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INVESTIGATORY POWERS OF CITY COUNCILS

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The investigating activities and powers of Congress have in recent years occupied the limelight in the newspapers, on the radio and television, and in the journals. [1] The investigating activities of state legislatures and of city councils have received less attention. As a part of the legislative process at the state and local levels, the investigatory power is also needed—and used.

Regardless of the level of government—national, state, or local—certain problems arise in the use of the power of investigation by the legislative branch, and certain abuses may develop. Whatever the level of government, the power of investigation may be used to further the legislative process and to attain needed, desirable, and workable legislation; or it may be used for personal or political purposes. It may be used to further the political ambitions of some or all members of the investigating committee; or it may be used to embarrass a particular administration in the belief it will further the fortunes of one political party.

What are the questions which have arisen in the use of the investigatory power by city councils, and how have they been answered by the courts? The first problem that has arisen is the scope and extent of the investigating power of city councils. Is such a power inherent or must it be specifically granted by the state, either by statutory or constitutional provision? If a specific grant is needed, does a constitutional grant of home rule include the power of council investigation? Whether the power is inherent or must be based on an express grant, what are the limitations as to scope? The courts are not in agreement on the answers to these questions.

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[1] For the investigating power of Congress and the problems arising from the use of such power, *see e.g.*, Forrester, *History and Function of Congressional Investigations*, 8 ARK. L. REV. 352(1954); Lashley, *Investigating Power of Congress: Its Scope and Limitations*, 40 A.B.A. J. 763, 808 (1954); Becker *et al., Symposium on Congressional Hearings and Investigations*, 14 FED. B. J. 5 (1954); Huard, *Fifth Amendment—An Evaluation*, 42 GEO. L. J. 345 (1954); Levi *et al., Congressional Investigations, a Symposium*, 18 U. OF CHI. L. REV. 421 (1951); Boudin, *Congressional and Agency Investigations—Their Uses and Abuses*, 35 VA. L. REV. 143 (1949).

Those courts taking a liberal position in respect to the investigatory powers of city councils hold, as did the New York Common Pleas Court in 1855, that "the right to pass laws, necessarily implies the right to obtain information upon any matter which may become the subject of law."[2] This position has been taken by the courts of several other states.[3] The Supreme Court of Tennessee has held that a municipal council has inherent authority to investigate the activities of its several departments and employees.[4] And the Court of Appeals of Ohio has gone so far as to say that:

> "the city council has an inherent power to make full and complete investigation on any matter coming within their operative function, whether in contemplation of future legislation or not."[5]

In other cases the courts have taken a more strict view of the right of a city council to investigate and have held that the power must be expressly conferred by statute. This was the position taken by the Supreme Court of Albany County, New York, in a 1920 decision when it held, "The common council of a city has none of the inherent powers of the Legislature * * * except as such powers may be expressly granted."[6]

Since the investigatory power of a city council has been conferred by statute in several states, the question as to whether the power is inherent and exists independently of statute has not arisen. In some cases where the power has been granted by statute, the courts have, however, stated that the power was inherent and would exist even if not expressly conferred.[7]

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[2] Briggs v. Mackellar, 2 Abb. Pr. 30 at 56 (N.Y. 1855). The court referred to the principle of Parliamentary Law, that either house of a legislative body may institute an investigation upon "any matter affecting the public interest upon which it may be important that it should have exact information and in respect to which it would be competent for it to legislate," and pointed out that this rule has been accepted by the legislative bodies of the country.

[3] *See, e.g.,* State *ex rel.* Holloway v. Rhodes, 33 O.L.A. 26, 35 N.E.2d 987 (1940); Herlands v. Surpless, 258 App. Div. 275, 16 N.Y.S.2d 454 (1st Dept. 1939), *aff'd without opinion,* 282 N.Y. 647, 26 N.E.2d 800 (1939).

[4] Leahy v. City of Knoxville, 193 Tenn. 242, 245 S.W.2d 772 (1951).

[5] State *ex rel.* Holloway v. Rhodes, note 3 *supra* at 990.

[6] *In re* Investigation of Contracts of the City of Albany and Its Officials, 113 Misc. 370, 184 N.Y.S. 518 (Sup.Ct. 1920). Both earlier and later decisions in that state had declared that the right to investigate was inherent in the right to legislate, Briggs v. Mackellar, 2 Abb. Pr. 30 at 54 (N.Y. 1855), and Herlands v. Surpless, 258 App. Div. 275, 16 N.Y.S.2d 454, 457 (1st Dept. 1939), *aff'd without opinion,* 282 N.Y. 647, 26 N.E.2d 800 (1939). See also 4 McQUILLIN, MUNICIPAL CORPORATIONS, §13.05 (3d ed. 1949).

[7] Leahy v. City of Knoxville, 193 Tenn. 242, 245 S.W.2d 772 at 773 (1951): "We think that a municipality has the inherent authority to investigate the activities of its several departments and employees. However, in looking to the charter provisions of the city of Knoxville, we find ample authority for such investigations." Herlands v. Surpless, 258 App. Div. 275, 16 N.Y.S.2d 454 at 457 (1st Dept. 1939), *aff'd without opinion,* 282 N.Y. 647, 26 N.E.2d 800 (1939): "Aside from the express right to investigate conferred by statute, the right to pass laws necessarily implies the right to direct an investigation of any matter which

In New York City the charter explicitly gives the council authority to conduct investigations and take testimony of witnesses under oath.[8] The number of cases in recent years involving investigations made under this grant is indicative of the use which is made of the power.[9] Cases have arisen under similar charter authorizations in St. Louis;[10] Toledo[11] and Columbus,[12] Ohio; Yonkers,[13] Niagara Falls,[14] and Kingston,[15] New York; Knoxville, Tennessee;[16] and Virginia, Minnesota.[17]

In some states the legislature has by general act empowered city councils to carry out investigations. An appellate court of New York, in the case of *Frank v. Balog,* held,

> "The provision in General City Law for conduct of inquiry into city affairs, attendance of witnesses, and issuance of subpoena in furtherance thereof is applicable where express statutory authority does not otherwise exist for such procedure."[18]

In 1920, a statute of the State of New York — the Second Class Cities Law, section 40 — was cited by the Supreme Court of Albany

may become the subject of law." State *ex rel.* Holloway v. Rhodes, 33 O.L.A. 26, 35 N.E.2d 987 (1940).

