall be punished for contempt of an investigating committee unless the court finds:

1. Conduct. That the conduct of the witness amounted to contempt;

2. Certain requirements. That the requirements of sections 424, 430, 453 and 454 have been complied with; and

3. That in the case of:

A. A citation for failure to comply with a subpoena, the requirements of section 423 have been complied with;

B. A citation for failure to testify in response to a request for his testimony challenged as not pertinent to the subject matter and scope of the investigation, the requirements of sections 412 and 453 have been complied with and the request was pertinent as explained;

C. A citation for failure to testify in response to a request for his testimony on grounds of privilege, the requirements of section 457 have been complied with.

§ 474. Saving clause

A decision by a witnesss to avail himself of any protection or remedy afforded by any provision of these rules shall not constitute a waiver by him of the right to avail himself of any other protection or remedy.

In House of Representatives,.....1975

Read twice and passed to be enacted.

.....*Speaker*

In Senate,.....1975

Read twice and passed to be enacted.

.....*President*

Approved.....1975

.....*Governor*

STATE OF MAINE

In House

Ordered,

WHEREAS, Legislative Joint Standing and Select Committees are being asked to investigate many matters on behalf of the Legislature; and

WHEREAS, such investigations frequently require taking testimony from witnesses; and

WHEREAS, there is a need to develop uniform rules of procedure for conducting complex investigations in which a committee is delegated the power to subpoena witnesses; and

WHEREAS, witnesses called to testify in such investigations must be able to rely on certain procedures and rights in terms of their appearances before such committees; and

WHEREAS, such rules must be carefully considered in order that the best interests of legislative committees and witnesses appearing before such committees will be served; now, therefore, be it

ORDERED, the Senate concurring, that the Legislative Council be authorized, through the Joint Standing Committee on State Government to study the establishment of uniform rules of procedure for legislative committees which have been delegated the subpoena power and uniform rights for witnesses required to testify before such committees; and be it further

ORDERED, that the Department of the Attorney General be respectfully requested to cooperate with the committee and provide such technical assistance as the committee deems necessary; and be it further

ORDERED, that the Council report the results of its findings together with any proposed recommendations and necessary implementing legislation to the next special or regular session of the legislature;

and be it further

ORDERED, Upon passage in concurrence, that suitable copies of this Order be transmitted forthwith to said agencies as notice of this directive.

IN SENATE
TAKEN FROM TABLE ON MOTION
BY SEN. SPEERS OF KENNEBEC
JUN 20 1975
MOTION BY Senator
re Tabled
SECRETARY

IN SENATE CHAMBER read and TABLED BY SEN. SEN. BERRY OF CUMBERLAND
JUN 20 1975
PENDING Passage
HARRY N. STARBRANCH, Secretary
SPEC. ASSIGN'D FOR later in the day

HOUSE OF REPRESENTATIVES
READ AND PASSED
JUN 19 1975
SENT UP FOR CONCURRENCE

HP1741

(Cooney)

Name:

Town: Sabattus

III. PROCEDURAL DUE PROCESS

The Fourteenth Amendment of the federal Constitution provides that, "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ." Due process of law has two aspects: procedural and substantive. Procedural due process assures the witness a fair hearing. Substantive due process protects the freedom of speech, press and other substantive rights constitutionally guaranteed him. Pertinent aspects of substantive due process are set forth in Section IV of this survey, those of procedural due process are as follows.

A. Competent Tribunal

An essential element of a fair hearing is a competent tribunal; that is, a tribunal which has authority to act and which conducts itself in accordance with that authority.

Two elements of committee competency are jurisdiction and quorum.

1. *Jurisdiction*

As previously explained (Section II above), a committee's jurisdiction is defined by its authorization. Action by the committee beyond the scope of its authority is void. For example, a committee's questions which are directed beyond its authorized scope of inquiry are void; a witness may rightfully refuse to answer them. (*Kilbourn* v. *Thompson; McGrain* v. *Daugherty.*)

2. *Quorum*

If the committee's authorization requires a quorum to be present for the taking of testimony, then in order to indict a witness for perjury, a quorum must be present when the challenged testimony is procured. (*Christoffel* v. *United States.*) In such circumstances, however, the witness must raise the quorum question at the hearing and thus provide the committee an opportunity to establish a quorum. If the witness does not raise the quorum question until the trial, he forfeits that ground of his defense. (*United States* v. *Bryan.*)

B. Pertinent Inquiry

Questions asked the witness must be pertinent to the subject under inquiry, otherwise the witness cannot be compelled to answer. There are several sources from which the witness may learn the subject and scope of inquiry: the committee's authorization (statute or resolution); the remarks of the chairman or members of the committee; or even the nature of the proceedings themselves might sometimes make the topic clear.

