

VOLUME NO. 43

OPINION NO. 60

LEGISLATURE - Power of standing committees to investigate matters during special session;

MONTANA CODE ANNOTATED - Sections 5-3-101, 5-5-101 to 5-5-105, 5-5-202;

MONTANA CONSTITUTION - Article V, sections 1, 10(4).

HELD: A standing committee of the Legislature not formally discharged prior to the final adjournment of the preceding session may meet during a special session for the purpose of gathering information and taking testimony on a matter not within the call of the special session.

March 26, 1990

John Vincent, Speaker  
House of Representatives  
State Capitol  
Helena MT 59620

Dear Representative Vincent:

You have requested my opinion on the following question:

May a standing committee of the Legislature meet for the purpose of gathering information and taking testimony on a matter not within the call of a special session?

The factual background to this request is that the Natural Resources Committee of the House of Representatives attempted to convene during the 1989 special session for the purpose of gathering information related to the cleanup of the hazardous waste contamination of the groundwater at Livingston, Montana. Hazardous waste cleanup was not within any of the subjects specified in the call of the special session. For the future guidance of the Legislature, you inquire as to the general information-gathering authority of standing committees during special sessions.

The legislative power in Montana is vested in the Legislature which consists of two chambers: the Senate and the House of Representatives. Mont. Const. Art. V, § 1. The Constitution provides that the Legislature may make rules for its proceedings. Mont. Const. Art. V, § 10(1). Under this rulemaking authority, the House Natural Resources Committee was designated a standing committee of the Fifty-first Legislature in rules adopted in January 1989. See Rule H30-10, Rules of the Montana Legislature (1989).

The authority to obtain information is an inherent attribute of legislative authority. A legislature cannot be expected to execute its lawmaking function wisely in the absence of companion authority to educate itself through fact-finding. The first clear judicial recognition of this principle was enunciated by the United States Supreme Court in McGrain v. Daugherty, 273 U.S. 135, 165 (1927):

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.

The Court concluded with regard to the federal constitution and Congress:

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. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry, with enforcing process, was regarded and employed as a necessary and

appropriate attribute of the power to legislate--indeed, was treated as inhering. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.

273 U.S. at 175. See also Watkins v. United States, 354 U.S. 178, 187 (1957). ("The power ... to conduct investigations is inherent in the legislative process. That power is broad.") I have found no Montana authority that recognizes an investigatory or information-gathering function within our Legislature that is narrower than that recognized in McGrain or the decisional law of other states. The legislative power described by Article V, section 1 of the Montana Constitution contains the inherent power of investigation. Statutory provision for legislative subpoena and for punishment through contempt for a witness's failure to comply with the subpoena reflects this power of investigation. See §§ 5-5-101 to 105, MCA.

Given the inherent authority of the Legislature to obtain information, a determination must be made whether that investigatory power is somehow limited during such times as the Legislature sits in special session. No express limitation exists in the state constitution. In fact, the constitution recognizes the need for information-gathering during the interim between regular legislative sessions. "The legislature may establish a legislative council and other interim committees." Mont. Const. Art. V, § 10(4). The foregoing provision was adopted in response to two concerns of the drafters of the 1972 Constitution: (1) that the legislative council be immune from judicial challenges to its interim activities, and (2) that the Legislature be allowed to exercise its investigative function through interim committees in the future. IV Mont. Const. Conv. 625, 626, 636 (1972). To a certain extent these goals reflect the same concern; they originate from several judicial challenges in the 1950's to the interim activity of the newly created legislative council.

In State v. Aronson, 132 Mont. 120, 314 P.2d 849 (1957), the Montana Supreme Court upheld the Legislature's attempt to create a legislative council which would serve during the interim, with the power to investigate and recommend legislation. Of significance to the present inquiry is that the Supreme Court recognized the power of the Legislature to create a committee to serve in the interim:

[A]ll courts have uniformly held that investigative power exists in the legislative branch which may be exercised after final adjournment as well as during the session.

*Id.* 132 Mont. at 138, 314 P.2d at 859. See also In re Petition of the Finance Committee of the Legislature of the Virgin Islands, 242 F.2d 902, 904 (3d Cir. 1957); State v. Fluent, 191 P.2d 241, 245 (Wash. 1948). This

principle is reflected in the 1972 Constitutional Convention transcripts: Article V, section 10(4) was drafted to protect the future interim work of the Legislature and in particular its investigative function. IV Mont. Const. Conv. 625, 626, 636 (1972).

Under the clear constitutional authority of Article V, section 10(4), the Legislature in 1973 vested its regularly-appointed standing and select committees with the power to sit during the interim. 1973 Mont. Laws, ch. 431, § 10. Section 5-5-202, MCA, presently states:

**Interim activities of committees.** During an interim when the legislature is not in session, all regularly appointed standing or select committees of either house not formally discharged prior to the final adjournment of the preceding session shall continue as such committees. They are empowered to continue to sit as such committees and may act through their joint subcommittees.