[8] NEW YORK CITY CHARTER, §43 (1943), grants the City Council power to investigate "any matters relating to the property, affairs, or government of the city." See also the charters adopted under authority of LAWS (1934), c. 867, by referendum Nov. 3, 1936, effective Jan. 1, 1938; and LAWS (1897), c. 378, as revised by LAWS (1901), c. 466.

[9] La Guardia v. Smith, 176 Misc. 482, 288 N.Y. 1, 41 N.E.2d 153 (1942); Barry v. City of New York, 175 Misc. 712, 25 N.Y.S.2d 27 (Sup. Ct. 1941); Smith v. Kern, 175 Misc. 937, 26 N.Y.S.2d 560 (Sup. Ct. 1940), *aff'd without opinion,* 260 App. Div. 1003, 24 N.Y.S.2d 992 (1st Dept. 1940), *aff'd without opinion,* 285 N.Y. 632, 33 N.E.2d 556 (1941); *In re* Radio Station WNYC (Novik), 169 Misc. 502, 7 N.Y.S.2d 297 (Sup. Ct. 1938), *aff'd without opinion,* 255 App. Div. 844, 7 N.Y.S.2d 998 (1st Dept. 1938), *aff'd without opinion,* 280 N.Y. 628, 20 N.E.2d 1008 (1939); Herlands v. Surpless, 258 App. Div. 275, 16 N.Y.S.2d 454 (1st Dept. 1939), *aff'd without opinion,* 282 N.Y. 647, 26 N.E.2d 800 (1939).

[10] *Ex parte* Holman, 197 Mo. App. 70, 191 S.W. 1109, *aff'd,* 270 Mo. 696, 195 S.W. 711 (1917); *Ex parte* Conrades, 185 Mo. 411, 85 S.W. 150 (1904); *In re* Dunn, 9 Mo. App. 255 (1880).

[11] Haas v. Jennings. Same v. La Penas. Same v. Murphy, 120 Ohio St. 370, 166 N.E. 357 (1929). The charter provision quoted here is typical: "Section 58. *Investigations by Council.* The council, or any committee thereof duly authorized by the council to do so may investigate the financial transactions of any office or department of the city government, and the official acts and conduct of any city official, and by similar investigations may secure information upon any matter within its competence as a legislative body. . . ."

[12] State *ex rel.* Holloway v. Rhodes, 33 O.L.A. 26, 35 N.E.2d 987 (1940).

[13] Frank v. Balog, 189 Misc. 1016, 73 N.Y.S.2d 285, *aff'd,* 272 App. Div. 941, 72 N.Y.S.2d 75 (2nd Dept. 1947). This investigation was authorized, according to the court, not only by the city's Supplemental Charter but also by the General City Law and Civil Practice Act, §406.

[14] Judson v. City of Niagara Falls, 140 App. Div. 62, 124 N.Y.S. 282 (4th Dept. 1910), *aff'd,* 204 N.Y. 630, 97 N.E. 1107 (1910).

[15] People *ex rel.* Webster v. Van Tassel, 64 Hun. 444, 17 N.Y.S. 938, *aff'd,* 19 N.Y.S. 643 (3rd Dept. 1892).

[16] Leahy v. City of Knoxville, 193 Tenn. 242, 245 S.W.2d 772 (1951).

[17] State *ex rel.* Peers v. Fitzgerald, 131 Minn. 116, 154 N.W. 750 (1915). The court did not question the city's right to investigate under its home rule charter, but refused to sanction its right to punish a witness. See note 104 *infra.*

[18] See note 13 *supra.*

County as vesting the council of the City of Albany with the power to investigate.[19] As early as 1860 the common council of any city in the same state had power to investigate, summon witnesses, and punish for perjury and contempt.[20] Today New York still empowers any city "to investigate and inquire into all matters of concern to the city or its inhabitants."[21] A grant of power to investigate in Illinois authorizes municipalities of over 500,000 population to examine and compel attendance of witnesses and production of papers.[22] Missouri grants investigatory powers to all four classes of cities in that state.[23] Among the other states which have given general grants of power to city councils to investigate are Michigan,[24] Ohio,[25] and Rhode Island.[26]

City councils have scrutinized a variety of matters. Under inquiry have been police departments,[27] a civil service commission,[28] contracts made by a city with a coal company,[29] the widening and improving of a street,[30] the management of a radio station[31] and of a hospital,[32]

[19] *In re* Investigation of Contracts of City of Albany and Its Officials, 113 Misc. 370, 184 N.Y.S. 518 (Sup. Ct. 1920). §40 of the Second Class Cities Law stated, "The common council may . . . regulate the powers and duties of any city officer or department and it has power to investigate all city officers and departments and shall have access to all records and papers kept by every city officer or department, and has power to compel attendance of witnesses and the production of books, papers or other evidence at any meeting of the common council or of any committee thereof, and for that purpose may issue subpoenas signed by the president." Cities of the second class at that time were cities of from 50,000 to 175,000 population, N.Y. CONST, art. XII, §2 (1920). In this case the court held that it was the Second Class Cities Law, *supra,* rather than the sections of the General City Law, relating to investigations by committees of a common council, that conferred on a committee or council of a city of the second class the authority to investigate municipal affairs.

[20] COMP. OF LAWS OF THE STATE OF N.Y. RELATING PARTICULARLY TO THE CITY OF N.Y. (Valentine 1862). 477: "An Act to compel the Attendance of Witnesses before Committees of Common Councils of Cities and to Punish False Swearing by such Witnesses," passed Feb. 18, 1860. §4 of this act repealed "An act to enable the common council of the city of New York to take testimony in matters referred for investigation or inquiry," passed Feb. 8, 1855, and cited in Briggs v. Mackellar, 2 Abb. Pr. 30 at 31, 32, as the authority for a police department investigation.