Procedural due process requires that the subject matter be made to appear with undisputable clarity:

> . . . it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it. (*Watkins* v. *United States.*)

IV. DUTIES, RIGHTS AND PRIVILEGES OF WITNESSES

A. Duties

It is unquestionably the duty of all witnesses under the Legislature's jurisdiction to cooperate with the Legislature in its efforts to obtain information needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Legislature and its committees and to testify fully with respect to matters within the province of proper investigation. (*Watkins* v. *United States.*)

B. Rights

In addition to rights he may have under state law, the witness has certain rights protected by the United States Constitution from unwarranted state interference. What constitutes "unwarranted" state interference is judicially defined within the concept of due process. (*Palko* v. *Connecticut.*) Those rights established by the United States Constitution which are pertinent to the investigative powers of State Legislatures are set forth in provisions of the First, Fourth, and Fifth Amendments, which have been judicially incorporated into the due process clause of the Fourteenth Amendment.

1. *First Amendment*

Under the First Amendment, a witness is protected from unwarranted interference of the federal government with his freedoms of speech, religion, press and assembly. The United States Supreme Court has interpreted the Fourteenth Amendment's due process clause to include the First Amendment freedoms among the liberties protected by virtue of the federal document. (*Munn* v. *Illinois; Near* v. *Minnesota.*)

Thus, before a witness can be compelled to testify about his beliefs, expressions or associations, the investigating committee must meet the standards of substantive due process; that is, the committee's "right to be informed" must outweigh the substantive rights of the witness. For example, an investigating committee could not compel a professor to disclose the subject of a particular lecture he gave unless the committee could establish that the state government was endangered by the subject matter allegedly presented by the professor in the lecture in question. (*Sweezy* v. *New Hampshire.*)

2. *Fourth Amendment*

In gathering information from persons in their homes, place of business, or elsewhere, an investigating committee must comply with the Fourth Amendment provision protecting persons from "unreasonable searches and seizures." The United States Supreme Court holds that the Fourth Amendment protection against "unreasonable searches and seizures" is applicable to state proceedings by virtue of the Fourteenth Amendment's "due process clause." (*Elkins* v. *United States; Mapp* v. *Ohio.*)

In the issuance of subpoenas for documentary evidence, obviously it is not always easy for a committee to specify precisely the documents which may prove significant to the investigation. Very broad subpoenas "are a commonplace." (Read, *et al., Legislation*, p. 429.) However, the Fourth Amendment protects persons from "unreasonable" subpoenas which call for information "irrelevant" to the matter authorized for committee inquiry. (*Small Business Administration* v. *Barron.*) The true test is not whether the documents subpoenaed are private, personal records, but rather whether the records are within the scope of the inquiry and relevant to the investigation. (*ASP Incorporated* v. *Capital Bank and Trust Company; Annenberg* v. *Roberts.*)

3. *Fifth Amendment*

(a) PRIVILEGE AGAINST SELF-INCRIMINATION

The Fifth Amendment provides that no person shall be compelled to be a witness against himself. This provision protects the witness from self-incrimination in state proceedings also by virtue of the Fourteenth Amendment's "due process clause."

The privilege against self-incrimination—that is, the privilege of a witness to refuse to testify on the ground that his testimony may incriminate him—is purely a personal privilege; it cannot be utilized by or on behalf of any organization, such as a corporation. Individuals, when acting as representatives of a collective group, are not entitled to the privilege. Moreover, "the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally." (*United States* v. *White.*)

A witness who exercises the privilege is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for a court to determine whether his silence is justified and to require him to answer if he is mistaken. (*Hoffman* v. *United States.*)