Section 5-5-202, MCA, makes clear that the authority of regularly appointed standing or select committees that have not been formally discharged is not lessened during the interim when the Legislature is not in session. The question arises whether the calling of a special session during an interim in which the subjects to be considered for lawmaking are limited somehow diminishes the power that the standing committee would have to investigate during the interim itself. Section 5-3-101, MCA, provides in full:

**Convening of special session -- limiting subjects.** The legislature may be convened in special session by the governor or at the written request of a majority of the members. The governor or the legislature may limit the special session to the subjects specified in the call.

It is relevant to point out here that the 1972 Constitutional Convention delegates expressly eliminated the Governor's authority to limit the subjects the Legislature may consider at a special session, which authority had existed in the former state constitution. However, an Attorney General's Opinion is not an appropriate vehicle for determining the constitutionality of a state statute, and thus for purposes of this discussion, the validity of section 5-3-101, MCA, is presumed.

Presuming that section 5-3-101, MCA, means that during a special session the Legislature's power to legislate, or pass laws, is limited to subjects specified in the call, it can be argued that the "derived" or "inferred" powers to investigate are similarly limited. See 1 Sutherland Statutory Construction § 12.04 (4th ed. 1985). I reject this reasoning, however, because the power to investigate during the interim is a constitutionally-recognized function of the Montana Legislature and because section 5-3-101, MCA, does not by its terms limit the investigatory function of the Legislature. The investigatory

function may be auxiliary to the lawmaking function, but it is a distinct and inherent power. The purported authority of section 5-3-101, MCA, to limit the subject matter of lawmaking during a special session does not diminish the inherent legislative power to investigate that exists during a regular session of the Legislature or during an interim period between sessions.

It is true that there exists a split of authority on this issue among the appellate courts of this country. Those opinions that have recognized an inherent legislative power are the most persuasive and well-reasoned. Hagaman v. Andrews, 232 So. 2d 1 (Fla. 1970); McGinley v. Scott, 164 A.2d 424 (Pa. 1960). The Hagaman decision of the Supreme Court of Florida is particularly instructive because at issue was the power of a standing committee with interim investigatory authority to investigate a matter not within the call of a special session. The Committee on Elections of the Florida House of Representatives issued a subpoena duces tecum to a bank officer for the purpose of procuring records of an organization known as "The Governors' Club." The bank sought a declaratory judgment on its duty to respond, and several intervenors, on behalf of the Governors' Club, argued that the election investigation was outside the scope of a contemporaneous special session called specifically by Florida's governor to fund a road building program and set dates for the following year's primary election. The Florida Supreme Court rejected this argument and ordered that the bank respond to the subpoena, noting: "The calling of the special session did not diminish the powers or duties of the Committee." Hagaman v. Andrews, 232 So. 2d at 4.

In McGinley v. Scott, *supra*, the Supreme Court of Pennsylvania addressed a state senate resolution that created a committee to investigate election fraud. The resolution was adopted at a session of the General Assembly that was dedicated to enacting laws "raising revenue and laws making appropriations." 164 A.2d at 429. The Supreme Court interpreted the measure as a resolution rather than a law and addressed the power of the legislature to investigate during the budget sessions:

The right to investigate in order to acquire factual knowledge concerning particular subjects which will, or may, aid the legislators in their efforts to determine if, or in what manner, they should exercise their powers, is an inherent right of a legislative body, ancillary to, but distinct from, such powers. It is immaterial that laws drafted as a result of the legislative investigation can not be passed at the session at which the committee was constituted.

*Id.* Several jurisdictions have held that the legislative investigatory authority is limited during the pendency of a special legislative session called for other purposes. Swing v. Riley, 90 P.2d 313 (Cal. 1939); State v. Anderson, 299 P.2d 1078 (Kan. 1956); Ex parte Wolters, 144 S.W. 531 (Tex. Crim. App. 1912). However, each of these cases involved a legislative investigatory

committee created during a special session that was expressly limited under the authority of the state's constitution. By contrast, as already noted, the Montana House Natural Resources Committee is a standing committee vested with interim authority. There is no express or implied limitation in the Montana Constitution or the applicable statutes circumscribing the interim investigative activity of the Legislature's standing committees, including such activity during special sessions. The continuing power of legislative committees to investigate in order to obtain information is an inherent attribute of the legislative power recognized by the framers of the 1972 Constitution.

THEREFORE, IT IS MY OPINION:

A standing committee of the Legislature not formally discharged prior to the final adjournment of the preceding session may meet during a special session for the purpose of gathering information and taking testimony on a matter not within the call of the special session.

Sincerely,

MARC RACICOT  
Attorney General