[21] N.Y. GEN. CITY LAW, §20-21 (1951).

[22] ILL. REV. STAT., c. 24, §23-111 (1953). This excludes all cities of the state except Chicago. DuBois v. Gibbons, 2 Ill.2d 392, 118 N.E.2d 295 (1954) holds this classification valid because "it is founded on a rational difference of situation or condition existing in the persons or objects upon which it rests and there is a reasonable basis for the classification in view of the objects and purposes to be accomplished."

[23] MO. REV. STAT. c. 73, §270; c. 75, §170; c. 77, §100; c. 79, §180 (1949).

[24] COMP. LAWS, MICH. c. 88, §18, 19 (1948).

[25] OHIO REV. CODE ANN. tit. 7, §705.21 (1954).

[26] GEN. LAWS OF R. I. c. 537, §4 (1938). Grants of power to investigate, both general and special, appear to be limited to a comparatively few states.

[27] Haas v. Jennings, 120 Ohio St. 370, 166 N.E. 357 (1929); Briggs v. Mackellar, 2 Abb. Pr. 30 (N.Y. 1855).

[28] Smith v. Kern, 175 Misc. 937, 26 N.Y.S.2d 560 (Sup. Ct. 1940) *aff'd without opinion,* 260 App. Div. 1003, 24 N.Y.S.2d 992 (1st Dept. 1940), *aff'd without opinion,* 285 N.Y. 632, 33 N.E.2d 556 (1941).

[29] *In re* Investigation of Contracts of City of Albany and Its Officials, 113 Misc. 370, 184 N.Y.S. 518 (Sup. Ct. 1920).

[30] *In re* Van Tine a Nims, 12 How. Pr. 507, 3 Abb. Pr. 39 (N.Y. 1855).

[31] *In re* Radio Station WNYC (Novik), 169 Misc. 502, 7 N.Y.S.2d 297 (Sup. Ct. 1938), *aff'd without opinion,* 255 App. Div. 844, 7 N.Y.S.2d 998 (1st Dept. 1938), *aff'd without opinion,* 280 N.Y. 628, 20 N.E.2d 1008 (1939).

collective action of city employees in lobbying,[33] the administration of relief funds,[34] and the alliance between crime and politics.[35]

The courts are the final arbiters as to the subjects which may be investigated. The subject-matter of inherent investigatory power has generally been conceded to be as broad as, if not broader than, that upon which cities may legislate.[36] Statutes or charters tend to grant authority to investigate almost any municipal office or department,[37] action not necessarily within a city council's power to legislate.[38] Inquiries cannot extend to the private affairs of citizens.[39] Yet courts have refused to concern themselves with the motives, the reasonableness, and even the subject-matter of an investigating committee of a city council.[40]

In its investigative capacity a city council may act more independently of the executive than in its legislative capacity. A resolution of the New York City Council setting up an investigating committee was held, because of its style and language, not to require the approval of the mayor;[41] nor was the Commissioner of Investigation, an administrative officer of the executive branch of the same city, permitted to inquire into the wisdom of certain council action in an investigation.[42] Conversely,

> "Neither the mayor nor any other city officer is beyond the scope of investigations which committees appointed by the New York City Council are authorized by charter to make, unless some statute or other principle of law secures to the mayor immunity from subpoena by such committee."[43]

[32] *In re* Lincoln Hospital, Bronx, 174 Misc. 389, 20 N.Y.S.2d 712 (Sup. Ct. 1940), *aff'd* 259 App. Div. 883, 20 N.Y.S.2d 717 (1st Dept. 1940), *rev'd on other grounds,* 284 N.Y. 296, 31 N.E. 31 (1940).

[33] Leahy v. City of Knoxville, 193 Tenn. 242, 245 S.W.2d 772 (1951).

[34] Herlands v. Surpless, 258 App. Div. 275, 16 N.Y.S.2d 454 (1st Dept. 1939), *aff'd without opinion,* 282 N.Y. 647, 26 N.E.2d 800 (1939).

[35] DuBois v. Gibbons, 2 Ill.2d 392, 118 N.E.2d 295 (1954).

[36] See notes 2 through 5 *supra.*

[37] See notes 8 and 19 *supra.*

[38] Without a charter provision, the court said in Smith v. Kern (note 28 *supra*), it would question the authorization of a special council committee to investigate the Civil Service Commission for the purpose of laying a foundation for a petition to the mayor calling for the removal of administrative officials, since the purpose was not to bring about remedial legislation.

[39] *In re* Investigation of Contracts of City of Albany and Its Officials, note 39 *supra* at 526; *In re* Van Tine a Nims, note 30 *supra. Cf. In re* Ellis, 176 Misc. 887, 28 N.Y.S.2d 988 (Sup. Ct. 1941); Carlisle v. Bennett, 268 N.Y. 212, 197 N.E. 220 (1935); *In re* Barnes, 204 N.Y. 108, 97 N.E. 508 (1912).

[40] Frank v. Balog, 189 Misc. 1016, 73 N.Y.S.2d 285, *aff'd* 272 App. Div. 941, 72 N.Y.S.2d 75 (2nd Dept. 1947); State v. Rhodes, 33 O.L.A. 26, 35 N.E.2d 987 (1940); *In re* Investigation of Contracts of City of Albany and Its Officials, 113 Misc. 370, 184 N.Y.S. 518 (Sup. Ct. 1920). In Frank v. Balog, *supra* at 286; the Supreme Court of Westchester County held, "Council members conducting investigation of municipal affairs in connection with proposed legislation were proceeding as administrative officers in performance of administrative functions, and court could not review exercise of such function in proceeding to compel attendance of witnesses at investigation, but court must assume that members were discharging their duties for welfare of entire community and to promote best interests of all citizens thereof."

[41] *In re* Radio Station WNYC, note 31 *supra.*

[42] *In re* Ellis, 176 Misc. 887, 28 N.Y.S.2d 988 (Sup. Ct. 1941).

