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Legislative Oversight Proceedings of the Arkansas General Assembly: Issues and Procedures

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LEGISLATIVE OVERSIGHT PROCEEDINGS OF THE ARKANSAS GENERAL ASSEMBLY: ISSUES AND PROCEDURES

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* Legal Counsel, Arkansas Legislative Audit. The author acknowledges helpful review and comments by the Legislative Auditor, Roger A. Norman. The author also acknowledges members of the Legislative Joint Auditing Committee, and staff of Arkansas Legislative Audit, that he has had the privilege of working with—they have provided opportunities to study, practice, and even litigate legislative oversight issues and procedures. The opinions expressed in this article are those of the author; they are not official positions of the Arkansas General Assembly or its committees, members, or staff.

INTRODUCTION

Legislative oversight is a significant legislative activity identified as one of the major functions performed by the Arkansas General Assembly.[1] It is also a long-standing legislative activity: Oversight has roots in British parliamentary practice and was a recognized activity in American legislative bodies prior to the adoption of the federal Constitution.[2] Despite this significance and long-standing recognition, there is a dearth of legislative oversight guidance in Arkansas's legal authorities. Arkansas-specific oversight guidance that does exist is both condensed and scattered, challenging counsel attempting to advise legislators, executive branch officials, witnesses, and others in oversight proceedings.

Further challenging counsel are the procedures and mechanisms involved in legislative oversight, which might appear familiar at first glance. For example, legislative entities can issue subpoenas.[3] But unless authorizing law subjects legislative subpoenas to the Arkansas Rules of Civil Procedure, those rules do not apply.[4] Similarly, witnesses may be called to testify at oversight hearings, but the evidentiary privileges recognized in judicial proceedings do not apply in legislative proceedings.[5] The Arkansas Constitution authorizes both houses of the General Assembly to establish their own rules of proceedings,[6] and counsel will need to recognize how these legislative procedures differ from judicial procedures.

This article surveys legislative oversight issues and procedures. The focus is on oversight as practiced by the General Assembly and addressed in Arkansas legal authorities. Legal authorities from other jurisdictions are

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1. *See* DIANE D. BLAIR & JAY BARTH, ARKANSAS POLITICS AND GOVERNMENT 217 (2d ed. 2005) (listing "three major functions" to include "oversee[ing] the administration of the state bureaucracy"); RALPH CRAFT, STRENGTHENING THE ARKANSAS LEGISLATURE 5 (1972) (identifying oversight as one of "four major tasks that every legislature performs").

2. *See* McGrain v. Daugherty, 273 U.S. 135, 161, 174 (1927); RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 15, 20–21, 31–34 (1974); Michael E. Libonati, *The Legislative Branch*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 37, 43 (G. Alan Tarr & Robert F. Williams eds., 2006).

3. *See, e.g.*, ARK. CODE ANN. § 10-3-411 (Supp. 2021) (authorizing the Legislative Joint Auditing Committee to issue subpoenas); *id.* § 10-4-421 (authorizing the Legislative Auditor to issue subpoenas).

4. *See* Valley v. Pulaski Cnty. Cir. Ct., 2014 Ark. 112, at *9, 431 S.W.3d 916, 922 (since ARK. CODE ANN. § 10-4-421(c) does not refer to Ark. R. Civ. P. 45(d), that rule does not govern the procedure for tendering a witness fee and mileage by the Legislative Auditor).

5. *See infra* notes 155–69 and accompanying text; *cf.* EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS § 7.02 (11th ed. 2020) ("[I]n a large number of states and in federal practice, the privileges recognized by the courts do not apply to hearings conducted by legislative committees.").

6. ARK. CONST. art. V, § 12. For further discussion of this provision, see *infra* notes 162–65, 389–401 and accompanying text.

consulted to supplement Arkansas authorities or to illustrate the law where no comparable Arkansas authorities exist. The article's goal is to assist counsel by identifying legal issues potentially arising from legislative oversight, discussing some of the relevant procedures, and providing a starting point for any necessary legal research.

Organizationally, this article begins by defining legislative oversight and very briefly noting the state of legislative oversight in Arkansas. The legal foundations for various oversight activities are set forth to help counsel understand the nature and extent of the General Assembly's oversight authority. The permissible scope of legislative oversight is considered, followed by reviews of limitations on that scope imposed by constitutional provisions and of matters that do not limit that scope, such as evidentiary privileges. Tools for oversight are explored, including subpoenas, staff investigations, and contempt proceedings. A variety of issues involving witnesses are addressed, including right to counsel and potential witness jeopardy arising out of oversight activity. Finally, two issues that limit judicial involvement in oversight proceedings are considered: justiciability and legislative privilege.

I. LEGISLATIVE OVERSIGHT AND ITS PRACTICE BY THE ARKANSAS GENERAL ASSEMBLY

It may be helpful to define legislative oversight and identify its purposes before addressing attendant legal issues and procedures. A very brief look at legislative oversight as practiced in Arkansas provides some useful context.

A. Definition and Purposes of Legislative Oversight

Legislative oversight generally involves monitoring the administration of government to ensure proper implementation and operation of governmental programs and expenditure of public funds.[7] For comparison, congressional oversight has been defined as reviewing federal agencies' actions and the programs and policies they administer, during program and policy implementation as well as afterward, constituting "a significant facet of congressional

7. CRAFT, *supra* note 1, at 5, 120; COMM. ON LEGIS. ORG., *Introduction to the Report of the Committee on Legislative Organization*, *in* READINGS IN ARKANSAS GOVERNMENT 117, 118 (Walter Nunn ed., 1973); NAT'L. CONF. OF STATE LEGISLATURES, MASON'S MANUAL OF LEGISLATIVE PROCEDURE § 757, para. 1 (2020 ed.) [hereinafter MASON'S MANUAL]. When specifically adopted rules do not apply, Mason's Manual governs the procedures of the Arkansas Senate and House of Representatives. *See* COMM. ON RULES, PARLIAMENTARY MANUAL OF THE SENATE: NINETY-THIRD GENERAL ASSEMBLY R. 27 (2021); H.R. 1001, § 1, para. 31, 93d Gen. Assemb., Reg. Sess. (Ark. 2021).

efforts to control administration and policy."[8] Through the various forms of oversight, a legislative body will supervise, or watch over, authority delegated to other entities or officials.[9] Legislation may, or may not, result from legislative oversight; it is an appropriate legislative function, even if no legislation results from the oversight activity.[10]

The legislature can conduct oversight through a variety of activities, such as review of agency budgets and rules, appropriating funds, investigations, and audits.[11] At the federal level, the most common forms of legislative oversight include budget authorizations, appropriation of funds, confirmations of appointments, investigations, and impeachments.[12] Each of these activities enables the legislature to oversee the operations of the other branches of government or of political subdivisions.

The power to investigate is particularly vital to legislative oversight. Legislatures conduct investigations to consider prospective legislation and to secure information needed to discharge any other legislative function or power.[13] Committees can be created and authorized to operate between legislative sessions to conduct investigations; witnesses can be subpoenaed to attend and give testimony; and the production of documents can be compelled.[14] Witness misbehavior can result in legal jeopardy for various crimes, including contempt.[15] The power to investigate, with related tools such as the subpoena power, empowers legislatures to conduct meaningful oversight.

One authority identifies three basic purposes for oversight, which can overlap.[16] First, programmatic purposes for oversight seek to ensure: (1) agencies are operated in a proper, cost-effective manner; (2) compliance with legislative intent; (3) waste, fraud, and abuse are identified; and (4) information for future policy making is acquired. Second, political purposes for oversight

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8. JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 2 (1990); *see* CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 1 (2021) [hereinafter OVERSIGHT MANUAL].

9. WALTER J. OLESZEK, CONG. RSCH. SERV., R41079, CONGRESSIONAL OVERSIGHT: AN OVERVIEW 4 (2010).

10. *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 509 (1975) ("To be a valid legislative inquiry there need be no predictable end result."); *infra* notes 77–80 and accompanying text.

11. MASON'S MANUAL, *supra* note 7, § 757, para. 2; COMM. ON LEGIS. ORG., *supra* note 7, at 118.

12. MORTON ROSENBERG, WHEN CONGRESS COMES CALLING 5 (2017).

13. *See* 72 AM. JUR. 2D *States, Territories, and Dependencies* § 51, Westlaw (database updated Nov. 2022); 81A C.J.S. *States* § 114, Westlaw (database updated Nov. 2022). For a contemporary account of one Arkansas legislative investigation and the context in which it occurred, see JOHN DIAMOND, PLEASE DELETE (2015).

14. *See* MASON'S MANUAL, supra note 7, § 757, para. 4; 81A C.J.S. *States* §§ 115–17, Westlaw (database updated Nov. 2022).

15. *See infra* notes 293–99, 350–72 and accompanying text.

16. OLESZEK, *supra* note 9, at 5–6.

include generating favorable publicity for legislators, programs, or agencies or garnering constituent or interest group support. Third, institutional purposes for oversight include protecting legislative prerogatives, checking the power of the other branches of government, and informing the legislature and the public. Another expert notes that "legislative oversight serves the purpose of informing Congress so that it may effectively develop legislation, monitor the implementation of public policy, and disclose to the public how its government is performing."[17]

B. The Practice of Legislative Oversight in Arkansas

While oversight is an important legislative function, members of the General Assembly have not always been satisfied with how oversight is implemented in Arkansas. An older study records that "[b]y a wide margin legislators realize that they are doing the poorest job in the area of overseeing the executive branch of government and the programs that it conducts."[18] A more recent study demonstrates continuing concern about the oversight function: "Legislators are aware of the institution's weakness at this oversight role, according to a 2001 survey, and feel term limits further diminish its ability to fully carry it out."[19]

This concern regarding the practice of legislative oversight merits attention. Policy making is a legislative function, "addressed in a democracy to the policy-making branch of government, the General Assembly . . . ."[20] But in order to enact policy through legislation, the General Assembly must have information relevant to the subject under consideration.[21] Oversight helps to ensure an informed legislature. Executive branch agencies and officials have access to expertise and information; historically, the part-time General Assembly lacked that same access.[22] The development of full-time legislative staff agencies certainly improved legislative access to information.[23] But committee oversight of agency operations, through activities such as

17. ROSENBERG, *supra* note 12, at 5.

18. CRAFT, *supra* note 1, at 5–6.

19. BLAIR & BARTH, *supra* note 1, at 219.

20. Cato v. Craighead Cnty. Cir. Ct., 2009 Ark. 334, at *9, 322 S.W.3d 484, 490 (quoting King v. Ochoa, 373 Ark. 600, 602, 285 S.W.3d 602, 604 (2008)); *see* James Willard Hurst, *The Legislative Branch and the Supreme Court*, 5 U. ARK. LITTLE ROCK L.J. 487, 488 (1982) ("representative assemblies are the principal agencies to determine general public policy").

21. *See* McGrain v. Daugherty, 273 U.S. 135, 175 (1927); MASON'S MANUAL, *supra* note 7, § 795, paras. 1, 4.

22. CRAFT, *supra* note 1, at 9–10; *cf.* COMM. ON LEGIS. ORG., supra note 7, at 126–27 ("One major problem faced by the legislature is the lack of adequate information.").

23. BLAIR & BARTH, *supra* note 1, at 210–11.

investigations, budgeting, appropriations, and audits, further informs the General Assembly in its policy making function.[24]

Observers tend to highlight three legislative oversight activities in Arkansas. First, committees of the General Assembly typically conduct oversight through investigations.[25] Second, the Legislative Council (or, during a legislative session, the Joint Budget Committee) exercises oversight through budgeting and preparing appropriation bills to fund various programs and agencies.[26] Third, the Legislative Joint Auditing Committee oversees audits of various state and local entities and officials to ensure expenditures comply with law.[27] Recent voter-approved tools for increased oversight include fiscal sessions in the alternate years between regular sessions (thereby allowing the General Assembly to review budgets and appropriate funds annually) and legislative review of administrative agencies' rules.[28]

II. AUTHORITY FOR THE GENERAL ASSEMBLY'S OVERSIGHT ACTIVITIES

What is the legal authority for various legislative oversight activities engaged in by the General Assembly? This section addresses that question.

A. Oversight Investigations—An Inherent Power of the General Assembly

The power to investigate is incident to, and an auxiliary of, legislative power.[29] Since state legislatures possess the power to legislate, and need information to exercise that and other legislative powers, they also possess an inherent power to investigate.[30] In its 1927 *McGrain v. Daugherty* opinion, the Supreme Court of the United States summarized state court holdings recognizing this inherent power to investigate: "The state courts quite generally have held that the power to legislate carries with it by necessary implication ample authority to obtain information needed in the rightful exercise of that power, and to employ compulsory process for the purpose."[31] The Court concluded in part:

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24. CRAFT, *supra* note 1, at 10; BLAIR & BARTH, *supra* note 1, at 211, 218.

25. HENRY M. ALEXANDER, ORGANIZATION AND FUNCTION OF STATE AND LOCAL GOVERNMENT IN ARKANSAS 175 (1947); BLAIR & BARTH, *supra* note 1, at 219.

26. BLAIR & BARTH, *supra* note 1, at 218; DONALD E. WHISTLER, CITIZEN LEGISLATURE: THE ARKANSAS GENERAL ASSEMBLY 203–10 (2010).

27. BLAIR & BARTH, *supra* note 1, at 218; WHISTLER, *supra* note 26, at 124, 204–05.

28. ARK. CONST. amends. LXXXVI, XCII; WHISTLER, *supra* note 26, at 198, 211–13 (fiscal sessions).

29. MASON'S MANUAL, *supra* note 7, § 795, para. 1.

30. *See id.* § 795, paras. 1–3, 5; 81A C.J.S. *States* § 114, Westlaw (database updated Nov. 2022).

31. McGrain v. Daugherty, 273 U.S. 135, 165 (1927).

> We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information . . . recourse must be had to others who do possess it.[32]

Arkansas's Constitution provides that "[t]he legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives . . . ." [33] By virtue of that express delegation of legislative power, the General Assembly possesses the inherent power to conduct oversight through investigations.[34] No provision of the Arkansas Constitution expressly grants the General Assembly authority to conduct such investigations, although certain provisions aid in conducting investigations.[35]

Two Arkansas appellate decisions acknowledge the General Assembly's authority to conduct oversight investigations. Perhaps the fullest acknowledgment of that authority can be found in an Attorney General's Opinion—but even that statement is brief.

In its 1915 *Dickinson v. Johnson* opinion, the Arkansas Supreme Court considered whether two committees of the General Assembly could continue certain investigations and audits after the legislature adjourned.[36] The court observed that "an investigation into the management of the various institutions of the State and the departments of the State Government is at all times a legitimate function of the Legislature."[37] However, no legislation had been enacted to authorize these committees to operate beyond adjournment; thus, they could not continue to function upon adjournment of the legislative body that created them.[38]

In its 1988 *Chaffin v. Arkansas Game and Fish Commission* opinion, the Arkansas Supreme Court disapproved a "review and advice" procedure utilized by the General Assembly to oversee administrative agencies.[39] The court not only confirmed the General Assembly's power to investigate but also noted some limitation on that power: "The legislature cannot hold the

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32. *Id.* at 174–75.

33. ARK. CONST. art. V, § 1, *amended by* ARK. CONST. amends. VII, XCIII.

34. *See* MASON'S MANUAL, *supra* note 7, § 795, paras. 1–3, 5; *McGrain*, 273 U.S. at 165, 174–75.

35. *See infra* notes 162–65, 202–06, 288–89, 389–401 and accompanying text.

36. Dickinson v. Johnson, 117 Ark. 582, 176 S.W. 116 (1915).

37. *Id.* at 588, 176 S.W. at 117.

38. *Id.* at 588–92, 176 S.W. at 117–18.

39. Chaffin v. Ark. Game & Fish Comm'n, 296 Ark. 431, 757 S.W.2d 950 (1988). For further discussion of this opinion, see *infra* notes 136–40 and accompanying text.

executive branch hostage to its will. While it can and should hold hearings and investigate at length the performance of state agencies, it cannot intrude on the prerogatives of the executive branch of government."[40]

In an opinion issued in 2007, the Attorney General responded to an inquiry concerning a certain legislative committee's authority.[41] The Attorney General's response includes a relatively complete summary of legislative authority to investigate.