(b) IMMUNITY STATUTES

The object of the constitutional privilege against self-incrimination is to secure the witness against a criminal prosecution. (*Brown* v. *Walker.*) If a witness is not subject to prosecution for crimes to which his withheld testimony relates, he cannot invoke the privilege, and can be compelled to disclose the information withheld. Thus, if a State has an "immunity statute" which provides that the witness shall not be prosecuted on account of testimony he gives under legal compulsion, then his testimony cannot "incriminate" him. Therefore, he cannot invoke the privilege against self-incrimination and he must testify. (*Brown* v. *Walker; Counselman* v. *Hitchcock;* see also 53 ALR 2d 1030.) The immunity also transcends jurisdictional limits, so that testimony compelled in one place cannot be prosecuted in another. (*Murphy* v. *Waterfront Commission; Malloy* v. *Hogan.*)

C. Executive Privilege

The executive branch of government is within the scope of legislative inquiry. (*McGrain* v. *Daugherty.*) Investigative power of a Legislature encompasses inquiries concerning the administration of existing laws, and comprehends probes into executive departments to expose corruption, inefficiency and waste. (*Watkins* v. *United States.*)

But the Legislature's power to investigate the Executive Branch, like its power to investigate private persons, is not unlimited. Just as it must contend with the Bill of Rights when investigating private persons, the Legislature must contend with the constitutional separation of powers when investigating the Executive Branch. Under that doctrine, the Executive Branch can claim a "right of privacy" which it terms "executive privilege"; that is, a privilege of the Executive Branch to withhold information from the Legislature whenever the Executive Branch believes the disclosure of such information would not be in the public interest.

The following specific grounds for invocation of the executive privilege have been advanced in regard to investigations conducted by Congress:

(1) Congress has no power to legislate on the particular matter in question;

(2) Foreign relations or military security requires the withholding of certain information;

(3) Effective and efficient performance of administrative functions with integrity requires the Executive Branch to safeguard (a) frank internal advice and discussions, (b) information received in confidence, (c) sources of confidential information, (d) methods of investigation, and (e) reputations of innocent persons. (Kramer and Marcuse, p. 899; Younger, p. 773.)

Conflicts between executive privilege and legislative powers of inquiry are not resolved by the courts, but are settled by political means. (Berger, p. 1044; Kramer and Marcuse, p. 903.) One of the major reasons advanced for not submitting such conflicts to the courts is that a dispute between the Executive and Legislative Branches of government is "essentially of a political nature and consequently not justiciable until and unless it develops into a case or controversy by directly affecting the rights of an individual." (Kramer and Marcuse, p. 903.)

However, there are differing opinions on the significance and applicability of the "political question" doctrine to controversies over executive privilege. One writer criticizes application of the doctrine to such controversies for the following reasons:

(1) In practice, the Executive Branch is "in the driver's seat" in the political resolution of such executive-legislative controversies;

(2) Neither branch, "in Madison's words, has the 'superior right of settling the boundaries between their respective powers' ";

(3) The power of determining those boundaries "was given to the courts," and the courts have exercised that power in "disputes between two States, between the United States and a State, between a Department and an independent agency";

(4) The justiciability of so-called "political questions" has been established by the reapportionment cases. He concludes, therefore, that the "intolerably prolonged controversy" over executive privilege "must be submitted to the courts." (Berger, pp. 1349, 1361, and 1362.)

On the other hand, there are writers who support the application of the "political questions" doctrine to controversies over executive privilege. The contention of two such writers is as follows:

> When these two powers (i.e., Congressional investigative authority and Executive privilege) . . . clash . . . we believe the conflict should be resolved, not by legal, but by political means. In our judgment, certain specific procedures and considerations, together with the exercise of mutual respect and self-restraint, will lessen the keen tensions which exist when these two branches of government here collide. We have faith that in the future, as in the past, our leaders will demonstrate the statesmanship required for the effective functioning of our political system by avoiding all-out assertions of these clashing powers—powers which are not absolute or mutually exclusive, but which must be maintained in a delicate balance. (Kramer and Marcuse, pp. 626 and 627.)

Controversies over executive privilege in legislative investigations continue to be settled by political means; whether responsibility for their resolution will ever be tendered to—and accepted by—the courts, remains to be seen.

FIRST SPECIAL SESSION

State of Maine

In the Year of our Lord, Nineteen Hundred seventy-six.