[43] LaGuardia v. Smith, 176 Misc. 482, 288 N.Y. 1, 41 N.E.2d 153 (1942). For a

The court held that the separation of powers does not apply to city governments.[44]

If a city has the authority to investigate, it follows that it should have authority to appropriate the money needed to make an investigation. The Supreme Court of Tennessee so held in *Leahy v. City of Knoxville.*[45] But taxpayers who sought to restrain the spending of money for an investigation that they alleged was unnecessary and futile were upheld by the Supreme Judicial Court of Massachusetts because the proposed expenditure could not be justified for public use.[46] That political considerations would be an important factor in determining the amount appropriated, there can be little doubt.[47]

The selection of the group to carry on the investigation may be subject to similar political considerations.[48] A committee of the council is the usual body.[49] The size of the committee has seldom been a matter of adjudication. The highest court of New York has held that a city council had power to authorize each member of a special investigating committee to act as a subcommittee of one to examine witnesses.[50] City councils have also authorized the mayor[51] or appointed a special agent[52] to make inquiries for them. When the common council of Detroit made an investigation through a committee of fifty citizens chosen by the mayor, the Supreme Court of Michigan held that it was within the power of the council to "conduct its investigation through a committee of outsiders or through the mayor, providing the investigation is made in its behalf, in accordance with its directions, and subject to its control, and the results are reported to it for action."[53]

discussion of the relation of the Chicago City Council's Committee on Crime to the courts, see 20 U. OF CHI. L. REV. 717 at 724, 725. The contention here is that municipal courts set up by state statute are not within the power of a city investigating committee.

[44] *Ibid.* See *id.* at 156 for a number of supporting cases. For a discussion of the separation of powers as applied to city government, see 42 COL. L. REV. 1217-1221.

[45] 193 Tenn. 242, 245 S.W.2d 772 (1951).

[46] Whiting v. Mayor of Holyoke, 272 Mass. 116, 172 N.E. 338 (1930). *Cf.* Attorney General *ex rel.* Maguire v. Murphy, 157 Mich. 615, 122 N.W. 260 (1909).

[47] 20 U. OF CHI. L. REV. 717 at 725.

[48] *Ibid.*

[49] *See, e.g.,* notes 27 through 34 *supra.* In *In re* Radio Station WNYC, note 31 *supra* at 299, the court stated that the council had power to appoint the members of an investigating committee because the council has authority to appoint its own committees.

[50] Smith v. Kern, note 28 *supra. Cf. In re* Joint Legislative Committee to Investigate Educational System of State of New York, 285 N.Y. 1, 32 N.E.2d 769 (1941); *In re* Gordon, 141 Misc. 635, 252 N.Y.S. 858 (Sup. Ct. 1931); *In re* Leach, 197 App. Div. 702, 189 N.Y.S. 352 (1st Dept. 1921).

[51] Note 46 *supra.*

[52] Friedman v. Forest City, 239 Iowa 112, 30 N.W.2d 752 (1948); State v. Rhodes, 33 O.L.A. 26, 35 N.E.2d 987 (1940).

[53] Attorney-General *ex rel.* Maguire v. Murphy, 157 Mich. 615, 122 N.W. 260 (1909).

Besides having considerable freedom in determining the composition of the investigating agency, city councils have been given some discretion in procedures used in conducting an investigation. In Massachusetts the highest court ruled that the legislative department of a city could hear evidence voluntarily laid before them, showing misconduct on the part of any officer of the city.[54] A New York City Charter provision requiring the council to sit with open doors has been held not to deprive a subcommittee of a special investigating committee of the council of the power to examine witnesses at private examinations. The court reasoned that the charter provision referred to legislative sessions only and not to fact-finding investigations, the purpose of which would be circumvented by public hearings.[55]

The power of a municipal legislative body to employ counsel to aid in its investigations seems to be indisputable.[56] The right to appoint a committee to investigate, summon witnesses, and to take testimony under oath impliedly empowers the council to employ legal assistance;[57] or, as an incidence to its general power, a common council has such authority in order to perform the duties with which it is charged by law.[58] Likewise, the employment of independent counsel other than the corporation counsel has been upheld out of a "due regard for properties"[59] and to prevent the anomaly of the corporation counsel's appearing as the legal advisor of two antagonistic departments under investigation.[60] Appointment of independent counsel would not preclude the corporation counsel, however, from affecting the course of the investigations as he advised other municipal officers of their rights.[61]

Once an investigation is under way, it can be effective only to the extent that information germane to the investigation can be obtained. Therefore, the power to compel attendance of witnesses and production of papers is vital. The charters and statutes which confer on the city council the power to investigate generally confer also the power to issue subpoenas.[62] In the few cases which suggest that the

[54] Lodge v. Fletcher, 184 Mass. 238, 68 N.E. 204 (1903).
[55] Note 28 *supra*.
[56] 4 McQUILLIN, MUNICIPAL CORPORATIONS, §13.05 (3d ed. 1949).
[57] Barry v. City of New York, 175 Misc. 712, 25 N.Y.S.2d 27 (Sup. Ct. 1941).
[58] Judson v. City of Niagara Falls, 140 App. Div. 62, 124 N.Y.S. 282 (4th Dept. 1910), *aff'd* 204 N.Y. 630, 97 N.E. 1107 (1910).
[59] Note 57 *supra* at 32.
[60] Note 58 *supra* at 285. The right of a city council to be independent of the executive branch in employing counsel of its own selection to give legal assistance in investigations is also maintained in *In re* Ellis, 176 Misc. 887, 28 N.Y.S.2d 988 (Sup. Ct. 1941). The independence of the council is further guaranteed in this case by the court's prohibiting an investigation by the executive branch of the wisdom of the council's choice of legal advisor.
[61] 20 U. OF CHI. L. REV. 717 at 725.
[62] *See, e.g.*, Haas v. Jennings, 120 Ohio St. 370, 166 N.E. 357 (1929); *In re* Investigation of Contracts of City of Albany and Its Officials, 113 Misc. 370, 184 N.Y.S. 518 (Sup. Ct. 1920); *Ex parte* Holman, 197 Mo. App. 70, 191 S.W.