> As to facilities operated by state agencies, certain interim committees of the Arkansas General Assembly have investigatory authority to the extent that such committees may subpoena persons, documents, and records as part of an appropriate study or investigation of the state agencies. . . . The General Assembly may also at any time during a legislative session by resolution appoint special committees to undertake investigations into the management of particular state institutions, although such investigating committees may not perform duties beyond the legislative session without the enactment of a bill to that effect. *See Dickinson v. Johnson*, 117 Ark. 582, 176 S.W. 116 (1915).
>
> This power of the General Assembly to conduct investigations is in aid of the proper discharge of its function to enact prospective legislation. . . . It has been observed, generally, that "[s]uch power of inquiry is an essential auxiliary to the legislative function and has long been treated as an attribute of the power of the legislature." . . . *See also Chaffin v. Ark. Game & Fish Comm'n*, 296 Ark. 431, 444, 757 S.W.2d 950 (1988) (commenting that the legislature "can and should hold hearings and investigate at length the performance of state agencies").
>
> It is also generally held, however, that "the power of a legislative investigating committee is limited and circumscribed by the statute or resolution creating it . . . ." [42]

These authorities acknowledge the General Assembly's inherent power to conduct oversight by investigating other agencies or officials. And as the Attorney General noted, oversight authority may be delegated to lawfully constituted committees of the legislature.

B. Oversight Activities Authorized in the Arkansas Constitution or Arkansas Code

Certain oversight mechanisms or activities are expressly authorized by the Arkansas Constitution or the Arkansas Code. Each of these activities

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40. *Chaffin*, 296 Ark. at 444, 757 S.W.2d at 957.
41. Op. Ark. Att'y Gen. No. 2007-044 (2007).
42. *Id.* (citations omitted).

presents opportunities for the General Assembly, or its committees or staff, to gather information and monitor government operations.

1. Appropriation and Budget Hearings

The General Assembly is constitutionally charged with appropriating funds from the treasury.[43] Prior to each legislative session, committees—the Legislative Council and the Joint Budget Committee—conduct budget hearings to aid in budgeting funds and drafting appropriation bills.[44] "At these hearings, agency heads and representatives of the governor provide justifications for their requests."[45] These hearings present opportunities for legislative oversight: they allow for monitoring existing programs and the expenditure of public funds.[46]

2. Review and Approval of Administrative Agency Rules

The Arkansas Constitution expressly authorizes the General Assembly to review and approve administrative agency rules.[47] These rules do not become effective until they have been reviewed and approved by the Legislative Council, as specified in law.[48] This review process provides further opportunities for legislative oversight, particularly with regard to agency rules and associated programs.

3. Removal By Impeachment or Joint Address

Article XV of the Arkansas Constitution empowers the General Assembly to impeach certain officials or seek their removal by joint address to the Governor.[49] Impeachment includes a trial before the Senate;[50] that body is authorized to compel the attendance of witnesses and the production of

43. ARK. CONST. art. V, § 29, *amended by* ARK. CONST. amends. LXXXVI, XCIV.

44. *See* BLAIR & BARTH, *supra* note 1, at 304; WHISTLER, *supra* note 26, at 203–08. Arkansas Code sections discussing pre-session budget hearings include ARK. CODE ANN. §§ 10-3-218, 10-3-307, 10-3-507 (Repl. 2012), and ARK. CODE ANN. §§ 19-4-202, 19-4-203 (Repl. 2016).

45. WHISTLER, *supra* note 26, at 203.

46. *Cf.* OVERSIGHT MANUAL, *supra* note 8, at 26 ("The appropriations process is among Congress's most significant forms of oversight.").

47. ARK. CONST. art. V, § 42.

48. *Id.* § 42(a)(2); ARK. CODE ANN. § 10-3-309(c) (Supp. 2021).

49. ARK. CONST. art. XV.

50. *Id.* § 2; ARK. CODE ANN. § 21-12-206 (Repl. 2022).

documents.[51] This process provides the General Assembly with an additional basis for investigating and obtaining information.[52]

4. Confirmation of Appointments

The Arkansas Constitution provides for senatorial confirmation of certain appointments by the Governor,[53] but senatorial confirmation of most appointees is required by Ark. Code Ann. § 10-2-113. Securing confirmation "may require extensive lobbying and consideration of influential senators' preferred choices."[54] Should the Senate conduct confirmation hearings, these could serve an oversight function by establishing nominees' views on the record—for which they could be held accountable later—and by providing legislative policy direction and other guidance for the nominees' future performance.[55]

5. Audits

The Legislative Joint Auditing Committee's authorization to audit entities and political subdivisions of the state can be found at Ark. Code Ann. §§ 10-3-402(c), 10-3-411(a)(1). That committee employs the Legislative Auditor, subject to confirmation by both houses of the General Assembly, who is given authority to conduct audits and to provide written reports thereof.[56] "Audit" is defined to include not just a review of financial matters but also other inquiries such as performance audits and investigations.[57] These audits "provide information which will facilitate the discharge by the General Assembly of its legislative responsibilities."[58]

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51. ARK. CODE ANN. § 21-12-204.

52. *Cf.* OVERSIGHT MANUAL, *supra* note 8, at 28–29 (characterizing the impeachment power of Congress as "a unique oversight tool" offering "an auxiliary constitutional method for obtaining information that might otherwise not be made available").

53. *See, e.g.*, ARK. CONST. amend. XLII, § 2 (confirmation of State Highway Commission appointees).

54. BLAIR & BARTH, *supra* note 1, at 170.

55. *Cf.* OVERSIGHT MANUAL, *supra* note 8, at 27–28 (noting the oversight function of confirmation proceedings).

56. ARK. CODE ANN. §§ 10-4-403(a), 10-4-405 (Repl. 2012 & Supp. 2021).

57. *Id.* §§ 10-3-402(f)(1), 10-4-401(a)(1) (Supp. 2021).

58. *Id.* § 10-3-402(a); *see* BLAIR & BARTH, *supra* note 1, at 218 (noting that "the continuous postauditing conducted by the Legislative Joint Auditing Committee" is one of "[t]he legislature's most important instruments for supervising the executive branch").

C. Codification of Oversight Authority Delegated to Legislative Committees

In some instances, the General Assembly has delegated oversight authority to legislative committees by enacting such delegations into law. To the extent the General Assembly has oversight authority over an official, agency, or subject, that authority can be delegated to a committee.[59]

> For the purpose of obtaining information looking to the enactment of laws to meet the requirements of Government, the appointment of committees by either branch of the Legislature, or by the concurrent action of both branches, is absolutely necessary for the efficient discharge of legislative functions, and is recognized under our systems of Government, both State and National.[60]

Three examples suffice to illustrate this. The Legislative Council is authorized "to conduct investigations pertaining to the operation of any state agency, institution, department, or office."[61] The Legislative Joint Auditing Committee is authorized "to conduct investigations or audits pertaining to the affairs of any entity of the state or political subdivision of the state" whenever that committee deems such investigations of entity operations or handling of public funds or assets to be necessary.[62] And the Joint Performance Review Committee is authorized to "[m]ake random and periodic performance review of specific governmental programs and agencies" and to "[c]onduct investigations into such specific problem areas of the administration of state government" brought to the committee's attention, among other duties.[63]

Codification of oversight authority enables these committees to avoid the issue addressed in *Dickinson v. Johnson*: since these committees continue to operate by virtue of law, they do not terminate when the legislature adjourns but continue to function in the interim between sessions.[64] Continued operation between sessions promotes improved oversight and a more informed legislature.[65]

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59. *See* MASON'S MANUAL, *supra* note 7, § 757, para. 4 ("Legislative committees may be created to investigate any subject legitimately within the scope of functions, powers, and duties of the legislature."); *id.* § 799, para. 3; Op. Ark. Att'y Gen. No. 2007-044 (2007) (noting certain committees have oversight authority and that the General Assembly may create special committees to undertake investigations).

60. Dickinson v. Johnson, 117 Ark. 582, 587, 176 S.W. 116, 117 (1915) (citation omitted).

61. ARK. CODE ANN. § 10-3-306(a) (Repl. 2012).

62. *Id.* § 10-3-411(a)(1) (Supp. 2021).

63. *Id.* § 10-3-902.

64. *See Dickinson*, 117 Ark. at 588–90, 176 S.W. at 117–18.

65. *See* BLAIR & BARTH, *supra* note 1, at 211 (noting that, among other improvements, committee operations in the interim are a "significant step[]" toward professionalism and help to inform legislators).

III. THE PERMISSIBLE SCOPE OF OVERSIGHT ACTIVITIES

Given that legislative oversight is authorized, the question then becomes how broadly that authority may be exercised. Is the scope of legislative oversight limited in any way?

A. Broad Permissible Scope of Legislative Oversight

The General Assembly's power to conduct oversight investigations extends to any matter that may be the subject of legislation or that involves a legislative power delegated by the Arkansas Constitution.[66] Since the "power of the General Assembly to conduct investigations is in aid of the proper discharge of its function to enact prospective legislation,"[67] the scope of matters that may be investigated is coextensive with the scope of those matters that may be the subject of legislation. As the Supreme Court of Pennsylvania notes: "The power to investigate is an essential corollary of the power to legislate. The scope of this power of inquiry extends to every proper subject of legislative action."[68]

Thus, the scope of legislative oversight that may be exercised by the General Assembly is very broad. A vast range of subjects fall within the scope of matters that may be the subject of legislation. The General Assembly may enact any law not prohibited by the United States or Arkansas Constitutions.[69] In addition to oversight connected to the power to legislate, those oversight activities specifically authorized by the Arkansas Constitution or the Arkansas Code further expand the scope of permissible legislative oversight.[70]

B. In Any Investigation, the Information Sought Must Be Relevant to a Proper Subject of Inquiry

While the permissible scope of oversight is broad, questions may be raised about the legislature's ability to obtain specific testimony or evidence in a particular legislative investigation. The authorities can be read to establish a two-part test. First, legislatures may obtain information on any subject that is relevant to the proper discharge of legitimate legislative functions; stated another way, the subject under investigation must fall within the legislature's

66. *See* MASON'S MANUAL, *supra* note 7, § 795, para. 2.

67. Op. Ark. Att'y Gen. No. 2007-044 (2007).

68. Commonwealth *ex rel.* Carcaci v. Brandamore, 327 A.2d 1, 3 (Pa. 1974) (citations omitted); *see* MASON'S MANUAL, *supra* note 7, § 795, para. 6.

69. *See* Bush v. Martineau, 174 Ark. 214, 215–16, 295 S.W. 9, 10 (1927).

70. *See supra* notes 43–63 and accompanying text.

proper field of action.[71] Second, the information sought must be relevant to that subject under investigation.[72]

A substantially similar two-part test was adopted in a 2012 proceeding before the Circuit Court of Pulaski County, Arkansas. The circuit court dismissed an action challenging a legislative subpoena because the subpoena was a proper exercise of legislative authority and not subject to judicial supervision.

> This Court is persuaded that it does not have subject matter jurisdiction in this case as the subject of the investigation is proper for legislative inquiry and the items sought are relevant to that subject. In this case, this Court finds that the legislative subpoena is not subject to judicial control.[73]

While this case involved a question of subject matter jurisdiction, it turned on the same key issue: the propriety of the legislative request for information. This circuit court opinion may have some limited *stare decisis* effect[74] in the same county where the General Assembly meets to conduct oversight and other business.[75]

Reading the cited authorities together, and acknowledging the circuit court opinion quoted, a two-part test should be applied to determine whether the particular information sought is within the permissible scope of legislative oversight: (1) whether the subject of the investigation is proper for legislative inquiry, and, if so (2) whether the information sought is relevant to that subject.[76]

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71. *See* Morss v. Forbes, 132 A.2d 1, 8 (N.J. 1957); 72 AM. JUR. 2D *States, Territories, and Dependencies* § 52, Westlaw (database updated Nov. 2022); MASON'S MANUAL, *supra* note 7, § 797, para. 7; *cf.* Watkins v. United States, 354 U.S. 178, 187 (1957) ("No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of Congress.").

72. *See* Ward v. Peabody, 405 N.E.2d 973, 978, 978 n.5 (Mass. 1980); 81A C.J.S. *States* § 115, Westlaw (database updated Nov. 2022).

73. Ark. Loc. Police and Fire Ret. Sys. v. Norman, No. CV-11-5426, (Pulaski Cnty. Cir. Ct. June 25, 2012).

74. *Cf.* Council of Co-Owners for the Lakeshore Resort & Yacht Club Horiz. Prop. Regime v. Glyneu, LLC, 367 Ark. 397, 402–03, 240 S.W.3d 600, 605 (2006) (stating where an issue before the circuit court in 2006 was "essentially the same" as the issue decided in the circuit court's 1994 order, "the circuit court correctly concluded that its decision was governed in this [2006] case by *stare decisis*").

75. *See* ARK. CONST. art. I; *id.* art. V, § 5(a) (providing that the legislature shall meet at the seat of government, which is in Little Rock); ARK. SEC'Y OF STATE, HISTORICAL REPORT OF THE SECRETARY OF STATE 22, 517 (2008) (noting that the State Capitol is in Little Rock, which is located in Pulaski County).

76. *See* 72 AM. JUR. 2D *States, Territories, and Dependencies* § 52, Westlaw (database updated Nov. 2022); 81A C.J.S. *States* § 115, Westlaw (database updated Nov. 2022).

1. Is the Subject of the Investigation Proper for Legislative Inquiry?

The possible subjects of legislative oversight are coextensive with the possible subjects of legislation that might be considered by the General Assembly—and the General Assembly may legislate on any subject not forbidden by the United States or Arkansas Constitutions.[77] There is accordingly a vast range of subjects that are proper for legislative inquiry. The Supreme Court of the United States noted the broad range of proper congressional oversight in 1957:

> The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.[78]

Note that legislation does not have to actually result from oversight activity—if it is *possible* that legislation might be drafted on a subject, that subject is proper for legislative oversight.[79] "The very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result."[80]

While the range of appropriate subjects for legislative oversight is extensive, there are limits. Constitutional limitations constrain the range of subjects upon which the General Assembly may legislate, and thus constrain the range of permissible oversight subjects.[81] Constitutional provisions protecting life, liberty, and property must be observed when conducting investigations.[82] Some of these constitutional limitations are explored below.[83]

Another limit may be imposed by the terms of the Code section or resolution delegating oversight authority to a particular legislative committee.

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77. *See supra* notes 66–70 and accompanying text.

78. Watkins v. United States, 354 U.S. 178, 187 (1957).

79. *See id.*; MASON'S MANUAL, *supra* note 7, § 795, para. 5 (noting inherent power to conduct investigations "in aid of prospective legislation").

80. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 509 (1975).

81. *See supra* note 69 and accompanying text.

82. MASON'S MANUAL, *supra* note 7, § 797, para. 3; *see* Hurst, *supra* note 20, at 496 (noting that "the privilege against self-incrimination and constitutional limits on search of papers" apply in legislative hearings).

83. *See infra* notes 95–154 and accompanying text.

Such terms may limit or circumscribe the authority of the investigating committee.[84]

A third limitation is that no legislative investigation may be undertaken solely for improper purposes, such as to inquire into private affairs, intentionally injure an individual, lay a foundation for criminal proceedings, or essentially conduct a trial.[85] No legislative body can inquire into a citizen's private affairs, "except to accomplish some authorized end."[86] The Supreme Court of the United States noted comparable limitations on congressional oversight:

> But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.[87]

However, an improper or ulterior purpose for an investigation will not be imputed.[88] If the purpose of a legislative investigation is not expressly stated, it may be presumed that the object of the investigation is to aid in legislation.[89] Mixed purposes—proper and questionable—will not be fatal to a legislative investigation as long as there is at least one valid legislative purpose.[90]

The subjects that are proper for legislative inquiry are almost limitless. As long as constitutional limitations are observed, the terms of authorizing law are respected, and solely improper purposes are not indulged, the subject of an investigation is likely proper for legislative inquiry.

