

States Turning Up Investigative Heat When Congress Falls Flat

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The Bottom Line

- Whether focused on matters of local or national concern, state legislatures have increasingly pursued investigations of private parties.
- Though the precise rules and procedures may vary, legislative committees in states across the country often have broad investigative authority.
- State legislative investigations present a new area of risk for individuals and companies beyond Capitol Hill.

State legislative investigations are as old as the republic. In some of the earliest recorded state legislative investigations, colonial legislatures conducted inquiries into the mustering rolls and expenditures of public funds for the Revolutionary War. Though most modern legislative investigations have been conducted by Congress, recent developments suggest state legislatures may increasingly flex their own investigative muscles in pursuit of both political and policy goals.

This dynamic is most evident in state capitals with unified government, particularly where Democrats are in power. For example, with Gov. Gavin Newsom (D-Calif.) positioning himself as a prominent foil to President Donald Trump, state legislators in California have launched investigations focused on both the current administration and private parties' interactions with federal officials. For state-level Democrats, investigations of this sort provide a meaningful counterweight to Congress' investigatory and political agenda.

Regardless of party, however, state legislators have the incentive and tools to pursue investigations targeting a broad range of private activity. The growing prevalence of state attorneys general investigations shows that such inquiries may proceed in parallel with congressional or other federal inquiries. In other cases, they might involve issues of unique interest to particular states or touch on matters for which Congress has left a vacuum.

The ability of state legislators—particularly those in states controlled by the party out-of-power in Congress—to launch investigations of their own underscores the need to remain

attentive to risks arising from inquiries outside of Washington. A review of the authorities of legislative committees in four states that have recently pursued investigations focused on private parties highlights this emerging risk area.

Let's zoom out and address the question about why government shutdowns are happening at all. They emanate from the zeal of achieving—or stopping—some policy or spending goal. The putative reason for this shutdown is the expiration of Obamacare subsidies.

But I think there's a bigger reason for every shutdown: Voter discontent with some dominant political dynamic. Voters want to see their elected representatives fight, even if the fight they wage has no likely positive outcome. Right now, Democratic voters are enraged by Trump's policies, and they are insisting their elected representatives fight hard and long.

That fervor may eventually wane as the effects of the shutdown incur more costs on average Americans (think massive flight delays and missed paychecks), but we haven't yet reached that point.



California

In California, all standing committees of the State Assembly have been [designated](#) investigating committees and are “authorized and directed to conduct oversight hearings and to ascertain, study, and analyze all facts relating to any subjects or matters” within their jurisdiction. The state Senate doesn’t appear to have similarly designated its standing committees as investigating committees. While this would seem to provide significant investigative autonomy to individual Assembly committees, the power to initiate and conduct investigations rests largely with the speaker and the Rules Committee.

For example, a committee chair seeking to conduct an oversight hearing generally is [required](#) to submit a letter to the speaker seeking permission to do so. If permission is granted, the committee must then coordinate with the speaker’s office and Rules Committee to establish the hearing’s parameters and scope. Likewise, while standing committees in both houses are [empowered](#) to issue subpoenas, committees may only do so with the permission of the Rules Committee of their respective house. A witness appearing before a legislative committee has no right to be represented by counsel at the hearing, though testifying witnesses are customarily allowed to be accompanied by counsel. Evidentiary privileges apply to all state proceedings in California, including legislative investigations and hearings, meaning witnesses may raise privileges such as self-incrimination and attorney-client privilege.

Importantly, however, witnesses may be [compelled](#) to provide evidence that may be self-incriminating, with state law granting immunity to witnesses who are so compelled. The Evidence Code also protects the disclosure of certain types of information, such as trade secrets. Individuals [must comply](#) with legislative subpoenas or face penalties for contempt.

Unlike Congress, the state Senate and Assembly are explicitly authorized under California law to direct the sergeant-at-arms of the state legislature to arrest any witness refusing to comply with a legislative subpoena. When the legislature isn’t in session, the legislature likewise can seek enforcement in the California courts. Failure to comply with a legislative request for testimony or documents is punishable as a misdemeanor.

Florida

Under delegated authority [provided](#) in the state constitution, all standing committees in the Florida legislature have broad investigatory authority over public and private entities. In the state House, upon a majority committee vote and approval of the speaker, committee chairs [may issue](#) subpoenas for testimony or documents. Likewise, under the [rules](#) of the state Senate, committee chairs may issue subpoenas with the approval of the president of the Senate. Meanwhile, the Florida Constitution provides that refusal to “obey [a] lawful



summons or to answer lawful questions” in connection with a legislative investigation may be punished by a fine of up to \$1,000 and imprisonment of up to 90 days, or both.

But where a party refuses to comply with a subpoena, contempt enforcement differs depending on whether the legislature is in session. During session, each chamber may initiate inherent contempt proceedings, whereby a chamber may impose fines or imprisonment, although imprisonment may not extend beyond the session’s final adjournment. When out of session, a committee [may file](#) a complaint in circuit court alleging that a witness has failed to fully comply with a duly issued legislative subpoena. The court may order the witness to comply, and failure to do so constitutes direct criminal contempt punishable by the court. False statements made under oath before a legislative committee constitute false swearing, a second-degree felony under Florida law.