right to obtain information essential to investigation and subsequent legislation is possessed inherently by municipal legislatures, an express statutory grant also empowers them to compel attendance of witnesses.[63] In one such case, the action of the council in conducting an investigation was said to be "equivalent to that of the Legislature and in construing motions to vacate the subpoenas the courts are construing a legislative act."[64] The usual interpretation, however, holds for the necessity of a statutory grant. Therefore, we are justified in concluding that

> "authority of a common council or one of its committees [to compel attendance of witnesses] * * * is purely statutory and lacks inherent power which legislative committees have under common law."[65]

An express grant of subpoena power usually states who the issuing authority shall be. As we have seen from the cases under consideration, investigations carried on other than under an express grant are rare.[66] For the most part, the power to issue a subpoena is given to a city council or its committees. This is true in general statutory provisions[67] as well as in special charters.[68] In Illinois, the clerk of the municipality, by order of the corporate authorities, issues subpoenas.[69] The statutes of Ohio and Rhode Island indicate that the presiding officer of the municipal legislature shall sign the subpoena.[70] In Michigan the mayor or any justice of the peace of the city is empowered as the issuing authority.[71] In the New York City case of *Herlands*

1109, *aff'd,* 270 Mo. 696, 195 S.W. 711 (1917); State *ex rel.* Peers v. Fitzgerald, 131 Minn. 116, 154 N.W. 750 (1915); People *ex rel.* Webster v. Van Tassel, 64 Hun. 444, 7 N.Y.S. 938, *aff'd,* 10 N.Y.S. 643 (3d Dept. 1892); *In re* Dunn, 9 Mo. App. 255 (1880); Briggs v. Mackellar, 2 Abb. Pr. 30 (N.Y. 1855). State *ex rel.* Peers v. Fitzgerald, *supra,* and *In re* Dunn, *supra,* cite home rule charters. Typical of the pewer granted is part of art. 4, §40, of the Second Class Cities Law quoted in *In re* Investigation of Contracts of City of Albany and Its Officials, *supra* at 523, ". . . and it [common council] has power to compel the attendance of witnesses and the production of papers or other evidence at any meeting of the common council or of any committee thereof, and for that purpose may issue subpoenas signed by the president."

[63] *See, e.g.,* Frank v. Balog, 189 Misc. 1016, 73 N.Y.S.2d 285 *aff'd* 272 App. Div. 941, 72 N.Y.S.2d 75 (2d Dept. 1947); Briggs v. Mackellar, 2 Abb. Pr. 30 (N.Y. 1855). In the former case the court points out that the right to subpoena witnesses, besides being implied in the right to investigate, is authorized by the General City Law, the Supplemental Charter, and the Civil Practice Act. See also *Ex parte* Holman, 197 Mo. App. 70, 191 S.W. 1109, *aff'd,* 270 Mo. 696, 195 S.W. 711 (1917).

[64] Herlands v. Surpless, 258 App. Div. 275, 16 N.Y.S.2d 454 (1st Dept. 1939), *aff'd without opinion,* 282 N.Y. 647, 26 N.E.2d 800 (1939).

[65] *In re* Investigation of Contracts of City of Albany and Its Officials, 113 Misc. 370, 184 N.Y.S. 518 (Sup. Ct. 1920) at 524.

[66] Notes 2 through 17 *supra.*

[67] Notes 23 through 26 *supra.*

[68] Note 62 *supra.*

[69] ILL. REV. STAT. c. 24, §23-111 (1953).

[70] OHIO REV. CODE ANN. tit. 7, §705.21 (1954). GEN. LAWS OF R. I. c. 537, §4 (1938).

[71] COMP. LAWS, MICH. c. 88, §18 (1948).

v. Surpless subpoenas were procured by the committee of the council from a court, as authorized by the general act; while under the city charter the council itself had authority to issue them.[72] By the charter in effect in Toledo in 1929, both mayor and council were authorized to issue subpoenas.[73] Where the authority to subpoena was vested in the council, a strict construction held that subpoenas for witnesses to testify before a committee must be issued by the common council itself, and not by the committee.[74]

Statutes and charters authorizing the summoning of witnesses and the production of books and papers may or may not indicate who is to serve the subpoena. When express statement is made, it is generally to the effect that the subpoena shall be served or executed by "an officer authorized by law to serve subpoenas and other process."[75] The administration of oaths to witnesses is sometimes also spelled out. The council and its committees, or the presiding officer, in particular, may be designated to administer oaths to witnesses.[76] With complaints about alleged bad motives, political or otherwise, in issuing subpoenas, courts have refused to be concerned.[77]

What power a municipal investigating body has over a private person and his papers has been in question in several cases. A claim that the subpoena power was limited to employees of the city was rejected by a court on the basis that charter authorization to investigate

[72] Note 64 *supra. Cf.* Frank v. Balog, 189 Misc. 1016, 73 N.Y.S.2d 285 *aff'd* 272 App. Div. 941, 72 N.Y.S.2d 75 (2d Dept. 1947) where the court upheld the authority of a committee of the common council to issue subpoenas under a supplemental charter provision when a general act provided for their issuance by application of the chairman of the investigating committee to a court. The first general act in New York had practically the same provision, note 20 *supra.*

[73] Haas v. Jennings, 120 Ohio St. 370, 166 N.E. 357 (1929). The charter also provided that any person or persons appointed by the mayor and that any committee of the council had the same power.

[74] *In re* Investigation of Contracts of City of Albany and Its Officials, 113 Misc. 370, 184 N.Y.S. 518 (Sup. Ct. 1920). The Illinois statute vesting the subpoena power in the "corporate authority" might be so construed, ILL. REV. STAT. c. 24, §23-111 (1953). In *Ex parte* Holman, 197 Mo. App. 70, 191 S.W. 1109, *aff'd* 270 Mo. 696, 195 S.W. 711 (1917), the court notes that the power to subpoena may be specifically delegated, under the charter, to any committee.