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84. Op. Ark. Att'y Gen. No. 2007-044 (2007); *see* Morss v. Forbes, 132 A.2d 1, 8 (N.J. 1957).

85. MASON'S MANUAL, *supra* note 7, § 797, paras. 1–2, 4–6.

86. Att'y Gen. v. Brissenden, 171 N.E. 82, 85 (Mass. 1930).

87. Watkins v. United States, 354 U.S. 178, 187 (1957).

88. MASON'S MANUAL, *supra* note 7, § 795, para. 6.

89. *Brissenden*, 171 N.E. at 85–86; *cf.* McGrain v. Daugherty, 273 U.S. 135, 178 (1927) (stating that without an express statement of legislative purpose, the only "legitimate object" for the investigation "was to aid in legislating," and "the presumption should be indulged that this was the real object").

90. *Cf. McGrain*, 273 U.S. at 180 (stating that where two purposes, one proper and one questionable, are cited in support of congressional investigative action, that action was sustained based on the proper purpose).

2. Is the Information Sought Relevant to the Subject of the Investigation?

In terms of legislative oversight, the requirement that information sought be relevant to the investigation's subject is not exacting.

> A judicial inquiry relates to a case, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates all possible cases which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry, which generally is very broad.[91]

The Supreme Judicial Court of Massachusetts noted that "too rigid or exacting an approach" to testing relevance could unduly impede a legislative investigation; indeed, Massachusetts "cases speak of a legislative committee's power to compel production of documents not 'plainly irrelevant' to the authorized investigation."[92]

Sometimes, this part of the test is not stated in terms of relevance, but instead whether the information or evidence sought is material or pertinent to the subject of legislative inquiry.[93] But those standards might not be any more exacting than the question of relevance. For instance, in assessing pertinence, federal courts require only that legislative inquiries be reasonably related to the subject under investigation and acknowledge that this standard is broader than the relevance requirement under the rules of evidence applicable in judicial proceedings.[94]

However this standard is framed, it is not overly problematic. Assuming a proper subject for legislative investigation, so long as the information sought is not plainly irrelevant to the legislative investigation or is reasonably related to the subject under investigation, the information may be obtained by the legislative body.

IV. CONSTITUTIONAL LIMITS ON LEGISLATIVE OVERSIGHT

Legislative oversight activities are subject to applicable constitutional limitations.[95] Legislative investigations must observe all constitutional provisions that protect life, liberty, property, and those that prevent inquiries into

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91. Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir. 1938).

92. Ward v. Peabody, 405 N.E.2d 973, 978, 978 n.5 (Mass. 1980).

93. MASON'S MANUAL *supra* note 7, § 801, paras. 4–6.

94. Rosenburg, *supra* note 12, at 18; TODD GARVEY, CONG. RSCH. SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 58 (2017) (discussing pertinency of legislative questions in the context of contempt citations).

95. *See* MASON'S MANUAL, *supra* note 7, § 797, para. 3; Hurst, *supra* note 20, at 496.

private affairs.[96] This section surveys some constitutional limitations that may be implicated in the course of legislative oversight proceedings.

A. First Amendment

The First Amendment to the United States Constitution prohibits enacting any law that abridges freedom of religion, speech, press, or to peaceably assemble or petition government to redress grievances.[97] The Supreme Court of the United States explained the rationale for applying this amendment to legislative investigations:

> While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of law-making. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or lawmaking.[98]

The Arkansas Constitution contains a similar provision that protects the right to assemble peaceably and to petition government.[99]

A 1963 decision of the Supreme Court of the United States illustrates how the First Amendment might limit legislative oversight.[100] A state legislative committee sought a private organization's membership records and when the organization's president refused to produce the records, he was held in contempt.[101] The Court cited past holdings "that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments."[102] Acknowledging the state's power to inform itself through legislative investigations, courts should nonetheless ascertain the permissibility of legislative demands in the face of claims that associational rights of individuals were being infringed.[103] The Court applied this test: "[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."[104] Since the legislative committee failed to meet this test, the lower court holdings were reversed.[105]

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96. Att'y Gen. v. Brissenden, 171 N.E. 82, 86 (Mass. 1930).
97. U.S. CONST. amend. I.
98. Watkins v. United States, 354 U.S. 178, 197 (1957) (citations omitted).
99. ARK. CONST. art. II, § 4.
100. Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539 (1963).
101. *Id.* at 540–43.
102. *Id.* at 543 (citations omitted).
103. *Id.* at 545–46.
104. *Id.* at 546.
105. *Id.* at 551, 557–58.

B. Fourth Amendment

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures.[106] The Arkansas Constitution contains a provision that is substantially similar to the Fourth Amendment.[107] In the context of legislative oversight, these constitutional provisions protect witnesses from subpoenas that are unreasonably broad or burdensome.[108] "[A] subpoena which is unreasonably broad in its demand and general in its terms constitutes an unreasonable search and seizure in violation of the State and Federal Constitutions."[109]

Relying on its state constitution, the Supreme Court of Pennsylvania quashed legislative subpoenas for lack of evidence demonstrating probable cause in a 1986 decision.[110] A legislative committee issued subpoenas to certain contractors, seeking certain personal financial information; the court noted that the time period for which these financial records were requested "would no doubt result in revelation of many private matters that do not relate to evidence of wrongdoing."[111] The contractors' privacy interests would be protected from unreasonable searches and seizures under Pennsylvania's Constitution, even in the course of a legislative investigation.[112]

> Thus, when the legislature undertakes to investigate a matter, and in the course thereof it seeks to obtain records in which one has a reasonable expectation of privacy, a subpoena therefor should not issue except upon a showing of probable cause that the particular records sought contain evidence of civil or criminal wrongdoing.[113]

The court opined that the subpoenas were too broad and thus invalid; the legislative committee should have developed testimony to establish "a basis to state with greater specificity in the subpoenas the particular types of transactions or approximate time frames with respect to which there was probable cause to believe evidence of wrongdoing might be found in the records sought."[114] It should be noted that, under its state constitution, the Supreme

106. U.S. CONST. amend. IV.

107. ARK. CONST. art. II, § 15.

108. *Cf.* OVERSIGHT MANUAL, *supra* note 8, at 58 ("The Fourth Amendment primarily protects congressional witnesses against subpoenas that are unreasonably broad or burdensome.").

109. People *ex rel.* Legis. Comm'n on Low Income Hous. v. Keefe, 223 N.E.2d 144, 146 (Ill. 1967) (reviewing legislative subpoenas).

110. Lunderstadt v. Pa. House of Representatives Select Comm., 519 A.2d 408 (Pa. 1986).

111. *Id.* at 410–12.

112. *Id.* at 414.

113. *Id.* at 415.

114. *Id.* Although not involving a state legislative subpoena, counsel may wish to review Carpenter v. United States, 138 S. Ct. 2206, 2222 (2018), where the Court observed: "The Government will be able to use subpoenas to acquire records in the overwhelming majority of

Court of Pennsylvania takes a more expansive view of search and seizure clause protections for the privacy interests of witnesses.[115]

The Supreme Court of Tennessee held that a constitutional protection against unreasonable searches and seizures does not apply to public records.[116] A legislatively created commission was charged with investigating crime, making findings, and reporting these to the legislature. Challenging the commission's authority to subpoena them, two witnesses argued that legislation establishing the commission contravened the state constitution's protection against unreasonable searches and seizures by requiring state departments and officers to furnish information to the commission.[117] The court rejected this imagined limitation upon the state's power to investigate public officials and to examine public records in their possession. Tennessee's constitutional protection "against unreasonable searches and seizures is not involved in a public inquiry into official conduct and the examination of official records. No provision of the Constitution can be invoked by public officials to enable them to suppress facts connected with the public business under their control."[118]

The controlling distinction between these two cases may well be the presence of a reasonable expectation of privacy. In the Pennsylvania case, the legislative committee sought personal financial records in which the contractors had a reasonable expectation of privacy.[119] But in the Tennessee case, "requiring all departments and officers of the State and its subdivisions to give information" to the commission, regarding "official conduct and the examination of official records,"[120] likely did not implicate a reasonable expectation of privacy—these were public matters, documented by public records.[121] The Supreme Court of Pennsylvania's more expansive view of state constitutional search and seizure protections[122] might be a factor here as well. And where a reasonable expectation of privacy is implicated, the legislative committee need not prove probable cause to any other entity before issuing the subpoena; rather, "based upon testimony in the hearings before" the committee, the subpoena should be more narrowly targeted.[123] That is, if the Pennsylvania

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investigations. We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party." In dissent, in the context of challenging the sweep of this holding, Justice Alito noted the use of legislative subpoenas. *Id.* at 2256 (Alito, J., dissenting).

115. Libonati, *supra* note 2, at 44.

116. Rushing v. Tenn. Crime Comm'n., 117 S.W.2d 4 (Tenn. 1938).

117. *Id.* at 6–7, 9.

118. *Id.* at 9.

119. *See Lunderstadt*, 519 A.2d at 412, 414–15.

120. *See Rushing*, 117 S.W.2d at 9.

121. *Cf.* Embry v. State, 70 Ark. App. 122, 15 S.W.3d 367 (2000) (stating that public employee did not have reasonable expectation of privacy in a government-owned storage shed).

122. *See supra* note 115 and accompanying text.

123. *See Lunderstadt*, 519 A.2d at 415.

court's view is adopted, the committee should develop proof to support a finding of probable cause prior to issuing its subpoena.

C. Fifth Amendment

The Fifth Amendment to the United States Constitution protects individuals against providing compelled incriminating testimony in criminal cases.[124] Arkansas's Constitution states: "[N]or shall any person be compelled, in any criminal case, to be a witness against himself . . . ."[125] This privilege against self-incrimination applies in both civil and criminal proceedings whenever an answer might subject the witness to criminal liability.[126] If compelled testimony, "used with other evidence, would lead to a conviction," and if there is a "possibility of prosecution," then a valid privilege claim exists.[127]

The privilege against self-incrimination applies in state legislative hearings. In a 1931 decision, the Court of Appeals of New York addressed the application of the privilege against self-incrimination to a subpoenaed witness who was held in contempt for not answering a state legislative committee's questions.[128] In the course of deciding the appeal, the court observed that "[t]he privilege in New York applies to an investigation by a Legislature as fully as to a trial in court."[129] In a 1938 decision, the Supreme Court of South Carolina considered a writ of habeas corpus brought by a witness under summons who refused to answer a state legislative committee's questions because the answers might incriminate him; the committee adjudged the witness in contempt and he was committed to the custody of the committee's marshal.[130] The court determined that, in light of the legislative committee's ability to subpoena or summons and compel the witness's attendance, "it inevitably follows that the privilege intended to guarantee a witness against self-incriminating evidence applies fully to a hearing before such a tribunal."[131]

124. U.S. CONST. amend. V.
125. ARK. CONST. art. II, § 8.
126. Dunkin v. Citizens Bank of Jonesboro, 291 Ark. 588, 591, 727 S.W.2d 138, 140 (1987).
127. Young v. Young, 316 Ark. 456, 462, 872 S.W.2d 856, 859–60 (1994) (emphasis in original).
128. Doyle v. Hofstader, 177 N.E. 489, 490–91 (N.Y. 1931).
129. *Id.* at 496 (citations omitted).
130. *In re* Hearing before Joint Legis. Comm., 196 S.E. 164, 165–66 (S.C. 1938).
131. *Id.* at 167 (citations omitted).

D. Fourteenth Amendment

Procedural due process requirements may be applicable to legislative contempt proceedings, depending on the context.[132] This issue is addressed below in the discussion of legislative contempt powers.[133]

E. Separation of Powers

The Arkansas Constitution contains an article expressly addressing separation of powers, Article IV. The first section of that article divides state government powers into "three distinct departments," legislative, executive, and judicial, each confided to a separate body.[134] The second section prohibits members of one department from exercising any power belonging to either of the other two departments, unless the constitution expressly permits this.[135]

One Arkansas case limited legislative oversight activity on separation of powers grounds.[136] A constitutional agency challenged the General Assembly's "review and advice" procedure whereby a legislative committee reviewed agency contracts, and provided "advice" concerning those contracts before the contracts took effect.[137] While there was testimony that the legislative committee was merely acting in an advisory capacity, other testimony asserted that the legislative advice was treated as approval or disapproval of the contracts.[138] The Arkansas Supreme Court determined that the "review and advice" procedure offended the Arkansas Constitution's separation of powers provisions since the legislative "advice" amounted to "a legislative order on how to execute a contract," an executive action.[139] The court drew the line between permissible and impermissible legislative oversight: "While [the legislature] can and should hold hearings and investigate at length the performance of state agencies, it cannot intrude on the prerogatives of the executive branch of government."[140]

Oversight of executive department officials and agencies should typically not be problematic from a separation of powers standpoint. By virtue of possessing legislative power, the General Assembly possesses the inherent power to investigate.[141] As the *Dickinson* court noted, "an investigation into

132. *See* Groppi v. Leslie, 404 U.S. 496, 500, 502–04, 506–07 (1972).
133. *See infra* notes 306–22 and accompanying text.
134. ARK. CONST. art. IV, § 1.
135. *Id.* § 2.
136. Chaffin v. Ark. Game and Fish Comm'n, 296 Ark. 431, 757 S.W.2d 950 (1988).
137. *Id.* at 433, 442–43, 757 S.W.2d at 951, 956.
138. *Id.* at 442–43, 757 S.W.2d at 956.
139. *Id.* at 443, 757 S.W.2d at 956–57 (citing, in part, ARK. CONST. art. IV, §§ 1–2).
140. *Id.* at 444, 757 S.W.2d at 957.
141. *See* ARK. CONST. art. V, § 1 (vesting the people's legislative power in the General Assembly); *supra* notes 33–35 and accompanying text.

the management of the various institutions of the State and the departments of State Government is at all times a legitimate function of the Legislature."[142] In separation of powers terms, legislative oversight of the executive is a proper exercise of legislative powers confided to the General Assembly.

A legislative committee's contemplated subpoena to an Arkansas judge, so that she might testify about her handling of certain child custody cases, provides an example of how separation of powers principles might apply to oversight proceedings concerning the judiciary.[143] One observer argued that issuing a legislative subpoena to a judge, seeking the judge's testimony about a case or class of cases, would threaten judicial independence and compromise the judge's ability to exercise judicial power.[144] The legislative committee ultimately did not issue the subpoena, but there are nonetheless at least two longstanding examples of the General Assembly exercising oversight involving the Arkansas judiciary. The General Assembly appropriates funds for judicial department entities such as the Arkansas Supreme Court and the Administrative Office of the Courts,[145] providing an opportunity for legislative oversight into administration and operation of the courts, while the Legislative Joint Auditing Committee reviews staff audits of judicial entities.[146]

F. Executive Privilege

Very generally, "executive privilege" is a president's or other executive's claim of constitutional authority to withhold information.[147] This privilege has been characterized as a "myth" that is "a product of the nineteenth century, fashioned by a succession of presidents who created 'precedents' to suit the occasion."[148] This relatively recent doctrine should be contrasted with parliamentary inquiry, which is documented as early as 1621, and with legislative oversight authority claimed and exercised by American legislative bodies before adoption of the federal Constitution.[149] In current federal practice,

142. Dickinson v. Johnson, 117 Ark. 582, 588, 176 S.W. 116, 117 (1915).

143. John DiPippa, *"Your Honor, You Are Hereby Commanded to Appear . . .": When a Legislative Committee Subpoenas a Sitting Judge*, 47 U. MEM. L. REV. 1193, 1193–94 (2017).

144. *Id.* at 1197, 1201, 1204–05.

145. *See, e.g.*, Act of Feb. 22, 2022, No. 20, 2022 Ark. Acts ___ (appropriation act for the Supreme Court); Act of Mar. 7, 2022, No. 172, 2022 Ark. Acts ___ (appropriation act for the Administrative Office of the Courts).

146. *See, e.g.*, LEGIS. JOINT AUDITING COMM., ARKANSAS SUPREME COURT ANNUAL FINANCIAL REPORT (2020) (audit of the Supreme Court); LEGIS. JOINT AUDITING COMM., ADMINISTRATIVE OFFICE OF THE COURTS ANNUAL FINANCIAL REPORT (2020) (audit of the Administrative Office of the Courts).