In March, Florida House Speaker Daniel Perez (R) directed the Insurance & Banking Subcommittee of the House Commerce Committee to initiate an investigation focused on allegations that property insurers relied on “accounting tricks” to conceal profits while claiming that rising premiums were required to offset the cost of litigation brought by homeowners. In so doing, Perez indicated the committee would be authorized to issue subpoenas, question witnesses under oath, and hire outside experts to support the committee’s work.

New York

In New York, the [rules](#) of the State Assembly authorize committees to “propose legislative action and conduct such studies and investigations as may relate to matter within their jurisdiction.” The Assembly rules likewise provide that committees may be directed to conduct an investigation by

the speaker. The rules in the state Senate don't expressly address committee investigations, but state [law](#) generally permits the chairman, vice-chairman, and a majority of a legislative committee to issue subpoenas for witness testimony or documents, with the provisions of state law governing judicial subpoenas applying equally to legislative subpoenas.

New York provides explicit authority for legislative committees to examine out-of-state witnesses. Legislative committees are allowed to "issue a commission for the examination of witnesses who are out of the state or unable to attend the committee or excused from attendance." Commissioners examine witnesses privately unless otherwise instructed and can't make testimony public without prior committee approval.

Although records maintained by the state Assembly are generally subject to public inspection and copying, the Assembly rules provide that materials "compiled for legislative purposes" may be withheld if their disclosure would "interfere with legislative investigations." The Senate rules don't appear to include a similar provision.

The New York Senate Committee on Investigations and Government Operations announced that the committee is launching an investigation into the property insurance industry. Citing increasing costs to property owners amid broader affordability and cost-of-living concerns, the committee's investigation is intended to examine the cause of increased insurance premiums. In addition to holding hearings, the committee intends to publish a formal report before the end of the year.

Texas

Under state [law](#), each standing committee of the Texas State Legislature is empowered to "conduct investigations to collect adequate information and materials necessary to perform its duties." Each house of the state legislature also may create a "general investigating committee," which is specifically authorized to "initiate or continue inquiries and hearings" about "any other matter the committee considers necessary for the information of the legislature or for the welfare and protection of state citizens." Under each house's rules, standing committees—including general investigative committees—are permitted to compel witness testimony and documents by a two-thirds vote of committee members. Committees may issue compulsory summons to witnesses "at any place in" Texas and generally must require witnesses to give testimony under oath, subject to perjury, though committees other than general investigative committees may waive the required oath.

Though witnesses have a right to counsel, Texas doesn't recognize a privilege against self-incrimination in legislative proceedings. Instead, state law provides immunity from prosecution for a person who testifies or produces a document while claiming potential self-incrimination may not be indicted

or prosecuted for any matter about which they truthfully testify or produce evidence. Notably, information held by a general investigating committee is confidential and not subject to public disclosure except as provided by the rules of the house establishing the committee.

Subpoenas issued by a legislative committee aren't self-enforcing. Rather, upon receiving a referral from the legislature, the prosecuting attorney is directed under state law to bring the matter before a grand jury. If an indictment is returned, the attorney is required under state law to prosecute the case. Failure to comply with a subpoena by refusing to appear or to answer a question could constitute contempt of the legislature, punishable by fines of \$100 to \$1,000 and imprisonment from 30 days to 12 months.

Finally, committees in Texas are empowered to issue writs of attachment to obtain compliance with subpoenas or other compulsory process. This additional enforcement mechanism, not available to congressional committees, is a potentially powerful tool to compel the production of documents or witness testimony in the state. In a move mirroring a number of recent inquiries on Capitol Hill, the Texas Senate Committee on State Affairs last summer issued document requests to a number of major tech companies seeking information regarding allegations of election interference. In so doing, the committee's chairman said he was prepared to issue subpoenas if the companies failed to comply voluntarily with the committee's requests. More recently, both chambers established general investigating committees focused on the deadly July 4 flooding in central Texas.



Flexing State Power

Given Congress' recent dominance in the realm of legislative investigations, it may be tempting to assume that drawing the ire of the congressional minority presents little tangible risk. However, the growing prevalence of high-profile state legislative investigations is a clear signal that clients that don't take into account this growing risk area do so at their own peril.

The examples cited above highlight the unique risk that state-level legislative investigations present. Clients facing scrutiny in Washington should therefore remain mindful of the interaction between congressional investigations and state-level inquiries touching on the same or similar topics. As with overlapping matters involving federal investigators and state attorneys general, clients facing such parallel investigations should consider that information or materials provided in separate matters will be closely compared, with any discrepancies likely to provoke further scrutiny. It is likewise essential to develop consistent public messaging that can be used both on Capitol Hill and in state capitals.

In all instances, inquiries from state legislative committees can present meaningful legal and strategic challenges for the companies involved. Clients who receive a subpoena or similar request from a state legislative committee should consult experienced counsel for assistance navigating any state-specific rules to craft a strategic and thoughtful response.

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