



State Legislative Investigation of Federal Activities

by Michael Stern

The power of state legislatures to conduct oversight and investigations has long been recognized. See *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (“Investigations, whether by standing or special committees, are an established part of representative government.”); *id.* at 378 n.6 (“It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees.”) (quoting Woodrow Wilson, *Congressional Government* 303 (1885)); *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927) (“In actual legislative practice, power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the colonial legislatures before the American Revolution, and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures.”).

While the precise scope of a state legislature’s investigative authority may vary by state law, generally the legislative power of investigation is as broad as the power to legislate or perform other tasks within the jurisdiction of the legislature. See *Trump v. Mazars*, 591 U.S. ___, slip op. at 11 (2020). It includes inquiries into the administration of existing laws, studies of proposed laws, and surveys of social, economic or political problems that may require legislative remedies. *Id.*

The legislative power of investigation also includes the use of compulsory process. See *McGrain*, 272 U.S. at 174 (“We are of opinion that the power of inquiry -- with process to enforce it -- is an essential and appropriate auxiliary to the legislative function.”). This power, however, is not unlimited. A legislative subpoena must serve a “valid legislative purpose” and not merely “expose for the sake of exposure.” *Quinn v. United States*, 349 U.S. 155, 161 (1955); *Watkins v. United States*, 354 U.S. 178, 200 (1957).

There is nothing unusual about state legislatures gathering information about federal programs or activities, such as the levels of federal funding for healthcare or education, that will affect their budgets or other aspects of their legislative agenda. See Michael Vitiello, *The Power of State Legislatures to Subpoena Federal Officials*, 58 Tul. L. Rev. 548, 549 (1983-84) (“Because of broad concurrent powers, state legislatures may frequently be aided by acquisition of information possessed by federal officials.”). Such information is ordinarily publicly available or voluntarily provided. While the use of compulsory process in this connection is rare, in principle a state legislature should be able to inquire into federal activities that are conducted within or affect its state so long as the information sought relates to a matter within the authority of the legislature. See generally *id.*



A more difficult issue would arise if a state legislature attempted to compel the production of information directly from federal officials or agencies. Any such effort would undoubtedly be met by a claim of federal immunity from state process and other defenses grounded in the U.S. Constitution. See Vitiello, 58 Tulane L. Rev. at 551-558. Only one older district court case directly addresses this issue. In that case the district court enjoined a Pennsylvania Senate committee, after it issued subpoenas for testimony and documents to multiple federal officials, from conducting its investigation into the organization, administration and functioning of the federal Works Progress Administration in Pennsylvania. *United States v. Owlett*, 15 F. Supp. 736, 742-43 (M.D. Pa. 1936). The court found that the investigation was “contrary to and in obstruction of the proper governmental functions of the United States of America” and that the committee had “no jurisdiction to make the investigation proposed by Senate Resolution No. 1, since the subject-matter of the investigation, the Works Progress Administration, a federal agency, is a matter over which the Senate has no legislative power.” *Id.* at 740, 742.

While the reasoning and language of *Owlett* are subject to criticism, see Vitiello, 58 Tulane L. Rev. at 568-69, the decision highlights the importance of identifying the state legislative interests at issue before commencing an investigation into federal activities. A resolution authorizing an investigation into such activities should indicate with as much specificity as possible areas of legislation that may be informed by the investigation.

In addition, the legislature should consider invoking its express authority to apply for a federal amendments convention under Article V of the U.S. Constitution. In this connection the investigating committee could be authorized to communicate with other states that may be interested in applying for a convention to address a common area of concern. Neither *Owlett* nor any other case has considered the effect of this constitutional power on the authority of a state legislature to conduct oversight of federal activities.

In any event, a state legislative investigation will not necessarily need to issue compulsory process against federal officers or agencies. Much needed information can be obtained from sources such as whistleblowers, private contractors, state agencies and officials, and a variety of other non-federal sources. Accordingly, lawmakers may wish to draft a state resolution authorizing an investigation into federal activities by either a standing or special committee that initially exempts federal officials and agencies from the committee’s compulsory process. If the committee is unable to obtain the requisite information from federal sources on a voluntary basis, it may then request further authority from the legislative chamber.