147. *See* BERGER, *supra* note 2, at 1; Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1, 9 (2020); *Privilege*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "evidentiary privilege").

148. BERGER, *supra* note 2, at 1.

149. *Id.* at 15, 20–21, 31–34.

the executive has expanded its use of executive privilege to the detriment of congressional oversight authority, resulting in an imbalance between the legislative and executive branches in information disputes.[150]

In its 2019 *Protect Fayetteville v. City of Fayetteville* opinion, the Arkansas Supreme Court addressed an issue of first impression: Is executive privilege recognized under Arkansas law?[151] The court did not cite to any express recognition of this doctrine in the Arkansas Constitution; rather, it quoted and cited that document's separation of powers article and pointed to recognition of this privilege in federal and other state courts.[152] Without defining the doctrine or indicating its limitations, the court found that executive privilege exists in Arkansas: "Considering the separation-of-powers doctrine, we hold that the executive privilege also exists in Arkansas. Again, its application and limitations will bear out in future cases."[153] Perhaps as it develops this doctrine, without the guidance of express constitutional authorizing language, the court will be mindful of the General Assembly's time-honored legislative oversight authority for the purposes of checking the executive and informing itself and the public.[154]

V. EVIDENTIARY PRIVILEGES, FOIA, AND "CONFIDENTIAL" MATTERS

A witness might object to legislative questioning in the belief that judicial evidentiary privileges apply in legislative proceedings. A witness might also object on the basis that the records sought are protected by an exemption in the Arkansas Freedom of Information Act ("FOIA") or that they are otherwise "confidential." This section addresses these claims.

A. Evidentiary Privileges

Although otherwise relevant for evidence purposes, some information is protected from disclosure for policy reasons—perhaps to protect certain relationships or to promote candid conversations regarding certain matters.[155] Protected relationships include attorney and client, physician and patient, accountant and client, and spousal relationships.[156] As to disclosure of communications or information incident to these relationships, the common law

150. *See* Shaub, *supra* note 147, at 25, 28, 34–55, 91.

151. Protect Fayetteville v. City of Fayetteville, 2019 Ark. 28, at *2, *7, 566 S.W.3d 105, 107, 109.

152. *Id.* at *7–9, 566 S.W.3d at 109–10.

153. *Id.* at *9, 566 S.W.3d at 110.

154. *See supra* notes 2, 16, 33–38 and accompanying text.

155. IMWINKELRIED, *supra* note 5, § 7.01; 81 AM. JUR. 2D *Witnesses* § 272, Westlaw (database updated Nov. 2022).

156. IMWINKELRIED, *supra* note 5, § 7.02.

developed evidentiary privileges permitting the holder of such a privilege the right to refuse disclosure of such communications or information.[157]

In Arkansas, evidentiary privileges are set forth in rules of evidence adopted by the Arkansas Supreme Court that are only applicable in judicial proceedings.[158] Support for this proposition can be found in the 1989 *McCambridge v. Little Rock* decision.[159] Among other issues, an attorney argued that two letters addressed to him by his deceased client were exempt from police disclosure under FOIA because of attorney-client privilege.[160] The Arkansas Supreme Court rejected that argument, in part because this privilege was not applicable outside of judicial proceedings: "[T]he attorney-client privilege, A.R.E. Rule 502, is an evidentiary rule limited to court proceedings. A.R.E. 101. It has no application outside of court proceedings and, therefore, cannot create an exception to a substantive act."[161]

Evidentiary privileges do not apply in legislative proceedings.[162] One rationale for this is based on an express constitutional power: the Arkansas Constitution authorizes both houses of the General Assembly to establish their own rules of proceedings.[163] The term "rules of proceedings" encompasses legislative decisions about applying evidentiary privileges in legislative hearings.[164] Since the power to adopt its own rules of proceedings is expressly

157. *Id.*; 81 AM. JUR. 2D *Witnesses* §§ 272, 274, Westlaw (database updated Nov. 2022).

158. *See* ARK. R. EVID. art. V (containing rules regarding various evidentiary privileges); ARK. R. EVID. 101 ("These rules govern proceedings in the courts of this State . . . ."); Morton Gitelman, *Commentary: How the Arkansas Supreme Court Raised the Dead*, 1987 Ark. L. Notes 93 (discussing adoption of the rules of evidence). This discussion does not address constitutional privileges, such as the privilege against self-incrimination. *See supra* notes 124–31 and accompanying text. And it does not address privileges that may exist in Arkansas Code that are created by the General Assembly itself. *See generally infra* notes 184–95 and accompanying text (discussing the legislature's ability to review records made "confidential" by legislative enactment). The focus here is on evidentiary privileges adopted by the judiciary.

159. McCambridge v. Little Rock, 298 Ark. 219, 766 S.W.2d 909 (1989).

160. *Id.* at 225–26, 766 S.W.2d at 912.

161. *Id.* at 226, 766 S.W.2d at 912 (citation omitted).

162. *See id.* (attorney-client privilege "has no application outside of court proceedings"); Hurst, *supra* note 20, at 496 ("[c]ourt-made rules of evidence do not govern" in legislative hearings); *cf.* IMWINKELRIED, *supra* note 5, § 7.02 ("[I]n a large number of states and in federal practice, the privileges recognized by the courts do not apply to hearings conducted by legislative committees.").

163. ARK. CONST. art. V, § 12. For further discussion of this provision, see *infra* notes 389–401 and accompanying text.

164. *Cf.* Michael D. Bopp & DeLisa Lay, *The Availability of Common Law Privileges for Witnesses in Congressional Investigations*, 35 HARV. J. L. & PUB. POL'Y 897, 932 (2012) ("[B]ecause the courts cannot dictate the rules of Congress's proceedings, parties must realize that the discretion to compel production of privileged material lies with Congress."); OVERSIGHT MANUAL, *supra* note 8, at 62 (explaining that each congressional chamber's power to determine its rules of proceedings includes the authority to establish procedures governing the treatment of privileges within those proceedings).

committed to the General Assembly, the judiciary cannot impose its rules of procedure—such as evidentiary privileges—on legislative proceedings because that would be contrary to the doctrine of separation of powers.[165] Until such time as evidentiary privileges are recognized by the General Assembly, they do not apply in legislative oversight proceedings.

Compare the *Congressional Oversight Manual* position on this issue. That publication notes "the congressional view that investigative committees are not bound by court-created common law privileges."[166]

> The underlying rationale for this position has been that Congress's exercise of its constitutionally based investigative powers cannot be impeded by court-created, common-law limitations and that each chamber's exclusive power to determine the rules of its own proceedings includes the authority to establish investigative and hearing procedures that govern the treatment of certain privileges within those proceedings.[167]

The publication acknowledged "non-binding dicta" in a 2020 Supreme Court of the United States decision concerning the applicability of evidentiary privileges in congressional proceedings.[168] But to the extent the Court's statement suggests an obligation to apply evidentiary privileges, the *Congressional Oversight Manual* establishes that the Court's statement is historically incorrect and misstates the evidence upon which it is based.[169]

B. FOIA and Its Exemptions

FOIA generally provides that "all public records shall be open to inspection and copying . . . by any citizen of the State of Arkansas."[170] However, certain public records are exempt from public inspection under FOIA; these exemptions can be found both in FOIA itself and in other parts of the

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165. *See* ARK. CONST. art. IV, § 2 (stating that no members of one department of government can exercise any power belonging to either of the other two departments); *cf.* MORTON ROSENBERG, CONG. RSCH. SERV., 95-464, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY 36 (1995) (suggesting that the legislative branch's investigatory authority "is subject to non-constitutional, common law rules developed by the judicial branch to govern its proceedings is arguably contrary to the concept of separation of powers"); 81A C.J.S. *States* § 87, Westlaw (database updated Nov. 2022) ("[U]nder the separation of powers doctrine, courts have no authority . . . to interfere with the proceedings of either house of the state legislature.").

166. OVERSIGHT MANUAL, *supra* note 8, at 61–62 (citations omitted).

167. *Id.* at 62.

168. *Id.* (quoting Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2032 (2020)).

169. *Id.* at 62–63, 63 n.329.

170. ARK. CODE ANN. § 25-19-105(a)(1)(A) (Supp. 2021).

Arkansas Code.[171] On occasion, one of these FOIA exemptions will be asserted as the basis for objecting to a legislative request for records.[172] That is not a valid objection.

In an opinion issued in 1989, the Attorney General considered whether a legislator could review records otherwise exempt from public inspection under FOIA by virtue of his membership in the General Assembly.[173] The Attorney General noted that "FOIA does not address who may or may not review documents by virtue of an official position."[174] He also noted several provisions in the Arkansas Code that allowed legislators and legislative committees to issue subpoenas compelling the attendance of witnesses and the production of records.[175] The Attorney General concluded "that the FOIA does not address the availability of public records for inspection by legislators. Members of the General Assembly may, however, compel the release of documents in accordance with" various Code sections.[176]

In an opinion issued in 2004, the Attorney General responded to a department director's concern about releasing records to the Division of Legislative Audit where the records sought were otherwise exempt from public inspection under FOIA.[177] The Attorney General opined that the FOIA exemption "does not prevent [the department's] release of records that are otherwise available" to Legislative Audit pursuant to one of its then-existing Code sections.[178] That Code section provided that the Legislative Auditor "shall have access at all times to all of the books, accounts, reports, confidential or otherwise . . . in any state . . . department . . . ."[179] The Attorney General concluded:

> This provision clearly affords Leg[islative] Audit access to records regardless of the records' confidential nature. It will be controlling as the specific statute on the subject. The FOIA is a general statute that affords "any

171. *Id.* § 25-19-105(b)–(c) (exemptions within FOIA); JOHN J. WATKINS ET AL., THE ARKANSAS FREEDOM OF INFORMATION ACT § 3.04[c] (6th ed. 2017) (noting exemptions in state statutes outside FOIA).

172. *See, e.g.*, Op. Ark. Att'y Gen. No. 2004-280 (2004) (discussing a department director who apparently relied upon a FOIA exemption as a basis to question providing records sought by the Division of Legislative Audit).

173. Op. Ark. Att'y Gen. No. 89-330 (1989).

174. *Id.*

175. *Id.*

176. *Id.*; *see also* Op. Ark. Att'y Gen. No. 90-001 (1990) (affirming Op. Ark. Att'y Gen. No. 89-330's conclusion and stating "that the legislature has the power to subpoena records that are exempt from public disclosure under FOIA").

177. Op. Ark. Att'y Gen. No. 2004-280 (2004).

178. *Id*. (citing ARK. CODE ANN. § 10-4-106 (repealed 2005)). Legislative Audit's current authorizing laws contain a Code section, ARK. CODE ANN. § 10-4-416(a)(1) (Supp. 2021), with substantially similar language as that quoted from ARK. CODE ANN. § 10-4-106 (repealed 2005).

179. Op. Ark. Att'y Gen. No. 2004-280 (2004) (quoting ARK. CODE ANN. § 10-4-106 (repealed 2005)).

> citizen of the State of Arkansas" the right to inspect and copy non-exempt public records. In my opinion the FOIA is inapplicable with respect to ADH records that are available to Leg[islative] Audit pursuant to [the former Code section].[180]

Arkansas Legislative Audit currently has a Code section containing substantially similar language to the former Code section relied on by the Attorney General.[181]

Thus, FOIA and its exemptions do not govern the General Assembly's right to obtain records. Instead, the question is whether the General Assembly possesses authority elsewhere in law to obtain and review the records sought. This authority will govern legislative access to records as the specific authority on the subject; the more general provisions of FOIA and its exemptions from public disclosure will not control.[182] Such authority might be codified, as illustrated by these two opinions. Such authority could also be found in the legislature's power to investigate or conduct other forms of oversight for the purpose of obtaining information needed to perform its duties.[183]

C. Confidential Matters

A general claim that records are confidential, perhaps based on a statute, does not bar legislative access to those records.[184] There may be Arkansas Code expressly permitting legislative access to confidential matters. For example, the Legislative Joint Auditing Committee is authorized to examine all records, "confidential or otherwise . . . ."[185] Similarly, Arkansas Legislative Audit has "access at all times" to any records, "confidential, privileged, or otherwise," of any entity or political subdivision of the state if the records are deemed necessary for an audit.[186] As the Attorney General remarked concerning the substantially similar predecessor to this Code section, "[t]his provision

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180. *Id.* (citations omitted).

181. *Compare* ARK. CODE ANN. § 10-4-106 (repealed 2005) ("access at all times to all . . . reports, confidential or otherwise"), *with* ARK. CODE ANN. § 10-4-416(a)(1) ("access at all times to any . . . records, confidential, privileged, or otherwise").

182. *See* Op. Ark. Att'y Gen. No. 89-330 (1989); Op. Ark. Att'y Gen. No. 2004-280 (2004).

183. *See supra* notes 29–34, 43–58 and accompanying text; *cf. In re* Hecht, 394 N.Y.S.2d 368, 370 (Sup. Ct. 1977) (noting that statutes and rules requiring confidentiality of records "cannot thwart a bona fide legislative investigation"); *see also infra* notes 184–95 and accompanying text.

184. *Cf.* MASON'S MANUAL, *supra* note 7, § 801, para. 6 ("The production of papers material to an inquiry cannot be refused merely because they are private.").

185. ARK. CODE ANN. § 10-3-411(a)(3)(A) (Supp. 2021).

186. *Id.* § 10-4-416(a)(1).

clearly affords Leg[islative] Audit access to records regardless of the records' confidential nature."[187]

If no Arkansas Code section expressly authorizes a particular legislative request for confidential records, the legislature should still be able to obtain those records even if that claim of confidentiality is based on a statute. If the General Assembly can enact a law establishing confidentiality, then it can amend or repeal that law.[188] And in aid of prospective legislation involving confidential records—including, but not limited to, amending or repealing confidentiality laws—the legislature should be able to inspect those records.[189]

This line of reasoning is illustrated by a 1977 opinion of the Supreme Court of New York.[190] A legislative committee charged with studying juvenile crime sought the records of a particular juvenile. Although an agency director had testified about "paying close attention" to keeping dangerous juveniles in a particular facility and this juvenile had been committed to that facility, the juvenile was free from custody and committed murder just a few months after his commitment. For the purpose of determining how to handle such cases in the future, the committee issued subpoenas to a couple of state agencies, seeking the juvenile's records.[191] One state agency opposed its subpoena, "stress[ing] the confidentiality [that] the law imparts to the records of juvenile proceedings."[192] The court noted that the juvenile's records were not to be used in evidence against him, but "[t]hey are the subject of a proposed inquiry in a legislative hearing."[193] The court held that the committee had the right to inspect the juvenile's records.

> The Family Court Act, and the administrative rules of that court and of the Department of Probation . . . providing for the sealing and keeping secure of case records cannot thwart a bona fide legislative investigation. Indeed, the very policy of confidentiality of such records was created by the Legislature, and may be scrutinized by it to determine if that policy should be retained or modified.[194]

187. Op. Ark. Att'y Gen. No. 2004-280 (2004); *see supra* notes 177–81 and accompanying text.

188. *Cf.* 81 AM. JUR. 2D *Witnesses* § 274, Westlaw (database updated Nov. 2022) ("a privilege created by the legislature can be limited by the legislature").

189. *See supra* notes 29–35, 77–80 and accompanying text.

190. *In re* Hecht, 394 N.Y.S.2d 368 (Sup. Ct. 1977).

191. *Id.* at 369–70.

192. *Id.* at 370.

193. *Id.*

194. *Id.*

The court acknowledged the potential for prejudice to the juvenile and commented that "[t]he committee must be relied on to protect the rights of the individual while pursuing the interests of society."[195]

VI. LEGISLATIVE SUBPOENAS

The necessity for legislative subpoenas has long been recognized. The Supreme Court of the United States observed:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete[,] so some means of compulsion are essential to obtain what is needed.[196]

This section addresses this important legislative tool.