[75] §58 of Toledo City Charter as cited in Haas v. Jennings, note 73 *supra.* See also State v. Fitzgerald, 131 Minn. 116, 154 N.W. 750 (1915); Mo. REV. STAT., note 23 *supra;* OHIO REV. CODE ANN., note 25 *supra.* Unusual detail was included in the New York Act of 1860, §2, note 20 *supra:* "Such summons shall be served by showing to the witness the original summons, under the hand of the officer issuing the same, and delivering to such witness a copy of the summons, or a ticket containing its substance, and paying him the fees of witnesses in civil actions in courts of record." The Missouri statute, c. 77, §100 *supra,* guarantees that city shall pay the process server such fees as are allowed by law for similar service.

[76] *See e.g.,* notes 23, 24, 26 *supra.*

[77] *In re* Ellis, 176 Misc. 887, 28 N.Y.S.2d 988 (Sup. Ct. 1941); Herlands v. Surpless, note 64 *supra;* Carlisle v. Bennett, 268 N.Y. 212, 197 N.E. 220 (1935); *In re* Investigation of Contracts of City of Albany and Its Officials, 113 Misc. 370, 184 N.Y.S. 518 (Sup. Ct. 1920). Relevancy is material, but the subpoena need not contain a declaration that the books or papers demanded are material to the investigation, *In re* Dunn, 9 Mo. App. 255 (1880).

"municipal affairs" included "conditions affecting every department and entire population of city, and not merely employees of city, and hence charter does not restrict use of subpoena to city employees."[78] In investigations in St. Louis forty years apart, gas company officials who challenged the right to summon them and the papers of their private businesses were told by the courts that they could not refuse to obey subpoena since their testimony and papers were material to the inquiry.[79]

On the other hand, since there was no clear warrant of the law, a private corporation having a contract with a city was held not required to submit to an examination of its books and papers concerning its contract with the city.[80] And in St. Louis, again, the examination of the private books and papers of a private business concern in an investigation of city departments was not permitted, being deemed a violation of constitutional guarantees against unreasonable search and seizure and self-incrimination.[81]

There is little question about the power of a council investigating committee to summon city officers and require the production of official papers in their charge.[82] In fact, some sort of specification of the authority over city officials and departments, or implication of this authority in establishing power over municipal affairs, is found in most enabling legislation, charter or statutory.[83] The official records and documents of an organization of municipal employees were considered not subject to personal privilege against self-incrimination since the employees held them in a "representative rather than a personal capacity."[84] At the same time, a city council was not permitted to require the production of papers by physicians of a city hospital under a privilege created by statute providing that physicians should not be allowed to disclose information acquired in attending

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[78] Frank v. Balog, 189 Misc. 1016, 73 N.Y.S.2d 285, *aff'd* 272 App. Div. 941, 72 N.Y.S.2d 75 (2d Dept. 1947).

[79] "No rule of law exempts any person from producing books or papers material to an inquiry in the course of justice, merely because they are private," *In re* Dunn, 9 Mo. App. 255 (1880). *Ex parte* Holman, 197 Mo. App. 70, 191 S.W. 1109, *aff'd*, 270 Mo. 696, 195 S.W. 711 (1917). *Ibid.* at 1110 points out also that the president of a public service corporation cannot justify his refusal to testify on the grounds that "if he could be called every citizen engaged in a purely private business might be subjected to like proceedings; petitioner not being engaged in a private business."

[80] *In re* Investigation of Contracts of City of Albany and Its Officials, 113 Misc. 370, 184 N.Y.S. 518 (Sup. Ct. 1920). At 526 the court further explains that the council is vested with power to summon city officers and their papers only.

[81] *Ex parte* Conrades, 185 Mo. 411, 85 S.W. 150 (1904). *Cf. In re* Ellis, 176 Misc. 887, 28 N.Y.S.2d 988 (Sup. Ct. 1941); *In re* Barnes, 204 N.Y. 108, 97 N.E. 508 (1912).

[82] Note 80 *supra.*

[83] *See, e.g.*, ILL. REV. STAT. c. 24, §23-111 (1953); N.Y. CITY CHARTER §21 (1936); N.Y. GEN. CITY LAW §20-21 (1951).

[84] Leahy v. City of Knoxville, 193 Tenn. 242, 245 S.W.2d 772 (1951).

a patient in a professional capacity.[85] When the mayor of New York City, in the course of a council investigation of the Civil Service Commission, received a subpoena *duces tecum,* he moved to vacate the subpoena on the ground that his immunity should be implied from the doctrine of separation of powers. The Court of Appeals, however, held that this doctrine does not generally apply to city governments and that the council had the right to subpoena documents from the office of mayor concededly pertinent to an official investigation.[86]

Whether the questions asked of a witness or the books and papers required of him are material to the investigation may be one of the chief safeguards of witnesses. An early New York act specified that a court should issue a summons to a witness if it "satisfactorily" appeared that the testimony of the witness "is or may be material in such investigation or inquiry."[87] But a witness must presume that an investigating committee will confine itself to matters within its jurisdiction and may not refuse to testify on the grounds that the committee might act arbitrarily or capriciously.[88] Even though the inquiry was relevant, the Court of Appeals of New York held that a statute protecting professional information acquired by a physician permitted him to refuse to testify.[89] Witnesses were also permitted to refuse to answer questions about their observations of illegal activities, the price paid for stocks, or any of their private activities not pertinent to the investigation.[90] Questions, however, as to a policeman's income and his ability to save money were held to have a direct bearing on a municipal investigation of the alliance between crime and politics.[91]

The position taken by the courts in respect to the relevancy of testimony applies also to subpoenas *duces tecum.* Witnesses are pro-

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[85] New York City Council v. Goldwater, 284 N.Y. 296, 31 N.E.2d 31 (1940). This case reverses *In re* Lincoln Hospital, Bronx, note 32 *supra. Cf.* Egan v. Board of Water Supply of City of New York, 205 N.Y. 147, 98 N.E. 467 (1912).