An Act to Amend the Rules for Legislative Investigating Committees.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. 3 MRSA §401, as enacted by PL 1975, c. 593, §3, is amended to read:

§401. Short title and purpose

This Act may be called "Rules for Legislative Investigations." The purpose of this Act is to establish rules of fair procedure for legislative investigating committees in order to provide for the creation and operation of such committees in a manner which will enable them to properly exercise the powers and perform the duties delegated to them by the Legislature, including the conduct of hearings in a fair and impartial manner consistent with the protection of the fundamental constitutional rights of persons called to testify at such hearings.

Sec. 2. 3 MRSA §402, sub-§1, 2nd sentence, as enacted by PL 1975, c. 593, §3, is repealed and the following enacted in place thereof:

The chairman may be either the permanent chairman, elected by the affirmative votes of a majority of committee members, or another member designated by the permanent chairman to be temporary chairman in the absence of the permanent chairman.

Sec. 3. 3 MRSA §402, sub-§4, as enacted by PL 1975, c. 593, §3, is amended to read:

4. Investigating committee. An "investigating committee" is any committee of the Legislature which has been granted ~~by the Legislature~~ the power to administer oaths, issue subpoenas and take depositions, as authorized by section 165, subsection 7. "Investigating committee" shall include the Legislative Council when it exercises the authority granted under section 162, subsection 4, ~~but shall not include the Committee on Legislative Ethics when it exercises the authority granted under section~~ 301-A, subsection 2, paragraph B.

Sec. 4. 3 MRSA §402, sub-§5, as enacted by PL 1975, c. 593, §3, is repealed.

Sec. 5. 3 MRSA §402, sub-§6, as enacted by PL 1975, c. 593, §3, is amended to read:

6. Members. The "members" of an investigating committee are the legislators appointed ~~by the Legislature~~ to serve on the committee.

Sec. 6. 3 MRSA §402, sub-§7, as enacted by PL 1975, c. 593, §3, is amended to read:

7. Quorum. A "quorum" is a majority of the members of ~~a~~ the ~~legislative~~ investigating committee.

Sec. 7. 3 MRSA §411, as enacted by PL 1975, c. 593, §3, is amended to read:

§411. Creation

Whenever the Legislature delegates to a committee the power to administer oaths, issue subpoenas and take depositions in connection with any study or investigation, such committee shall ~~automatically~~ become an investigating committee for the purpose of such study or investigation and shall be subject to the provisions of this chapter, whether or not such power is utilized by the committee in the course of such study or investigation.

Sec. 8. 3 MRSA §413, as enacted by PL 1975, c. 593, §3, is amended to read:

§413. Number of members; makeup of committee

~~No~~ An investigating committee shall consist of ~~fewer than~~ at least ~~3~~ 9 members. The membership of each such committee shall reasonably reflect the political composition of the Legislature. Whenever any action by the committee requires the presence of a quorum, or the affirmative votes of a majority of the members, the quorum or majority shall include members from more than one political party.

Sec. 9. 3 MRSA §421, as enacted by PL 1975, c. 593, §3, is repealed.

Sec. 10. 3 MRSA §422, as enacted by PL 1975, c. 593, §3, is repealed and the following enacted in place thereof:

§422. Order of procedure

The order of procedure in making a study or an investigation shall be established by the affirmative votes of a majority of the committee members.

Sec. 11. 3 MRSA §423, as enacted by PL 1975, c. 593, §3, is amended to read:

§423. Issuance of a subpoena

The decision to issue a subpoena shall be an ~~investigating committee action~~ require the affirmative votes of a majority of committee members. Subpoenas shall be signed by the chairman.

Sec. 12. 3 MRSA §424, as enacted by PL 1975, c. 593, §3, is repealed and the following enacted in place thereof:

§424. Notice to witnesses

1. Subpoenaed witnesses. Service of a subpoena requiring the attendance of a person at a hearing of an investigating committee, or requiring a person to provide the committee with books, accounts, documents or other testimony shall be made in the manner provided for the service of subpoenas in civil actions in the Superior Court at least 10 days prior to the date of the hearing. Such subpoena shall include a listing of any specific matters within the scope of the investigation concerning which the testimony of the supoenaed witness will be sought. Any person so served with a subpoena shall at the same ti be served with a copy of the order, resolution or statute authorizing the investigation, a copy of the rules under which the committee functions, a notice that he may be accompanied at the hearing by counsel and a copy of that portion of the committee records pertaining to authorization of the issuance of his subpoena.