A. Authority to Issue Legislative Subpoenas

The General Assembly's power to issue subpoenas is inherent in, and auxiliary to, its power to legislate.[197] The Court of Appeals of New York explained that "[t]he law-making power given to the Legislature authorizes it, by inquiry, to ascertain facts which affect public welfare and the affairs of government. Such power of inquiry, with process to enforce it, is an essential auxiliary to the legislative function."[198] The ability to compel the attendance of witnesses is an attribute of the power to legislate and is an essential implication of that power.[199] Thus, by virtue of the power to legislate conferred by the Arkansas Constitution on the General Assembly,[200] that body is authorized to issue subpoenas to compel the attendance of witnesses and the production of documents.[201]

The Arkansas Constitution recognizes legislative subpoena power when it provides that "[e]ach house shall have power to . . . enforce obedience to its

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195. *Id.* at 371.
196. McGrain v. Daugherty, 273 U.S. 135, 175 (1927).
197. *See* MASON'S MANUAL, *supra* note 7, §§ 795, para. 5, 800, para. 2.
198. *In re* Joint Legis. Comm. to Investigate the Educ. Sys., 32 N.E.2d 769, 771 (N.Y. 1941) (citations omitted); *see McGrain*, 273 U.S. at 175.
199. Att'y Gen. v. Brissenden, 171 N.E. 82, 85 (Mass. 1930).
200. *See* ARK. CONST. art. V, § 1.
201. *See* MASON'S MANUAL, *supra* note 7, §§ 795, para. 5, 800, para. 2.

process . . . ."[202] Legislatures are generally authorized to issue process[203] and this constitutional provision expressly recognizes the General Assembly's power to issue process. "Process" includes writs issued by an authorized entity.[204] A subpoena is a writ commanding a person's appearance at a certain time and place.[205] Thus, the term "process" encompasses legislative subpoenas.[206]

Two recent Arkansas court decisions address legislative subpoenas without directly discussing legislative authority to issue those subpoenas. In a 2014 opinion, the Arkansas Supreme Court rejected an argument that a subpoena issued by the Legislative Auditor was invalid for failure to comply with Rule 45(d) the Arkansas Rules of Civil Procedure; the court refused to read that requirement into the statute authorizing the subpoena, and affirmed the trial court's finding that the subpoena was valid.[207] In a 2012 order, the Circuit Court of Pulaski County dismissed, for lack of jurisdiction, a challenge to another subpoena issued by the Legislative Auditor; the court found that the subpoena was not subject to judicial control at that point because the subject under investigation was proper for legislative inquiry and the items sought were relevant to that subject.[208] Although neither of these decisions addresses the General Assembly's authority to issue subpoenas, they do sustain the exercise of that legislative power.

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202. ARK. CONST. art. V, § 12.

203. 72 AM. JUR. 2D *States, Territories, and Dependencies* § 56, Westlaw (database updated Nov. 2022); *see, e.g.*, *In re Joint Legis. Comm.*, 32 N.E.2d at 771 ("[The] power of inquiry, with process to enforce it, is an essential auxiliary to the legislative function.").

204. 62B AM. JUR. 2D *Process* § 1, Westlaw (database updated Nov. 2022); *cf.* Henderson v. Dudley, 264 Ark. 697, 709, 574 S.W.2d 658, 665 (1978) ("Process, in the sense of the statutes, is a comprehensive term which includes all writs, rules, orders, executions, warrants or mandates issued during the progress of an action . . . ."); *Process*, BLACK'S LAW DICTIONARY (11th ed. 2019).

205. 81 AM. JUR. 2D *Witnesses* § 6, Westlaw (database updated Nov. 2022); 98 C.J.S. *Witnesses* § 20, Westlaw (database updated Nov. 2022); *Subpoena*, BLACK'S LAW DICTIONARY (11th ed. 2019).

206. *Cf.* McCrae v. State, 92 Ark. 28, 30 (1909) (noting that a party "contented himself with having a subpoena issued and served, without seeking any other process of the court").

207. Valley v. Pulaski Cnty. Cir. Ct., 2014 Ark. 112, at *11–14, 431 S.W.3d 916, 921–23.

208. Ark. Loc. Police and Fire Ret. Sys. v. Norman, No. CV-11-5426, (Pulaski Cnty. Cir. Ct. June 25, 2012).

B. Delegation of Legislative Authority to Issue Subpoenas

Legislative authority to issue subpoenas may be delegated to committees[209] or individuals.[210] An exercise of this delegated subpoena power must comply with Arkansas Code that authorizes such power.[211] Since the General Assembly has delegated the authority to issue subpoenas, a brief review of the authorizing Code sections may be helpful.

The Senate or the House of Representatives, or the two bodies meeting jointly, may "[i]ssue the necessary subpoenas" to compel a person's appearance "before them or a committee thereof . . . ."[212] Witness subpoenas shall be issued at the request of (1) a member of either the Senate or House, "with the majority support of the member's respective house"; (2) the President Pro Tempore of the Senate, on behalf of a majority of that body; (3) the Speaker of the House of Representatives, on behalf of a majority of that body; or (4) an accused party.[213] Witness subpoenas must be issued under the hand of specified legislative leaders and attested by specified legislative officials.[214] A witness appearing in response to a legislative subpoena "shall be allowed the same fees as allowed by law to witnesses for their attendance in any court . . . ."[215]

Another Code section sets forth the mechanics for issuing subpoenas by authorized legislative committees: "The committee so empowered may issue its subpoena signed by its chair or acting chair for the attendance of witnesses and the production of papers or records, and the subpoena may be served by any officer authorized to serve process in civil cases."[216] The provision for

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209. *See* Op. Ark. Att'y Gen. No. 2007-044 (2007) (certain committees of the General Assembly "may subpoena persons, documents, and records"); *see also In re* Joint Legis. Comm. to Investigate the Educ. Sys., 32 N.E.2d 769, 771 (N.Y. 1941) (noting that the power to compel the attendance of witnesses and the production of documents "may be delegated to a committee"); 81A C.J.S. *States* §§ 116–17, Westlaw (database updated Nov. 2022).

210. *See* Op. Ark. Att'y Gen. No. 89-330 (1989) ("Several provisions of the Arkansas Code . . . allow members of the legislature and their committees to issue subpoenas compelling the appearance of witnesses and the production of records."); *see also In re Joint Legis. Comm.*, 32 N.E.2d at 771–72 (sustaining subpoena issued by a single member of a legislative committee); *cf.* Att'y Gen. v. Brissenden, 171 N.E. 82, 83–87 (Mass. 1930) (legislature delegated the authority to investigate to the attorney general as well as the power to require witness attendance and document production by summons; court noted that ascertaining facts "is a responsibility not infrequently placed upon committees and individuals").

211. *See Valley*, 2014 Ark. 112, at *7–9, 431 S.W.3d at 921–22 (examining Legislative Auditor's subpoena for compliance with ARK. CODE ANN. § 10-4-421); *cf.* Op. Ark. Att'y Gen. No. 2007-044 (2007) (legislative committee's power to investigate is limited by the statute creating the committee).

212. ARK. CODE ANN. § 10-2-301(a)(1) (Repl. 2012).

213. *Id.* § 10-2-301(b).

214. *Id.* § 10-2-303.

215. *Id.* § 10-2-304(a).

216. *Id.* § 10-2-307.

paying witness fees likely applies to witnesses appearing under subpoena authorized by this section.[217] Legislative committees authorized to issue subpoenas include: (1) the Legislative Council,[218] (2) the Joint Performance Review Committee,[219] (3) the Joint Committee on Advanced Communications and Information Technology,[220] and (4) the Senate and House Committees on Education.[221] Some Code sections detail specific additional requirements that must be met prior to issuing committee subpoenas. For example, before the Joint Performance Review Committee (meeting with both Senate and House members) can take any action to exercise its subpoena authority, either notice of at least one week must be given to all members or there must be a two-thirds vote of the House membership and a two-thirds vote of the Senate membership; if either of those conditions is satisfied, a majority of the House membership and a majority of the Senate membership must still approve the subpoena.[222] These more detailed requirements supplement the mechanics quoted at the beginning of this paragraph.[223]

The Legislative Joint Auditing Committee may issue subpoenas in three contexts: (1) "[i]n connection with any investigations or audits";[224] (2) to oversee compliance with fiscal management laws as provided in the Arkansas Governmental Compliance Act;[225] and (3) to require the Attorney General to appear concerning a municipal charter revocation referral.[226] The committee must comply with specific requirements concerning a witness's prior failure to appear or produce documents, notice to the membership, approval, and issuance.[227] Subpoenas may be served by the sheriff of the county where the subpoenaed witness or records may be located, or the committee may ask the Arkansas State Police to effect service.[228] A witness under subpoena is entitled to a witness fee and travel allowance "at the same rate as provided by law for witnesses subpoenaed to appear in civil actions in circuit court."[229]

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217. *See id.* § 10-2-304(a) ("Every witness attending either house or a committee thereof . . . being summoned, shall be allowed the same fees . . . .").

218. ARK. CODE ANN. § 10-3-306(c) (Repl. 2012).

219. *Id.* § 10-3-901(f) (when meeting jointly or when Senate or House members meet separately); *id.* § 10-3-902(7)(B)(iii) (Supp. 2021) (for referrals of election law violations).

220. *Id.* § 10-3-1704(b)(3).

221. *Id.* § 10-3-2103(b)(1) (concerning investigations into the effectiveness of education programs).

222. *Id.* § 10-3-901(f) (Repl. 2012).

223. *Compare, e.g.*, *id.* (requirements to be empowered to issue subpoenas), *with id.* § 10-2-307 (mechanics to issue subpoenas for "[t]he committee so empowered").

224. ARK. CODE ANN. § 10-3-411(c) (Supp. 2021).

225. *Id.* § 10-4-307(a) (Repl. 2012). The Arkansas Governmental Compliance Act can be found at ARK. CODE ANN. §§ 10-4-301 to 10-4-309 (Repl. 2012 & Supp. 2021).

226. *Id.* § 14-62-115(b) (Supp. 2021).

227. *Id.* § 10-3-411(c)–(e).

228. *Id.* § 10-3-411(g).

229. *Id.* § 10-3-411(h).

The Legislative Auditor is authorized to issue subpoenas for persons or records "[i]n connection with an audit of any entity of the state or a political subdivision of the state or an audit related to any transactions or relationships with the entities or subdivisions . . . ."[230] A subpoenaed witness, after appearing, shall receive "the same compensation as is received by persons serving as witnesses in circuit courts of this state."[231] The Legislative Auditor may also elect to effect service through a sheriff or the Arkansas State Police.[232]

C. Challenging Legislative Subpoenas

1. Grounds for Challenges

As previously noted, constitutional provisions, authorizing law, and improper motives are all limitations on legislative investigations.[233] These same matters may provide grounds to challenge legislative subpoenas.

Constitutional provisions may limit or invalidate legislative subpoenas. For example, a legislative subpoena duces tecum must describe the documents required with reasonable certainty and sufficient definiteness so that a witness can identify the documents sought.[234] The Supreme Court of Illinois directed the dismissal of an action seeking to enforce overbroad legislative subpoenas for records, noting that "[i]t is established law that a subpoena which is unreasonably broad in its demand and general in its terms constitutes an unreasonable search and seizure . . . ."[235]

Subpoenas should also comply with the terms of any resolution or statute authorizing the legislative investigation or the subpoena.[236] One basis for examining legislative subpoenas is "whether the inquiry is within the authority of the issuing party" which may be answered by examining "the express language of the enabling resolution."[237] A review of the Code sections summarized above[238] suggests several possible issues, including: was the issuing legislative committee or official authorized to issue a subpoena for this purpose; was the subpoena approved by any extraordinary vote requirements; was it

230. ARK. CODE ANN. § 10-4-421(a) (Supp. 2021).
231. *Id.* § 10-4-421(c).
232. *Id.* § 10-4-421(e).
233. *See supra* notes 81–90 and accompanying text.
234. 81A C.J.S. *States* § 117, Westlaw (database updated Nov. 2022).
235. People *ex rel.* Legis. Comm'n on Low Income Hous. v. Keefe, 223 N.E.2d 144, 146 (Ill. 1967).
236. *See* Valley v. Pulaski Cnty. Cir. Ct., 2014 Ark. 112, at *8–9, 431 S.W.3d 916, 921–22 (examining Legislative Auditor's subpoena for compliance with ARK. CODE ANN. § 10-4-421); MASON'S MANUAL, *supra* note 7, § 802, paras. 1, 3–4, 10.
237. Lunderstadt v. Pa. House of Representatives Select Comm., 519 A.2d 408, 411 (Pa. 1986).
238. *See supra* notes 212–32 and accompanying text.

executed by the proper parties; and was service properly effected? But to the extent these issues are governed by legislative rules of proceedings, they may not be justiciable; this concern is discussed below.[239]

Improper motives may also limit or invalidate legislative subpoenas. Courts will assume that a legislative inquiry is "well intended."[240] But "there is protection against harassing tactics unjustified by the requirements of sober investigation," such as by requesting an unreasonable number of documents.[241]

2. Timing of Challenges

If grounds exist to challenge a legislative subpoena, a challenge must be brought at the proper time. Service of a facially valid subpoena upon a witness, without more, does not violate that witness's rights, and a court will not speculate or presume that a legislative committee will act irregularly or illegally at that stage of the proceedings.[242] A temporary restraining order enjoining further legislative investigation, in that context, would be inappropriate.[243] Instead, "[c]ourts should not interfere with the investigatory powers of the Legislature necessary to carry out its legislative function until some citizen's constitutional rights are affected and asserted as a reason for noncompliance or refusal to honor a legislative subpoena."[244]

The Commonwealth Court of Pennsylvania's 1974 decision in *Camiel v. Select Committee* is instructive. A legislative committee effected service of a subpoena upon Camiel, who promptly sought a court order quashing the subpoena.[245] The court recognized that it was being "asked here to interfere with the legislative process"; the court believed it "must question whether we have the jurisdiction and the power to interfere at this point in the proceedings."[246] Although Camiel had been served, there had been "no confrontation," and there might not be: (1) the subpoena might be withdrawn; (2) the legislative committee might accept whatever documents Camiel might be willing to submit; (3) upon confrontation, the committee "could decide not to force the issue or even to seek a contempt citation"; or (4) Camiel might raise constitutional claims before the committee who might agree with him.[247] The court

239. *See infra* notes 389–401 and accompanying text.

240. *In re* Joint Legis. Comm. to Investigate the Educ. Sys., 32 N.E.2d 769, 771 (N.Y. 1941); *see supra* notes 88–90 and accompanying text.

241. Ward v. Peabody, 405 N.E.2d 973, 978 (Mass. 1980) (citation omitted).

242. State *ex rel.* Hodde v. Superior Ct., 244 P.2d 668, 674 (Wash. 1952).

243. *Id.* at 668–69, 674–76.

244. Camiel v. Select Comm. on State Cont. Pracs. of House of Representatives, 324 A.2d 862, 866 (Pa. Commw. Ct. 1974).

245. *Id.* at 863–65.

246. *Id.* at 866.

247. *Id.*

contrasted several Supreme Court of the United States cases, where that body "was rendering decisions on ripe cases presenting concrete issues concerning the effect of legislative action on citizens' constitutional rights."[248] In this case, there was no constitutional impediment to the legislative inquiry, "but a constitutional issue may be raised by a citizen at that point in the proceedings when his or her constitutional rights are affected, which may be declared a constitutional impediment through a court decision."[249] Thus, "[a]bsent a confrontation and a record made showing the factual posture of the matter," Camiel's case was not ripe for a final judicial determination of any constitutional issues, and his petition was dismissed.[250]

The Circuit Court of Pulaski County referred to this "confrontation" requirement in its 2012 order involving a legislative subpoena.[251] After the Legislative Auditor subpoenaed a state agency's records, that agency sought an order declaring that the information was not subject to subpoena.[252] The Legislative Auditor moved to dismiss the agency's complaint for lack of subject matter jurisdiction.[253] The court framed the issue as "whether a legislative subpoena is subject to judicial control."[254] The court agreed to dismiss the state agency's complaint for lack of subject matter jurisdiction.