[86] LaGuardia v. Smith, 288 N.Y. 1, 41 N.E.2d 153 (1942). The motion was denied in the Supreme Court, 176 Misc. 482, 27 N.Y.S.2d 321 (1941) and affirmed in the Appellate Division, 262 App. Div. 708, 27 N.Y.S.2d 992 (1st Dept. 1941), *motion for leave to appeal denied* 262 App. Div. 726, 28 N.Y.S.2d 705 (1st Dept. 1941). Petitioner appealed by permission of the Court of Appeals, the highest state court. A discussion of this case in relation to the doctrine of separation of powers is found in 42 COL. L. REV. 1217-1221. *Cf. In re* Joint Legislative Committee to Investigate Educational System of State of New York, 285 N.Y. 1, 32 N.E.2d 769 (1941) in which the Court of Appeals was reluctant to quash a subpoena in advance of a hearing.

[87] COMP. OF LAWS OF THE STATE OF N.Y. RELATING PARTICULARLY TO THE CITY OF N.Y. (Valentine, 1862). 478, §2.

[88] *Ex parte* Holm, 197 Mo. App. 70, 191 S.W. 1109, *aff'd* 270 Mo. 696, 195 S.W. 711 (1917).

[89] Note 85 *supra. Cf.* People *ex rel.* Karlin v. Culkin, 284 N.Y. 465, 162 N.E. 487 (1928).

[90] *In re* Barnes, 204 N.Y. 108, 97 N.E. 508 (1912); *In re* Cole, 16 Misc. 134, 38 N.Y.S. 955 (Co. Ct. 1896); *In re* Van Tine a. Nims, 12 How. Pr. 507, 3 Abb. Pr. 39 (N.Y. 1855); Briggs v. Mackellar, 2 Abb. Pr. 30 (N.Y. 1855). *Cf.* Carlisle v. Bennett, 268 N.Y. 212, 197 N.E. 220 (1935).

tected by the courts when the papers and books summoned are not material to the investigation.[92] That the person affected might be entitled to test the propriety of a subpoena *duces tecum* by application in advance of production of papers is suggested in one case[93] and denied in another,[94] neither case dealing with a city council investigation. There is similar disagreement over the protection afforded witnesses by constitutional guarantees against unreasonable search or seizure.[95]

An important privilege of witnesses generally applicable to legislative investigations is the privilege against self-incrimination. Iowa and New Jersey are the only two states which do not have a constitutional provision on self-incrimination,[96] and in them such a privilege is a part of the common law.[97] The privilege, as applying to city council investigations, was asserted in two early New York cases. In one case there was a qualification: "A witness is not bound to answer any questions where his answer would tend to criminate or degrade him, unless the question is essential to the direct proof of the matter under investigation."[98] In the other case it was stated that "the witness himself must be the judge, how far the answer may tend to criminate him." But the witness could have been compelled to state the grounds upon which he refused to answer.[99] This contrasts with a Tennessee Supreme Court decision in 1951 where the "examining tribunal" was held to be the one to decide the matter in respect to subpoenaed records.[100] When it has been a point at issue, the privilege of witnesses against self-incrimination seems to have been respected.[101]

Exceptions to this consideration for a witness' privilege against self-incrimination may be found when public officers and employees

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[91] DuBois v. Gibbons, 2 Ill.2d 392, 118 N.E.2d 295 (1954).

[92] State *ex rel.* Peers v. Fitzgerald, 131 Minn. 116, 154 N.W. 750 (1915). *Cf.* Hirshfield v. Craig, 239 N.Y. 98, 145 N.E. 816 (1924), where the Court of Appeals ruled that samples of granite are not "books and papers."

[93] *In re* Ellis, 176 Misc. 887, 28 N.Y.S.2d 988 (Sup. Ct. 1941).

[94] *In re* Joint Legislative Committee to Investigate Educational System of State of New York, 285 N.Y. 1, 32 N.E.2d 769 (1941).

[95] Herlands v. Surpless, note 64 *supra; In re* Conrades, 185 Mo. 411, 85 S.W. 160 (1904); *In re* Dunn, 9 Mo. App. 255 (1880).

[96] 20 U. OF CHI. L. REV. 717 at 723, n. 39.

[97] State v. Height, 117 Iowa 650, 91 N.W. 935, 937, 938 (1902); State v. Zdanowicz, 69 N.J.L. 619, 55 Atl. 743, 744 (1903).

[98] Briggs v. Mackellar, 2 Abb. Pr. 30 (N.Y. 1855). Rules of Parliamentary Law governing the examination of witnesses are listed here.

[99] *In re* Van Tine a. Nims, 12 How. Pr. 507, 509, 3 Abb. Pr. 39, 41 (N.Y. 1855). Apparently, the reasons for refusing to answer were so obvious that the special committee did not ask the witness to state them.

[100] Leahy v. City of Knoxville, 193 Tenn. 242, 245 S.W.2d 772, 775 (1951).

[101] A city council would be in no position to grant immunity against state prosecution, 20 U. OF CHI. L. REV. 717 at 726. An Ohio statute provides that, while a witness must testify, "such testimony shall not be used against him in any criminal prosecution, except for perjury," OHIO REV. CODE ANN., tit. 7, §705.21 (1954).

are being examined. Courts have upheld the dismissal of police officers invoking the privilege, on the ground that refusal to testify is repugnant to the position of trust which they have taken upon themselves.[102] The cases in point have arisen in regard to grand jury investigations, but it seems as if similar reasoning would apply to legislative investigations on the municipal level. In Louisiana any city officer or employee refusing to waive immunity from prosecution when questioned by an officer or body authorized to conduct any inquiry forfeits his position in the classified service of the city.[103]

The effectiveness of an investigatory committee is also dependent on its ability to take action against recalcitrant witnesses. In both home rule and non-home rule states, courts have held that "such power [to punish for contempt] is not to be inferred, but must be clearly granted either by the Constitution or by statute."[104] In some cases there has been a charter grant of power to punish for contempt.[105] The statutes in Illinois,[106] Ohio,[107] and Rhode Island[108] which authorize municipal legislative investigations also prescribe punishment for witnesses held in contempt.[109] When the nature of punish-