2. Voluntary witnesses and interested parties. Any voluntary witness or interested party who requests permission to testify before the committee shall be given, in advance of his appearance before the committee, a copy of the order, resolution or statute authorizing the investigation, a copy of the rules under which the committee functions and a notice that he may be accompanied at the hearing by counsel.

3. Extensions of time. Any subpoenaed witness may request in writing to the committee that he be granted additional time to prepare for his testimony before the committee. The committee may, upon the affirmative votes of a majority of the committee members, grant the request and establish a new date for his testimony.

Sec. 13. 3 MRSA §425, as enacted by PL 1975, c. 593, §3, is repealed.

Sec. 14. 3 MRSA §426, 1st and 2nd sentences, as enacted by PL 1975, c. 593, §3, are amended to read:

All testimony of subpoened witnesses shall be under oath or by affirmation. ~~A voluntary~~/Other witnesses may be required by the affirmative votes of a majority of the committee members to testify under oath ~~by legislative committee action~~ or by affirmation.

Sec. 15. 3 MRSA §427, as enacted by PL 1975, c. 593, §3, is amended to read:

§427. Testimony

Taking of testimony shall be by ~~the investigating committee's counsel, or other staff personnel or~~ the members of the committee. A quorum shall be present. Unless otherwise decided by ~~investigating committee action,~~ the affirmative votes of a majority of committee members, upon the request of the witness, all testimony shall be taken in open session. ~~However, if any witness so requests, his testimony shall be taken in executive session, unless otherwise decided by investigating committee action.~~ If a witness requests that his testimony be taken in executive session, the committee shall meet in executive session to hear the reasons for such request before voting in public session upon the request. Testimony taken in executive session shall be used in the report of the committee only upon the affirmative votes of a majority of the committee members.

Sec. 16. 3 MRSA §428, as enacted by PL 1975, c. 593, §3, is amended to read:

§428. Records

A complete record shall be kept of all ~~investigating~~ committee ~~action~~ proceedings, including a ~~transcript of~~ all testimony taken. Except as provided in sections 458 and 459, all such records shall be placed on file with the Secretary of the Senate at the conclusion of

the investigation, and shall become public records at the conclusion of the biennium in which the investigating committee was created. Such records shall be retained by the Secretary of the Senate for that biennium, at which time the records shall be transferred to the Maine State Archives for disposition in accordance with procedures adopted by the State Archivist pursuant to Title 5, section 91, et seq.

Sec. 17. 3 MRSA §429, as enacted by PL 1975, c. 593, §3, is repealed and the following enacted in place thereof:

§429. Transcripts of testimony

Upon payment of the cost of preparation, any person may obtain a transcript of testimony taken in open session. No testimony taken in executive session shall be available in transcript form to the public. A witness, upon payment of the cost of preparation, may obtain a copy of his own testimony in executive session.

Sec. 18. 3 MRSA §430, as enacted by PL 1975, c. 593, §3, is repealed and the following enacted in place thereof:

§430. Suspected criminal activity

1. Warning. Prior to receiving the testimony of any witness, the chairman of the committee shall warn the witness of the provisions of subsection 2 and sections 453, 454 and 471.

2. Reporting. If in the course of the investigation, the investigating committee has cause to suspect any person of violating any provisions of Title 17 or Title 17-A, it shall, by the affirmative vote of a majority of its members, instruct the chairman of the committee to notify the Attorney General of the suspected violation.

Sec. 19. 3 MRSA §451, 2nd sentence, as enacted by PL 1975, c. 593, §3, is repealed.

Sec. 20. 3 MRSA §452, as enacted by PL 1975, c. 593, §3, is repealed.

Sec. 21. 3 MRSA §453, as enacted by PL 1975, c. 593, §3, is repealed and the following enacted in place thereof:

§453. Refusal to testify on constitutional or statutory grounds

During the time he is giving testimony, a witness may refuse to answer any question addressed to him by the committee or to provide information or documents requested by the committee, which would, if answered or provided, violate the rights guaranteed him under the federal

Constitution or the Maine Constitution, or which would violate any personal privilege established by statute, or which is not within the scope of the investigation as this is defined and limited by the authorization for the investigation.

Sec. 22. 3 MRSA §454, as enacted by PL 1975, c. 593, §3, is repealed and the following enacted in place thereof:

§454. Refusal to testify on procedural grounds

A witness may refuse to testify before a committee or to provide requested information to a committee, if:

Makeup of committee.