> This Court is persuaded that it does not have subject matter jurisdiction in this case as the subject of the investigation is proper for legislative inquiry and the items sought are relevant to that subject. In this case, this Court finds that the legislative subpoena is not subject to judicial control. Ark. Code Ann. § 10-4-421(d)(1) provides for judicial action only if there is a "confrontation" involving a request for sanctions for disobeying a subpoena.[255]

A witness challenging a subpoena must wait until his or her rights are affected before asserting any challenges. Any challenge to a legislative subpoena made prior to a request for sanctions might well be blocked by an order dismissing the challenge for lack of subject matter jurisdiction.

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248. *Id.* at 866–69 (citations omitted).
249. *Id.* at 870.
250. *Camiel*, 324 A.2d at 870–71.
251. Ark. Loc. Police and Fire Ret. Sys. v. Norman, No. CV-11-5426, (Pulaski Cnty. Cir. Ct. June 25, 2012).
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id*.

VII. OTHER TOOLS FOR OVERSIGHT: STAFF INVESTIGATIONS, DEPOSITIONS, AND INTERROGATORIES

There are other tools at the General Assembly's disposal for effecting or aiding in legislative oversight.

A. Staff Investigations

While the power to investigate and ascertain facts is incident to the power to legislate, ascertaining facts is not itself legislative, or exclusively judicial, in nature.[256] "The ascertainment of facts in its essence is not a legislative function. It is simply ancillary to legislation. It may be accomplished in divers ways. While it may be done by the Legislature itself, it is a responsibility not infrequently placed upon committees and individuals."[257] Thus, the General Assembly may delegate investigative authority to its staff.[258]

Such investigative authority has been delegated to Arkansas Legislative Audit ("Audit"). That agency is directed by the Legislative Auditor, who is authorized personally or through his assistants and employees to conduct audits.[259] The term "audits" is broadly defined to not only include financial audits but also any "investigation, or other report or procedure approved by the Legislative Joint Auditing Committee for an entity of the state or a political subdivision of the state . . . ."[260] The Legislative Auditor may "require the aid and assistance of all officials, auditors, accountants, and other employees" of state entities and political subdivisions "at all times in the inspection, examination, and audit of any . . . pertinent records."[261] Audit staff also enjoys "access at all times to any . . . records, confidential, privileged, or otherwise," deemed necessary to audit public funds related transactions of state entities or political subdivisions.[262]

Such investigative authority has also been delegated to the Bureau of Legislative Research ("Bureau"). That agency's duties include to "[m]ake studies and investigations, upon direction of the Legislative Council, and secure factual information, prepare reports, and draft legislation as may be required by the Legislative Council or any of its subcommittees . . . ."[263] This agency "is a service agency within the legislative department," and all

256. Att'y Gen. v. Brissenden, 171 N.E. 82, 85–86 (Mass. 1930); *see* 72 AM. JUR. 2D *States, Territories, and Dependencies* § 53, Westlaw (database updated Nov. 2022).

257. *Brissenden*, 171 N.E. at 86.

258. *Cf.* OVERSIGHT MANUAL, *supra* note 8, at 80 (noting oversight activity of congressional staff and congressional agencies, among others).

259. ARK. CODE ANN. §§ 10-4-401(b), 10-4-407(1) (Supp. 2021).

260. *Id.* § 10-4-402(a)(1).

261. *Id.* § 10-4-403(e).

262. *Id.* § 10-4-416(a)(1).

263. *Id.* § 10-3-303(c)(1).

members of the General Assembly have access to it.[264] State agencies must promptly provide the Bureau "with information, records, and access to electronic databases and files" when requested, "unless prohibited by federal or state law."[265] State agencies' staff must also be "reasonably accessible for consultation" with Bureau staff.[266]

Information obtained by legislative staff may be subject to confidentiality requirements. One Code section applies to all legislative employees, including Audit and Bureau employees. It provides that an information request made to a legislative employee by or on behalf of a legislator, including any documents obtained in connection with the information request, must remain confidential; the documents are not public records for FOIA purposes.[267] If Bureau staff are authorized to assist constitutional officers and state agencies in preparing legislation, any documents or working papers involved are confidential and are not public records.[268] Similarly, if Audit obtains records that are exempt from public disclosure in the hands of the records' custodian, those records remain exempt from public disclosure in the hands of the Legislative Auditor and Audit staff.[269] While Audit may exercise its discretion to determine what goes into an audit report, confidential material that is included in the report will need to be evaluated for possible redaction before the report is made public.[270]

Reports prepared by legislative staff do not have the force of law.[271] But they can inform the General Assembly and its committees in the performance of legislative oversight.[272]

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264. *Id.* § 10-3-303(e).

265. ARK. CODE ANN. § 10-3-315(b) (Repl. 2012); *see also id.* § 10-3-304(d) (requiring "[a]ll departments and agencies" of state government to cooperate with the Legislative Council and the Bureau "in providing assistance, information, or data when requested so that the General Assembly might be fully advised of all matters with respect to" state government operations).

266. *Id.* § 10-3-315(d).

267. *Id.* § 10-2-129 (Supp. 2021).

268. *Id.* § 10-2-129(e).

269. *Id.* § 10-4-416(e).

270. *See* Op. Ark. Att'y Gen. No. 94-170 (1994).

271. *Cf.* Op. Ark. Att'y Gen. No. 87-42 (1987) (proposed language in a bill, which would adopt a document to be prepared by the Bureau of Legislative Research that would reflect legislative intent, "essentially cloaks the Bureau of Legislative Research with lawmaking powers" and would be unconstitutional).

272. *See* BLAIR & BARTH, *supra* note 1, at 218 (noting that "the continuous postauditing conducted by the Legislative Joint Auditing Committee" is one of "[t]he legislature's most important instruments for supervising the executive branch"); *e.g.*, DIAMOND, *supra* note 13, at 212–32 (presentation of an audit report and subsequent committee questioning based upon the report and other matters).

B. Depositions

Arkansas Code provides that "[i]n cases not otherwise provided for by law," in either house of the General Assembly, the houses meeting jointly, or a committee of either house, "depositions may be taken and read . . . in all cases in which the taking and reading of depositions would be allowed in any cause pending before a court of law."[273] Commissions may be issued to take such depositions if necessary, and the proceedings for conducting the depositions "shall be the same as may be prescribed by law for taking depositions to be read in a court of law."[274]

C. Interrogatories

Committees may propound written interrogatories to a witness.[275] The interrogatories must be forwarded to any officer in this state authorized to administer oaths; that officer "is clothed with power and authorized to compel the attendance of the witness" before the officer so that the witness's answers can be taken.[276] The witness is required "to subscribe and swear to the truthfulness of the interrogatories," and this must be certified by the officer.[277] After this process is completed, "[t]he usual fees allowed officers for taking depositions and witnesses for their attendance shall be allowed for services authorized by this section . . . ."[278]

VIII. CONTEMPT

Legislative bodies exercise contempt power for self-protection, to maintain order, and to obtain information.[279] This section addresses contempt power in the context of legislative oversight.

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273. ARK. CODE ANN. § 10-2-305(a) (Repl. 2012). For comparison, congressional depositions are discussed at OVERSIGHT MANUAL, *supra* note 8, at 43–45; ROSENBERG, *supra* note 12, at 18–20.

274. ARK. CODE ANN. § 10-2-305(b)–(c).

275. *Id.* § 10-2-308(a).

276. *Id.*

277. *Id.*

278. *Id.* § 10-2-308(b).

279. *See* MASON'S MANUAL, *supra* note 7, §§ 801, para. 1, 805, paras. 1, 3, 806, paras. 1–2.

A. Authority to Exercise Contempt Power

Legislatures possess inherent power to punish contempt.[280] Recall that the power to legislate carries with it an implied power to investigate and obtain information.[281] Sometimes information is not forthcoming, even when a subpoena is served to compel a witness's testimony or the production of documents.[282] Without some means of punishing such noncompliance, legislatures could not preserve their rights; a subpoena would be little more than "a formalized request," and legislative authority to obtain information would be subject to obstruction.[283] Thus, by virtue of possessing legislative authority, power is implied to punish contempt to the extent necessary to preserve and carry out that legislative authority.[284]

The Arkansas Constitution confers the power to legislate upon the General Assembly.[285] That express delegation of power includes the inherent power to punish contempt.[286] The General Assembly can therefore exercise the contempt power to enforce subpoenas and otherwise punish misconduct arising in the course of legislative oversight.[287]

The Arkansas Constitution also states that "[e]ach house shall have power to . . . punish its members, or other persons, for contempt or disorderly behavior in its presence" and to "enforce obedience to its process . . . ."[288] "Process" includes legislative subpoenas;[289] therefore, the General Assembly may "enforce obedience" to its subpoenas.

Constitutional recognition of the General Assembly's contempt power does not necessarily extinguish that body's inherent contempt power.[290] The Supreme Court of the United States observed that "under state constitutions all governmental power not denied is possessed"; in that case, a constitutional provision could not grant contempt power to a legislature since such power

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280. *Id.* §§ 795, para. 5, 806, paras. 1–2; 81A C.J.S. *States* § 119, Westlaw (database updated Nov. 2022).

281. *See* McGrain v. Daugherty, 273 U.S. 135, 165, 174–75 (1927); *supra* notes 29–32 and accompanying text.

282. *See McGrain*, 273 U.S. at 175; OVERSIGHT MANUAL, *supra* note 8, at 48.

283. *See* OVERSIGHT MANUAL, *supra* note 8, at 48, 54.

284. *See* Marshall v. Gordon, 243 U.S. 521, 541 (1917); *cf.* ASP, Inc. v. Cap. Bank & Tr. Co., 174 So. 2d 809, 814 (La. Ct. App. 1965) (stating legislature would be helpless and ineffective to command compliance with subpoenas unless it has contempt power; therefore, equally inherent with the subpoena power is the legislative power to punish contempt).

285. ARK. CONST. art. V, § 1.

286. *See Marshall*, 243 U.S. at 535–36, 541; MASON'S MANUAL, *supra* note 7, §§ 795, para. 5, 805.

287. *See* MASON'S MANUAL, *supra* note 7, § 801; 81A C.J.S. *States* § 119, Westlaw (database updated Nov. 2022).

288. ARK. CONST. art. V, § 12.

289. *See supra* notes 202–06 and accompanying text.

290. *See* MASON'S MANUAL, *supra* note 7, § 806, para. 1.

already existed.[291] It may be that the Arkansas constitutional provision merely recognizes and affirms the General Assembly's inherent contempt power.[292] In any event, the General Assembly possesses inherent authority to punish contempt, including noncompliance with its subpoenas, and the Arkansas Constitution at least acknowledges—or perhaps provides alternate authority for—the legislature's contempt power.

B. Punishing Contempt of Legislative Subpoenas

The General Assembly relies on the judiciary for assistance in punishing contempt of legislative subpoenas. If a person is subpoenaed to appear before the Senate, the House, a committee of either body, or a joint interim committee, and that person fails to appear or produce subpoenaed documents, such fact "shall be certified to the circuit court of the county in which the hearing is held," and that court "shall punish the person for contempt" in the same manner as if the person was in contempt of the court's subpoena or directive.[293] Substantially similar provisions exist for the Legislative Joint Auditing Committee and the Legislative Auditor.[294] Any legislative exercise of the contempt power must conform to these laws.[295] But the General Assembly may adopt alternative methods for punishing contempt.[296]

Note that these Code sections authorize a circuit court to punish contempt of legislative subpoenas in the same manner as if the witness was in contempt of the court's own subpoena or directive. Although these Code sections do not specifically refer to Ark. Code Ann. § 16-10-108 in the context of the circuit court's authority, it would seem to apply; that Code section authorizes every court of record "to punish, as for criminal contempt" persons guilty of "[w]illful disobedience of any process or order lawfully issued or

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291. *Marshall*, 243 U.S. at 535–36; *cf.* LIBONATI, *supra* note 2, at 37 (state constitutions operate to limit state governmental powers).

292. *See* MASON'S MANUAL, *supra* note 7, § 806, para. 1.

293. ARK. CODE ANN. § 10-2-306(b) (Repl. 2012). ARK. CODE ANN. § 10-2-110 addresses disorderly conduct in general.

294. *See id.* § 10-3-411(j) (Supp. 2021) (Legislative Joint Auditing Committee); *id.* § 10-4-421(d)(1) (Legislative Auditor).

295. *See* MASON'S MANUAL, *supra* note 7, § 801, para. 2.

296. *See* ASP, Inc. v. Cap. Bank & Tr. Co., 174 So. 2d 809, 814–15 (La. Ct. App. 1965) (existing constitutional and statutory provisions for punishing contempt of the legislature were "non-exclusive"; an additional procedure adopted in a resolution "was an additional means of punishing a contempt of the authority of the Legislature").

made by it . . . ."[297] The term "process" includes subpoenas.[298] Contempt adjudicated under this Code section is a Class C misdemeanor.[299]

The 2014 Arkansas Supreme Court opinion in *Valley v. Pulaski County Circuit Court* illustrates how these Code sections work together.[300] Despite being subpoenaed by the Legislative Auditor, a witness failed to appear at a meeting of a Legislative Joint Auditing Committee subcommittee. The Legislative Auditor responded by filing a petition for adjudication of contempt in the Pulaski County Circuit Court, citing Ark. Code Ann. §§ 10-4-421(d)(1) and 16-10-108(a)(3) as statutory authority for further proceedings.[301] The circuit court issued an order to appear and show cause, and directed the Legislative Auditor to effect service by any means allowed under Rule 4 of the Arkansas Rules of Civil Procedure; an affidavit of service was subsequently filed, declaring that the witness had been served with the order to appear and show cause, the petition for adjudication of contempt, and the subpoena.[302] The circuit court agreed that the proceedings were for criminal contempt and appointed the Pulaski County Prosecuting Attorney to represent the State of Arkansas at trial; the circuit court found that the Legislative Auditor's subpoena was valid and that the witness was guilty of criminal contempt.[303] On appeal, the Arkansas Supreme Court held that "[t]he petition and order to show cause sufficiently provided [the witness] with notice that he was accused of criminal contempt for failing to appear" and that the circuit court properly denied the witness's motion to dismiss for lack of service.[304] The court also held that the Legislative Auditor's subpoena did not need to comply with Rule 45(d) of the Arkansas Rules of Civil Procedure regarding the service of a witness fee and mileage.[305]

C. Due Process and the Contempt Power

As the *Valley* opinion suggests, due process requirements are applicable to legislative exercises of the contempt power.[306] Witnesses charged with

297. ARK. CODE ANN. § 16-10-108(a)(3) (Repl. 2010).

298. *See supra* notes 202–06 and accompanying text.

299. ARK. CODE ANN. § 16-10-108(b)(1) (Repl. 2010); *cf.* MASON'S MANUAL, *supra* note 7, § 801, para. 3 (stating a witness's refusal to answer a committee's proper questions has been held to be criminal contempt).

300. Valley v. Pulaski Cnty. Cir. Ct., 2014 Ark. 112, at *2–5, 431 S.W.3d 916, 918–20.

301. *Id.* at *2, 431 S.W.3d at 918.

302. *Id.* at *2–3, 431 S.W.3d at 918–19.

303. *Id.* at *3–5, 431 S.W.3d at 919–20.

304. *Id.* at *5–7, 431 S.W.3d at 920–21.

305. *Id.* at *7–9, 431 S.W.3d at 921–22.

306. *See* Groppi v. Leslie, 404 U.S. 496, 500, 502–04, 506–07 (1972); Commonwealth *ex rel.* Carcaci v. Brandamore, 327 A.2d 1, 5 (Pa. 1974); *cf. Valley*, 2014 Ark. 112, at *6–7, 431

contempt are entitled to notice and an opportunity for a hearing appropriate to the nature of the case.[307] Notice and hearing requirements may vary, depending on the context; for example, if the legislature acts to punish contempt immediately upon its occurrence, less process might be due than if the legislature waits a few days.[308] Past Supreme Court decisions "strongly indicate that the panoply of procedural rights that are accorded a defendant in a criminal trial has never been thought necessary in legislative contempt proceedings."[309]

Due process issues also arise when a witness objects to committee questions, or when a legislative committee rules against such an objection but the witness continues not to answer. A witness can only be found in contempt for refusing to answer a question if the question or testimony sought is pertinent to the subject or purpose of the legislative inquiry.[310] Witnesses are entitled to know the purpose of a legislative committee's inquiry so that they can decide if the committee's questions are pertinent or material to that purpose and answer, or decline to answer, accordingly.[311] Failure to provide clarity regarding the inquiry's purpose may provide a nonresponsive witness with a viable due process defense should the witness face a contempt charge.[312] Due process further requires that the legislative committee clearly inform the witness of its ruling on the witness's objection to a question or any privileges asserted.[313] If the committee rejects the witness's challenge to a question and directs the witness to answer, then continued refusal to answer will put the witness at risk of prosecution.[314]

The need for clarity in stating a legislative inquiry's purpose is illustrated by a 1959 opinion of the Supreme Court of the United States involving a state

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S.W.3d at 920–21 (witness was provided with sufficient notice that he was accused of criminal contempt).