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[102] Moretti v. Civil Service Board of Chicago Park District (Circuit Court of Cook County, 1952) reported in 34 CHI. BAR REC. 77 (1952); Drury v. Hurley, 339 Ill. App. 33, 88 N.E.2d 728 (1949); Christal v. Police Commission of City and County of San Francisco, 33 Calif. App.2d 564, 92 P.2d 416 (1939); DeGuire v. Police Commission of City and County of San Francisco, 33 Calif. App.2d 576, 92 P.2d 423 (1939); Roche v. Police Commission of City and County of San Francisco, 33 Calif. App.2d 574, 92 P.2d 422 (1939); Souder v. City of Philadelphia, 305 Pa. 1, 156 Atl. 245 (1931). *Cf.* McAuliffe v. Mayor of City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892): "The petitioners may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

[103] LA. REV. STAT., tit. 33, c. 5, §2427 (1950). Under a similar New York City Charter provision a high school teacher was dismissed, Goldway v. Board of Higher Education, 178 Misc. 1023, 37 N.Y.S.2d 34 (Sup. Ct. 1942). *Cf.* N.Y. CONST., art. I, §6 (1954) and ILL. REV. STAT., c. 38, §82 (1953) in reference to grand jury investigations.

[104] *Ex parte* Holman, 197 Mo. App. 70, 191 S.W. 1109, *aff'd* 270 Mo. 696, 195 S.W. 711 (1917); State *ex rel.* Peers v. Fitzgerald, 131 Minn. 116, 154 N.W. 750 (1915); *Ex parte* Conrades, 185 Mo. 411, 85 S.W. 150 (1904). *Cf. In re* Llewellyn, 2 Pa. Dist. Rep. 631 (1893); Brown v. Davidson, 59 Iowa 461, 13 N.W. 442 (1882); Watson v. Nelson, 69 N.Y. 536 (1877); Noyes v. Byxbee, 45 Conn. 382 (1877); *Ex parte* Malinkrodt, 20 Mo. 493 (1847). A suggestion that the power to subpoena witnesses and books and papers confers by implication the power to commit for contempt is found in *Ex parte* Sanford, 236 Mo. 665, 139 S.W. 376 (1911). McQuillin unequivocally states that the power of municipal legislative bodies to punish for contempt must be granted expressly and cannot be implied or inferred, 4 MCQUILLIN, MUNICIPAL CORPORATIONS, §13.52 (3d ed. 1949).

[105] Haas v. Jennings, 120 Ohio St. 370, 166 N.E. 357 (1929); State *ex rel.* Peers v. Fitzgerald, 131 Minn. 116, 154 N.W. 750 (1915); People *ex rel.* Webster v. Van Tassel, 64 Hun. 444, 17 N.Y.S. 933, *aff'd*, 19 N.Y.S. 643 (3d Dept. 1892); *In re* Dunn, 9 Mo. App. 255 (1880).

[106] ILL. REV. STAT., c. 24, §23-111 (1953).

[107] OHIO REV. CODE ANN., tit. 7, §705.21 (1954).

[108] GEN. LAWS OF RHODE ISLAND, c. 537, §4 (1938).

[109] One finds a similar provision in the early acts in New York State, note 20 *supra.*

ment for contempt is indicated, it may vary from a general statement of whatever a court would be empowered to do if the matter were pending there,[110] to a fine,[111] imprisonment,[112] or both.[113]

Under certain other circumstances the courts have denied to city councils the power to punish for contempt. When a witness was held in contempt for refusing to take an oath and committed to jail, the Supreme Court of Rhode Island held that the *mittimus* issued was illegal because no definite term of punishment was specified in it.[114] A commitment for refusing to produce books and accounts was also set aside in New York State on the grounds that the charter authorized commitment only for refusing to attend, to be sworn, or to answer questions, and not for refusing to produce books and papers.[115] The Supreme Judicial Court of Massachusetts held a statute conferring power to imprison and punish for contempt unconstitutional because a city council making an investigation was neither a legislature nor a court and could not be vested with authority to punish without right of appeal or trial by jury.[116]

The power of investigation would appear to be an essential part of the legislative process at all levels of government, including the local. The desirability of having facts on which to base public policy is obvious. At all levels of government, including the local, there is danger of abuse of this policy. A survey of the case law indicates that while the power has in most cases been properly used by city councils, in some instances there have been abuses of the power. The courts, by checking the abuse of such power, have served as guardians of the rights of the individual. The greatest protection in the future, as it has been in the past, is the election of city council members who are interested in the furtherance of the general welfare by the determination of wise public policy.

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[110] Notes 10 and 20 *supra.*

[111] State *ex rel.* Holloway v. Rhodes, 33 O.L.A. 26, 35 N.E.2d 987 (1940). The fine of witnesses for non-attendance after being subpoenaed is specified as not to exceed $20.

[112] Haas v. Jennings, 120 Ohio St. 370, 166 N.E. 357 (1929); *Ex parte* Holman, 197 Mo. App. 70, 191 S.W. 1109, *aff'd,* 270 Mo. 696, 195 S.W. 711 (1917); People *ex rel.* Webster v. Van Tassel, 64 Hun. 444, 17 N.Y.S. 938, *aff'd,* 19 N.Y.S. 643 (3d Dept. 1892); *In re* Dunn, 9 Mo. App. 255 (1880). *Cf.* Doyle v. Hofstader, 257 N.Y. 244, 177 N.E. 489 (1931); *Ex parte* Sanford, 236 Mo. 665, 139 S.W. 376 (1911).

[113] State *ex rel.* Peers v. Fitzgerald, 131 Minn. 116, 154 N.W. 750 (1915). An interesting provision in LA. REV. STAT., tit. 38, c. 10, §2182 (1950), makes persons or corporations refusing to testify or produce books and papers in investigations concerning state contracts ineligible to hold contracts with the state.

[114] *In re* Hammel, 9 R.I. 248 (1869). *Cf.* Haas v. Jennings, 120 Ohio St. 370, 166 N.E. 357 (1929).

[115] People *ex rel.* Webster v. Van Tassel, 64 Hun. 444, 17 N.Y.S. 938, *aff'd,* 19 N.Y.S. 643 (3d Dept. 1892).

[116] *In re* Whitcomb, 120 Mass. 118 (1876).