1. / The committee is not constituted as required by section 413;

Subpoena.

2. / His subpoena was not issued in accord with the requirements of section 423 and section 424, subsection A; or

Quorum.

3. / A quorum of the committee is not present as required by section 427.

Sec. 23. 3 MRSA §455, as enaacted by PL 1975, c. 593, §3, is repealed and the following enacted in place thereof:

§455. Television, films or radio broadcasts

The committee may decide by the affirmative votes of a majority of the members to televise, film or broadcast testimony taken in open session.

Sec. 24. 3 MRSA §456, as enacted by PL 1975, c. 593, §3, is repealed and the following enacted in place thereof:

§456. Forms of answers and statements

In giving testimony, the witness may briefly explain his answers or statements. The witness may insert in the record sworn, written statements of reasonable length relevant to the subject matter and scope of the investigation.

Sec. 25. 3 MRSA §457, as enacted by PL 1975, c. 593, §3, is repealed.

Sec. 26. 3 MRSA §458, as enacted by PL 1975, c. 593, §3, is amended to read:

§458. Rights of interested parties

Any interested party may request an opportunity to appear before the investigating committee. The decision ~~on this~~ to grant such a request shall be ~~investigating committee action~~ by the affirmative votes of a majority of the committee members. If such request is granted, the interested party shall appear before the committee as a

witness. If such request is not granted, that part of the testimony in which the interested party was specifically identified or which makes identification possible shall not be used in the report of the committee, shall be expunged from the records of the committee and shall not be the basis of, or be admissible as evidence in proceedings relating to any criminal charge against such person.

Sec. 27. 3 MRSA §459 is enacted to read:

§459. Rights of persons referred to in executive session testimony

If any person is specifically identified in testimony taken before an investigating committee in executive session, the committee shall notify such person by registered mail or personally that he has been so identified and shall provide in the notice a transcript of the testimony relating to him. Such person may within 10 days of receipt of notice request an opportunity to appear before the committee as an interested party. If the person is not notified as provided in this section, or if his request to appear before the committee is not granted as provided in section 458, that part of the testimony in which the witness was specifically identified or which makes identification possible shall not be used in the report of the committee, shall be expunged from the records of the committee and shall not be used as the basis of, or be admissible as evidence in proceedings relating to any criminal charge against such person.

Sec. 28. 3 MRSA c. 21, subchapter V, as enacted by PL 1975, c. 593, §3, is repealed and the following enacted in place thereof:

SUBCHAPTER V.

IMMUNITY AND ENFORCEMENT

§471. Immunity

An investigating committee may, upon the affirmative votes of a majority of the committee, grant a witness use immunity for any testimony to be given before the committee. If the committee grants the witness immunity, no testimony required of the witness under the immunity grant shall be used to subject the witness to any criminal proceeding or any penalty or forfeiture, nor shall such testimony be

competent testimony in any criminal proceeding against the witness in any court, except upon a prosecution for perjury or a similar offense committed in giving the testimony. If an investigating committee shall grant ← → immunity to a witness, the chairman shall immediately notify the Attorney General of the immunity granted.

§472. Legislative responsibility

The Legislature has the responsibility for insuring adherence to these rules.

Statement of Fact

The purpose of this Act is to clarify the provisions governing legislative investigating commtttees. Aside from changes in language to clarify the present statute, the following substantive changes are made:

1. The investigating committee is enlarged and must reasonably reflect the political composition of the Legislature.
2. The methods for notifying and subpoenaing witnesses are set out in detail.
3. The provisions regarding open and executive sessions are set out in detail, providing for media coverage of open session and public access to any testimony in open session; but also providing for witness protection by executive sessions with limited release of testimony and expungement provisions and by providing protection for those identified by testimony of others.
4. A provision allowing the committee, after having warned the witness giving testimony, to report suspected criminal activity to the Attorney General.
5. The witness is given specific constitutional, statutory and procedural grounds on which he may refuse to testify.
6. The investigating committee is given the authority to grant limited immunity from criminal prosectution in order to receive potentially incriminating testimony.
7. The enforcement of these provisions, including the compelling of testimony and the determination of valid witness objections, is by action of the Legislature through its own authority. The sections that require Superior Court enforcement are removed.