307. *See Groppi*, 404 U.S. at 502–03; *Brandamore*, 327 A.2d at 5.

308. *See Groppi*, 404 U.S. at 500, 503–04, 506–07.

309. *See id.* at 501.

310. *See* MASON'S MANUAL, *supra* note 7, § 801, para. 4; 81A C.J.S. *States* § 119, Westlaw (database updated Nov. 2022).

311. *See* Scull v. Virginia *ex rel.* Comm. On L. Reform & Racial Activities, 359 U.S. 344, 345, 353 (1959); MASON'S MANUAL, *supra* note 7, § 801, para. 4; *cf.* Watkins v. United States, 354 U.S. 178, 208–09 (1957) (stating witness before a congressional committee must decide at the time questions are propounded whether to answer; to make that choice, the witness is entitled to know the subject to which the questions are deemed pertinent; knowledge about the subject must be as explicit and clear as required by due process in expressing the elements of a crime).

312. *See Scull*, 359 U.S. at 345; *cf.* OVERSIGHT MANUAL, *supra* note 8, at 61 (stating due process clause establishes a relevance requirement in congressional contempt prosecutions: the relationship between the question posed to the witness and the matter under inquiry must be clear).

313. *See* OVERSIGHT MANUAL, *supra* note 8, at 61.

314. *See* Morss v. Forbes, 132 A.2d 1, 9–10 (N.J. 1957).

legislative committee and a reluctant witness.[315] The witness declined to answer certain questions; he asked to be told the specific subject of the committee's inquiry so that he could determine which of the committee's questions were pertinent to that subject.[316] The committee chairman's response was "unmistakabl[y] cloud[y]" and "ambiguous."[317] As to the committee's questions, the Court observed that "[i]t is difficult to see how some of these questions have any relationship to the subjects the Committee was authorized to investigate, or how Scull could possibly discover any such relationship from the Chairman's statement."[318] The witness then appeared before a circuit court to show cause why he should not be compelled to answer the questions; the circuit court ordered the witness to answer and he was cited for contempt after he refused to do so.[319] The record demonstrated that the purposes of the committee's inquiry were unclear or conflicting.[320]

> To sustain his conviction for contempt under these circumstances would be to send him to jail for a crime he could not with reasonable certainty know he was committing. This Court has often held that fundamental fairness requires that such reasonable certainty exist. Certainty is all the more essential when vagueness might induce individuals to forgo their rights of speech, press, and association for fear of violating an unclear law.[321]

Thus, the witness's contempt conviction contravened the Fourteenth Amendment's procedural requirements.[322]

IX. WITNESSES

There are a number of potential issues arising from a witness's appearance during legislative oversight proceedings. This section addresses these issues.

A. Duty to Cooperate

Every citizen may be called upon, if needed, to serve as a witness for the general good.[323] As the Supreme Court of the United States noted regarding congressional witnesses:

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315. *Scull*, 359 U.S. 344 (1959).
316. *Id.* at 346–47.
317. *Id.* at 345, 348.
318. *Id.* at 349.
319. *Id.* at 344, 350.
320. *Id.* at 353.
321. *Scull*, 359 U.S. at 353 (citations omitted).
322. *Id.* at 345.
323. *See* Rushing v. Tenn. Crime Comm'n, 117 S.W.2d 4, 7 (Tenn. 1938) ("Every citizen of the State may be called upon to render services as a witness for the general good as well as

> It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of Congress and its committees and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice.[324]

When called to attend a legislative hearing, it is not the witness's place to judge the necessity of his or her appearance, nor may the witness excuse failure to attend on a personal belief that their testimony would be immaterial or irrelevant.[325]

This duty to cooperate in legislative oversight is codified in some instances. All agencies of state government are directed to cooperate with the Legislative Council and the Bureau of Legislative Research when these entities request assistance or information.[326] Unless prohibited by law, all state agencies must provide the Bureau with information or records upon request, and staff of these state agencies must be "reasonably accessible for consultation . . . ."[327] The Legislative Auditor is authorized to require "the aid and assistance of all officials, auditors, accountants, and other employees" of state entities and political subdivisions in the course of conducting audits.[328]

B. Administration of Oaths

Unless required by law or policy, witnesses need not be administered an oath prior to testifying before legislative committees.[329] However, there are good reasons for administering oaths in legislative oversight proceedings. Doing so underscores the seriousness of the situation, encourages a witness to tell the truth, and helps assure the reliability of testimony.[330] Administration of an oath is also required to successfully prosecute a witness for perjury.[331]

Several sections of the Arkansas Code authorize administration of oaths in legislative proceedings. The President Pro Tempore of the Senate, Speaker of the House of Representatives, chair of a committee of either house, or a chair's designee, "may administer oaths to witnesses in any case under their

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his own benefit."); *cf*. 81 AM. JUR. 2D *Witnesses* § 72, Westlaw (database updated Nov. 2022) ("The duty to testify is a basic obligation that every citizen owes his or her government.").

324. Watkins v. United States, 354 U.S. 178, 187–88 (1957).

325. State v. Brewster, 99 A. 338, 341 (N.J. 1916).

326. ARK. CODE ANN. § 10-3-304(d) (Repl. 2012).

327. *Id.* § 10-3-315.

328. *Id.* § 10-4-403(e) (Supp. 2021).

329. *See* MASON'S MANUAL, *supra* note 7, § 800, para. 4.

330. *See* 81 AM. JUR. 2D *Witnesses* § 625, Westlaw (database updated Nov. 2022).

331. *See id.*; *see* ARK. CODE ANN. § 5-53-102(a)(1) (Supp. 2021); *infra* notes 350–56 and accompanying text.

examination."[332] If a committee or joint committee of the General Assembly is authorized to issue subpoenas, then that committee's chair, or the chair's designee, "shall be fully empowered to administer oaths . . . ."[333] "The co-chairs of the Legislative Council are authorized to administer oaths"[334] as are the co-chairs and co-vice chairs of the Legislative Joint Auditing Committee.[335] While conducting any audit or examination, the Legislative Auditor or any authorized assistant may administer oaths.[336]

C. Sixth Amendment Right to Counsel and Other Rights

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions" the accused enjoys certain rights, including the rights to confront witnesses and to have assistance of counsel.[337] The Arkansas Constitution contains a similar provision, but it includes a right to be heard by the accused and counsel.[338] The Sixth Amendment's confrontation clause guarantees the accused the right to cross-examine adverse witnesses.[339]

These rights generally do not apply in legislative proceedings unless the legislature adopts them in some fashion.[340] The Court of Appeals of New York provided the rationale for this in an 1885 decision.[341] Having been summoned by a legislative committee, a witness appeared with counsel and declined to answer various questions on counsel's advice. The committee directed its chair to no longer recognize the witness's right to have counsel present, whereupon counsel "instructed the witness to withdraw from the committee and leave with him."[342] The committee chair noted that the witness left at his

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332. ARK. CODE ANN. § 10-2-105(b) (Repl. 2012).

333. *Id.* § 10-2-306(a). For a survey of committees authorized to issue subpoenas, see *supra* notes 212–29 and accompanying text.

334. ARK. CODE ANN. § 10-3-306(c) (Repl. 2012).

335. *Id.* § 10-3-411(f) (Supp. 2021).

336. *Id.* § 10-4-421(b).

337. U.S. CONST. amend. VI.

338. ARK. CONST. art. II, § 10.

339. *Article: III. Trials*, 50 GEO. L.J. ANN. REV. CRIM. PRO. 597, 786 (2021).

340. *See* Withrow v. Joint Legis. Comm. to Investigate the Educ. Sys., 28 N.Y.S.2d 223, 228 (Sup. Ct. 1941) ("[A] witness has no legal right to counsel or to cross-examine his accusers in a legislative inquiry such as this."); Hurst, *supra* note 20, at 496 (rebuttal and cross-examination are matters of committee discretion); *cf.* OVERSIGHT MANUAL, *supra* note 8, at 43 (noting that Sixth Amendment rights to present one's own evidence and cross examine witnesses do not apply in congressional proceedings; the right to counsel may not apply, but congressional committee rules may afford a limited right to counsel); ROSENBERG, *supra* note 12, at 37 (congressional committee rules allow a witness to be accompanied by counsel but may circumscribe counsel's role); *id.* at 63 (Sixth Amendment rights to cross-examine and call witnesses on one's own behalf do not apply in congressional hearings).

341. People *ex rel.* McDonald v. Keeler, 2 N.E. 615 (N.Y. 1885).

342. *Id.* at 617.

own peril; the witness "replied that he took the peril of it" and departed.[343] Unsurprisingly, the state senate found the witness to be in contempt; one of the challenges to that finding raised by the witness was that the committee refused to recognize his right to appear by, and act on the advice of, counsel.[344] The court of appeals was "of opinion that he had no constitutional or legal right to the aid of counsel on such examination."[345] The court acknowledged the constitutional right to counsel at trial but distinguished that context from an appearance as a witness at a legislative committee hearing.

> But here the relator was not on trial, nor was he a party, but he was a mere witness called upon to testify in relation to charges against another person, and there was no trial pending against any one. As well might a witness, examined before a grand jury conducting an investigation of a charge against another person, with a view to his indictment, claim the right to be attended by counsel. We do not think that a mere witness has that right.[346]

In the context of another legislative committee's investigation, the Supreme Court of New York declared that "a witness has no legal right to counsel or to cross-examine his accusers in a legislative inquiry such as this."[347]

Nonetheless, legislative committee chairs retain some discretion in how they manage their committees, and those committees can operate under less formal procedures.[348] Witnesses may be allowed to exercise rights or procedures similar to those available in judicial proceedings, solely at a committee's discretion or as permitted by legislative rule.[349]

D. Witness Jeopardy

Witnesses may be subject to jeopardy for misbehavior in the course of legislative oversight. This section briefly summarizes some potential pitfalls. This is not intended to be an exhaustive list of applicable Code sections, nor is it an exhaustive look at the Code sections cited.

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343. *Id.*
344. *Id.* at 617–18, 626.
345. *Id.* at 626.
346. *Id.*
347. Withrow v. Joint Legis. Comm. to Investigate the Educ. Sys., 28 N.Y.S.2d 223, 228 (Sup. Ct. 1941).
348. *See* MASON'S MANUAL, *supra* note 7, §§ 611, 638.
349. *See* Hurst, *supra* note 20, at 496 (the order of testimony, rebuttal, and cross-examination are all matters of committee discretion); *cf.* OVERSIGHT MANUAL, *supra* note 8, at 43 (congressional committees may, at their discretion, permit a witness to offer evidence or cross-examine others while counsel may be permitted to do so by rules); ROSENBERG, *supra* note 12, at 37 (witnesses do not have the right to make opening statements, but that opportunity is usually provided).

1. Perjury

False testimony provided to a legislative committee or official may constitute perjury.[350] Arkansas law provides that perjury is a Class C felony if a person knowingly makes a false material statement while lawfully under oath in an official proceeding.[351] "Official proceeding" includes proceedings heard before a legislative agency or official authorized to hear evidence under oath.[352] As previously noted, several sections of the Arkansas Code authorize the administration of oaths in legislative proceedings.[353] A "false material statement" is one that affects, or could affect, the course or outcome of an official proceeding or the action or decision of a public servant performing a governmental function; the statement need not be admissible under the rules of evidence, and lack of knowledge of materiality is no defense to a perjury charge.[354]

Other Code provisions address perjury in legislative proceedings. A person who provides false testimony while under oath before a committee of either house of the General Assembly, or a joint committee thereof, "is guilty of perjury and subject to the penalties prescribed by law."[355] A person placed under oath or subpoenaed by the Legislative Joint Auditing Committee or the Legislative Auditor, who knowingly gives false testimony that is material to an audit, "shall be deemed guilty of perjury upon conviction by a court of competent jurisdiction."[356]

2. False Swearing

If a person, lawfully under oath but not in an official proceeding, makes a false material statement knowing it to be false, that person may be guilty of false swearing, a Class A misdemeanor.[357] Lack of knowledge of the statement's materiality is not a defense.[358] One possible context for a false swearing charge outside of an official proceeding might be when the Legislative Auditor or authorized assistants administer an oath in the course of conducting an audit.[359]

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350. *See* ARK. CODE ANN. §§ 5-53-101 to 102 (Repl. 2016 & Supp. 2021); *cf.* OVERSIGHT MANUAL, *supra* note 8, at 55 (noting potential prosecution for perjury before congressional committees).

351. ARK. CODE ANN. § 5-53-102 (Supp. 2021).

352. *Id.* § 5-53-101(4)(A) (Repl. 2016).

353. *See supra* notes 332–36 and accompanying text.

354. ARK. CODE ANN. §§ 5-53-101(1)(A), 5-53-102(b) (Repl. 2016 & Supp. 2021).

355. *Id.* § 10-2-306 (Repl. 2012).

356. *Id.* § 10-4-421(d)(2) (Supp. 2021).

357. *Id.* § 5-53-103.

358. *Id.* § 5-53-103(b).

359. *Id.* § 10-4-421(b).

3. Improper Conduct Toward Witnesses: Bribery, Intimidation, Tampering, and Retaliation

Certain conduct toward other witnesses in legislative proceedings may give rise to criminal jeopardy. It is a Class B felony to bribe actual or prospective witnesses for the purpose of influencing their testimony or inducing their absence from an official proceeding.[360] It is also a Class B felony to intimidate actual or prospective witnesses for those same purposes.[361] Tampering is either a Class D felony or a Class A misdemeanor if a person, believing an official proceeding or investigation is pending, induces or attempts to induce another person to engage in false testimony, withhold testimony or documents, evade process, or absent them self from the proceeding or investigation despite being properly summoned.[362] And it is a Class C felony to retaliate against a person for anything lawfully done in the capacity of witness.[363]

4. Obstructing Governmental Operations

A person commits obstruction of governmental operations by knowingly obstructing, impairing, or hindering the performance of any governmental function; this is a Class A misdemeanor when force is used or threatened, but otherwise a Class C misdemeanor.[364] "Government function" includes any activity that a public servant is legally authorized to undertake on behalf of the governmental unit he or she serves.[365] Since legislative oversight constitutes a government function, obstruction of oversight activity may constitute a crime.[366]

5. Contempt

As previously discussed, contempt of legislative subpoenas adjudicated under Ark. Code Ann. § 16-10-108 is a Class C misdemeanor.[367]

6. Tampering with a Public Record

A person may be guilty of tampering with a public record if that person, with the purpose of impairing the verity, legibility, or availability of a public

360. ARK. CODE ANN. § 5-53-108 (Supp. 2021).
361. *Id.* § 5-53-109.
362. *Id.* § 5-53-110.
363. *Id.* § 5-53-112.
364. *Id.* § 5-54-102(a)(1), (b) (Repl. 2016).
365. *Id.* § 5-54-101(6) (Supp. 2021).
366. *Cf.* OVERSIGHT MANUAL, *supra* note 8, at 56 (noting federal law that criminalizes certain acts that might obstruct congressional investigations).
367. *See supra* notes 293–305 and accompanying text.

record, knowingly either makes a false entry in or falsely alters that record or erases, obliterates, removes, destroys, or conceals that record.[368] "Public records" include records of any type required by law to be created by, or received and retained in, any governmental office that afford notice to the public or that memorializes acts of a public office or servant.[369] For example, this crime might conceivably be applicable if, in response to a legislative request or subpoena, a person alters or conceals a public record with the required intent and purpose. In the context of legislative oversight, tampering with a public record would be a Class D felony.[370]

7. Providing False Information to the Legislative Auditor

If a person knowingly provides false documents, records, or other data to the Legislative Auditor or that official's staff, that person may be found guilty of providing false information.[371] Punishment is in the same manner as provided for tampering with a public record; in this context, providing false information would be a Class D felony.[372]

E. Parallel Proceedings

Even if participation in legislative oversight does not directly place a witness in criminal jeopardy, the witness should nonetheless be conscious of parallel proceedings.[373] These include proceedings such as civil litigation, administrative hearings, criminal prosecutions, or professional ethics inquiries, where a witness's legislative testimony might be useful for other purposes.[374] An example stemming from testimony before the Legislative Joint Auditing Committee illustrates this concern. After that committee heard directly conflicting testimony concerning document destruction given by two witnesses under oath, a prosecuting attorney announced that he would be looking into that matter.[375] Although the prosecuting attorney ultimately decided not to pursue the document destruction claims, or possible perjury based on the

368. ARK. CODE ANN. § 5-54-121(a) (Repl. 2016).
369. *Id.* § 5-54-101(12) (Supp. 2021).
370. *Id.* § 5-54-121(b)(2) (Repl. 2016).
371. *Id.* § 10-4-416(f) (Supp. 2021).
372. *See id.* (specifically referencing ARK. CODE ANN. § 5-54-121); *id.* § 5-54-121(b)(2) (Repl. 2016).
373. *Cf.* James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1171–73 (2007) (describing parallel proceedings that congressional witnesses might face).
374. *Id.*
375. DIAMOND, *supra* note 13, at 211–12, 224–28, 235, 253–54.

conflicting testimony,[376] this illustrates how legislative oversight testimony could lead to, or be used in, other proceedings.

F. Open Hearings

Generally, legislative oversight hearings are open to the public.[377] The Arkansas Constitution provides that "[t]he sessions of each house, and of committees of the whole, shall be open, unless when the business is such as ought to be kept secret."[378] However, that provision does not apply to other legislative committees.[379] FOIA requires that meetings of governing bodies of various public entities supported by public funds, including "organizations of the State of Arkansas," shall be public.[380] In a 1984 opinion concerning FOIA's public meeting requirement, the Attorney General opined that "[t]his would be applicable to legislative committees covered by F.O.I."[381] The General Assembly specifically exempted meetings of one committee from public observance,[382] which is arguably legislative acknowledgment that FOIA's public meeting requirement applies to legislative committees by default. If a legislative committee nonetheless excluded the public by conducting a closed hearing, that act might not be justiciable; this issue will be discussed below.[383]

There are provisions for closing some legislative committee meetings. For example, the Legislative Council's hearings are open to the public, "except in those instances in which the Legislative Council feels that it is necessary to go into executive session."[384] The term "executive session" is not defined, but there is no reason to think that it would be limited to personnel matters, unlike the FOIA exception limiting executive sessions to that topic.[385]

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376. *Id.* at 253–54.

377. *See* MASON'S MANUAL, *supra* note 7, § 630, para. 1.

378. ARK. CONST. art. V, § 13. Resorting to "committee of the whole" permits an entire chamber—either the Senate or House—to meet as a committee for greater ease in considering legislative business. *See* MASON'S MANUAL, *supra* note 7, §§ 684, para. 1, 685, para. 1.

379. *See* John J. Watkins, *Open Meetings Under the Arkansas Freedom of Information Act*, 38 ARK. L. REV. 268, 273 (1984).

380. ARK. CODE ANN. § 25-19-106(a) (Supp. 2021).

381. Op. Ark. Att'y Gen. No. 84-91 (1984); *see* Watkins, *supra* note 379, at 281–82 (noting FOIA's applicability to the legislature and its committees).

382. *See* ARK. CODE ANN. §§ 10-3-3203(a), 25-19-106(c)(7) (Supp. 2021).

383. *See infra* notes 389–401 and accompanying text; *see also* WATKINS ET AL., *supra* note 171, § 2.02[b] (discussing justiciability of legislative FOIA violations).

384. ARK. CODE ANN. § 10-3-305(a) (Repl. 2012); *see* Watkins, *supra* note 379, at 330 (noting this particular statutory exception to FOIA).

385. *Compare Session*, BLACK'S LAW DICTIONARY (11th ed. 2019) (sub-entry for "executive session" defining it as a meeting usually held in secret with limited attendance without noting any limit on topics that may be discussed), *with* ARK. CODE ANN. § 25-19-106(c)(1)(A) (Supp. 2021) (allowing an exception to the public meeting requirement for "an executive session . . . only for the purpose of" specified personnel actions).

Meetings of the Child Maltreatment Investigations Oversight Committee are closed to the public and exempt from FOIA's public meeting requirement.[386] The General Assembly is well within its authority in these instances as the decision to open or close legislative meetings is a procedural question determined by the legislature under its express power to adopt rules of proceedings.[387]

X. JUDICIAL INVOLVEMENT IN LEGISLATIVE OVERSIGHT

The limitation on judicial interference with legislative subpoenas has already been noted.[388] This section discusses two other considerations that limit judicial involvement in legislative oversight: justiciability of legislative rules of proceedings and legislative privilege.

A. Justiciability of Rules of Proceedings

Both houses of the General Assembly may determine their own rules of proceedings.[389] The term "rules of proceedings" is interpreted broadly and includes operating procedures which apply to the exercise of any power, transaction of any business, or performance of any duty conferred by the state constitution.[390] Examples of rules of proceedings include legislative rules for adoption—or not—of evidentiary privileges, or for opening or closing legislative hearings to the public.[391] Constitutional requirements prevail over legislative rules.[392] Beyond any constitutional limitations, however, the

386. *See supra* note 382 and accompanying text.

387. *See* ARK. CONST. art. V, § 12; *cf.* Abood v. League of Women Voters, 743 P.2d 333, 337 (Alaska 1987) ("The question whether legislative business should be conducted in open or closed sessions is a procedural question which has traditionally been the subject of legislative rules."). Additionally, legislative enactments permitting closed meetings are consistent with the FOIA provision that meetings may be closed "as otherwise specifically provided by law . . . ." *See* ARK. CODE ANN. § 25-19-106(a) (Supp. 2021).

388. *See supra* notes 242–55 and accompanying text.

389. ARK. CONST. art. V, § 12. Although this article does not discuss such rules unless they have been codified, counsel should always consult the relevant rules of either house of the General Assembly or any legislative oversight committee. These rules may address matters not covered elsewhere. For example, as of this writing, the rules of the Legislative Joint Auditing Committee address the role of counsel at committee meetings. *See* LEGIS. JOINT AUDITING COMM., RULES OF THE LEGISLATIVE JOINT AUDITING COMMITTEE V.G.3 (2018).

390. *See* MASON'S MANUAL, *supra* note 7, § 3, para. 2; *see also* Des Moines Reg. & Tribunal Co. v. Dwyer, 542 N.W.2d 491, 497–98 (Iowa 1996) (collecting and quoting cases).

391. *See supra* notes 164–67 (evidentiary privileges); *supra* note 387 (open or closed hearings) and accompanying text.

392. *See* MASON'S MANUAL, *supra* note 7, §§ 6, para. 2, 10, para. 3; 81A C.J.S. *States* § 87, Westlaw (database updated Nov. 2022).

legislative power to adopt rules of proceedings is unlimited.[393] "Subject to the restrictions imposed by the constitution each branch of the legislature is free to adopt any rules it thinks desirable."[394]

The judiciary can declare a legislative rule that violates a constitutional mandate to be void, but if a legislative body violates its own rule enacted pursuant to power to determine "rules of proceedings," that would not be subject to judicial review.[395] "In most cases, the rules of the Senate and House are matters of determination for those houses alone, and courts will not interfere or pass upon their validity or observance absent some constitutional deficiency."[396] Assuming they do not offend the constitution, deviations from legislative rules of proceedings are not justiciable: that is, concerns regarding observance of such rules are not subject to resolution on the merits by a court.[397]

This rule is illustrated by the Arkansas Supreme Court's 1891 *Railway Co. v. Gill* decision.[398] Challenging allegedly excessive fares, a railroad passenger argued that an enactment authorizing the railroad to set fares was not adopted in accordance with the General Assembly's joint rules.[399] The court made short work of that argument: "The joint rules of the general assembly were creatures of its own, to be maintained and enforced, rescinded, suspended, or amended, as it might deem proper. Their observance was a matter entirely subject to legislative control and discretion, not subject to be reviewed by the courts."[400] Subsequent decisions of the court involving various legislative rules of proceedings quote this passage from *Gill* with approval.[401]

Thus, to the extent legislative oversight activity is governed by legislative rules of proceedings, any deviation from such rules would not be justiciable; this assumes that a constitutional provision is not offended by the deviation.

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393. 72 AM. JUR. 2D *States, Territories, and Dependencies* § 47, Westlaw (database updated Nov. 2022); *see* Op. Ark. Att'y Gen. No. 98-019 (1998) ("It appears, however, that each house of the Arkansas General Assembly is given wide latitude as to the promulgation, amendment, and observance of its own rules.").

394. Bradley Lumber Co. v. Cheney, 226 Ark. 857, 859, 295 S.W.2d 765, 766 (1956).

395. *See* MASON'S MANUAL, *supra* note 7, § 7, para. 2 (constitutional provision); *id.* § 3, para. 7 (legislative rule); 81A C.J.S. *States* § 87, Westlaw (database updated Nov. 2022).

396. Op. Ark. Att'y Gen. No. 98-019 (1998).

397. *Cf. Justiciable*, BLACK'S LAW DICTIONARY (11th ed. 2019). For a brief discussion of this issue in the context of possible legislative violations of FOIA, see WATKINS ET AL., *supra* note 171, § 2.02[b] (6th ed. 2017) (discussing justiciability of FOIA lawsuits against the legislature).

398. Ry. Co. v. Gill, 54 Ark. 101, 15 S.W. 18 (1891).

399. *Id.* at 105, 15 S.W. at 19.

400. *Id.* at 105–06, 15 S.W. at 19.

401. County of Howard v. Rotenberry, 286 Ark. 29, 32, 688 S.W.2d 937, 939 (1985); Reaves v. Jones, 257 Ark. 210, 213, 515 S.W.2d 201, 203 (1974); Bradley Lumber Co. v. Cheney, 226 Ark. 857, 859–60, 295 S.W.2d 765, 767 (1956).

B. Legislative Privilege

In its 2019 *Protect Fayetteville v. City of Fayetteville* opinion, the Arkansas Supreme Court considered another issue of first impression: besides the existence of executive privilege, does legislative privilege also exist in Arkansas?[402] Unlike executive privilege, the court could point to express language in the Arkansas Constitution as the starting point for its discussion of legislative privilege: "The legislative privilege is derived from the Speech and Debate Clause of the Arkansas Constitution. It states that 'for any speech or debate in either house,' members of the General Assembly 'shall not be questioned in any other place.'"[403] The court noted that Arkansas's Constitution adopts "the exact language" of the federal Constitution's Speech or Debate Clause and that the court typically follows the Supreme Court of the United States' interpretation of any virtually identical federal provision when interpreting the state's constitution.[404] The court concluded, "like the Supreme Court, that the Speech and Debate Clause affords legislators privilege from certain discovery and testimony and that the privilege extends beyond statements and acts made on the literal floor of the House."[405]

Since the court did not further define the scope or applicability of legislative privilege,[406] it is not yet certain to what extent legislative privilege would apply to the General Assembly's oversight activity. But if the court continues to follow federal precedent, the case of *Eastland v. United States Servicemen's Fund*[407] should prove persuasive.

Eastland had its genesis in a subpoena duces tecum issued to a bank by a Senate subcommittee seeking production of a nonprofit corporation's records.[408] The corporation objected on First Amendment grounds, and brought an action to enjoin the subpoena's implementation before the subpoena could actually be served. The corporation's complaint named the subcommittee's chair, nine other Senators, the subcommittee's chief counsel, and the bank as defendants. Although the trial court denied the corporation's request for injunctive relief and dismissed the Senators based on federal Speech or Debate

402. Protect Fayetteville v. City of Fayetteville, 2019 Ark. 28, at *2, *5, 566 S.W.3d 105, 107–08.

403. *Id.* at *6, 566 S.W.3d at 109 (quoting ARK. CONST. art. V, § 15). Although the court referred to the Speech and Debate Clause, the federal and state constitutional provisions apply to "speech or debate"; thus, this article will use "or" unless a direct quote employs "and." *See* U.S. CONST. art. I, § 6, cl. 1 ("Speech or Debate"); ARK. CONST. art. V, § 15 ("speech or debate").

404. *Protect Fayetteville*, 2019 Ark. 28, at *6–7, 566 S.W.3d at 109.

405. *Id.* at *7, 566 S.W.3d at 109.

406. *Id.*, 566 S.W.3d at 109.

407. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975).

408. *Id.* at 492–500.

Clause immunity, the court of appeals reversed and attempted to fashion a remedy.

The Supreme Court reversed the court of appeals, concluding "that the actions of the Senate Subcommittee, the individual Senators, and the Chief Counsel are protected by the Speech or Debate Clause . . . and are therefore immune from judicial interference."[409] The federal clause has been read broadly to effectuate its purposes, which include "insur[ing] that the legislative function the Constitution allocates to Congress may be performed independently" and reinforcing separation of powers.[410] Once it is determined that a legislator is acting within the legitimate legislative sphere, the Speech or Debate Clause absolutely bars judicial interference.[411] Legislative oversight activity qualifies for this protection.

> The power to investigate and to do so through compulsory process plainly falls within that definition. This Court has often noted that the power to investigate is inherent in the power to make laws . . . . Issuance of subpoenas such as the one in question here has long been held to be a legitimate use by Congress of its power to investigate.[412]

The pleadings demonstrated "that the actions of the Members and Chief Counsel fall within the 'sphere of legitimate legislative activity.'"[413] Immunity applied to both legislators and staff.

> We conclude that the Speech or Debate Clause provides complete immunity for the Members for issuance of this subpoena. We draw no distinction between the Members and the Chief Counsel. In *Gravel* . . . we made it clear that "the day-to-day work of such aides is so critical to the Members' performance that they must be treated as [the Members'] alter egos . . . ." . . . Since the Members are immune because the issuance of the subpoena is "essential to legislating," their aides share that immunity.[414]

The Court remanded the case so that, ultimately, the trial court could dismiss the corporation's complaint against the Senators and their subcommittee's chief counsel.[415]

The scope of legislative immunity under the state constitution's Speech or Debate Clause remains to be developed. But by interpreting identical language in the federal Constitution, *Eastland* provides guidance in support of

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409. *Id.* at 501 (citing U.S. CONST. art. I, § 6, cl. 1).
410. *Id.* at 501–02.
411. *Id.* at 503.
412. *Id.* at 504 (citations omitted).
413. *Eastland*, 421 U.S. at 506.
414. *Id.* at 507 (brackets in original) (citing Gravel v. United States, 408 U.S. 606, 616–17 (1972)).
415. *Id.* at 512.

affirming legislative privilege immunity for members and staff of the General Assembly engaged in legislative oversight; this would limit judicial involvement in oversight activity.

CONCLUSION

An article about congressional investigations summarized what counsel should know to navigate those oversight proceedings.

> [A] lawyer needs to understand the legal principles that govern congressional investigations, have some knowledge about the history of legislative inquiries, and be aware of the political realities that drive many such investigations. A lawyer needs to know that a congressional investigation is a procedural hybrid, part political circus with seemingly little order, and part legal process with unique and explicit rules and procedures.[416]

Political realities are well outside the scope of this article, and issue can be taken with the "political circus" characterization. However, the author wholeheartedly agrees that counsel practicing in legislative oversight proceedings of the Arkansas General Assembly needs to understand the relevant issues and procedures—they are unique, differing from judicial proceedings in sometimes significant ways. If this survey of legislative oversight issues and procedures contributes to such understanding, then it will have fulfilled its purpose.

416. Hamilton et al., *supra* note 373, at 1117.