

M I N U T E S
SPECIAL COMMITTEE ON AGING
EXECUTIVE SESSION
February 6, 1975

Senators present: CHURCH (Chairman), WILLIAMS (N.J.),
RANDOLPH (W.Va.), MUSKIE (Maine), MOSS (Utah), HARTKE
(Ind.), PELL (R.I.), EAGLETON (Mo.), CHILES (Fla.),
CLARK (Iowa), HANSEN (Wyo.), PERCY (Ill.), BEALL (Md.),
DOMENICI (N. Mexico), BROCK (Tenn.), BARTLETT (Okla.).

Senators' Staff Present: Suzanne Murray (Eagleton),
Caroleen Silver (Domenici), Rick Farrell (Chiles),
Peter L. Harris (Pell), Scott Ginsberg (Clark), Laura Aidt
(Stafford), Dave Rust (Beall), Vern Goeches (Percy),
Thomas Thornburgh (Bartlett).

Committee Staff Present: William E. Oriol, David A. Affeldt,
Val J. Halamandaris, John A. Edie, Deborah Kilmer,
Patricia G. Oriol, Gerald D. Strickler, Kathryn Dann,
Donna Gluck, Dona Hopper.

CONVENED AT 10:10 a.m.

CHURCH: This meeting has been called. . .for certain problems
in the Moss Subcommittee on scandals and wrongdoing in connec-
tion with the nursing homes in New York State.

I want to commend Senator Moss and Senator Percy and other
members of the Subcommittee who have been doing a remarkable
job in uncovering problems that could be. . .with the high
costs in Medicaid payments to nursing homes and I think this
effort should be continued -- I certainly support it very
strongly. I think the Executive Department should be alerted

to the problems and routed out in carrying on financial mismanagement and fraudulent appropriation of Federal moneys for payment to nursing homes. To get to the bottom of this in New York, Senator Moss has gone to New York City and has undertaken to take by subpoena the evidence in this and he has legal problems.

PERCY: The conduct of these hearings by Senator Moss was fair, toughminded. . .with superior staff backup and good GAO support. I think the Subcommittee had the facts and it was probably well known by those who are trying to stop the action of our subpoena.

CHURCH: I would like to ask Senator Moss to explain to the Committee the legal situation and propose appropriate action by the Committee to back up this inquiry. I won't be able to stay for the whole of this meeting. I have another hearing for the FBI, etc., I arranged but I am leaving my proxy with Senator Moss. You have my approval of the work you are doing.

MOSS: Thank you, Senator Church. I think we have a quorum now and only need to proceed. Hearings in New York City -- the State is already proceeding in this area too and they have a criminal. . . -- we are concerned by the indications that a great deal of money is syphoned through Medicare and Medicaid for welfare patients and a Federal. . . -- this is what we are inquiring into in many States -- not only in New York. We have two problems before us:

1. When we went back on February 4 to conduct the hearings Senators Williams, Percy, and Domenici were there with me and the bank officer appeared to give us their subpoenaed records of the bank but Mr. Lewin, who represents Mr. Bergman, opposed it, made an emotional argument to quash it. We heard it and counseled with the members of the Subcommittee there and we rejected the opposition. He requested some time -- trying to be fair I gave him 24 hours to seek relief in Federal court. The ruling has not been made yet whether the court will find our subpoena inadequate in some way. If we need anything more to comply, we will have to. . .

2. The other is the contempt citation against Bergman. Dr. Bergman was placed under oath and testified at some length -- we took. . .into custody at that time -- we could have talked about the records at that time but we wanted to talk to Bergman first and wanted to look into his records first. At the conclusion of his testimony, we did work out the time to return on February 4 to testify. Subsequent to that time, we were contacted by his counsel. We also told him that we would work out some accommodation (on the records) to be fair. Dr. Bergman agreed that he would be there. His lawyer protested by correspondence -- said it was not being carried on properly. We countered in correspondence that the hearing would proceed on February 4 -- sent a telegram about that. We did not agree with this telegram -- directed him to be there on the 4th.

Lewin made the argument first on the bank subpoena and then I called Bergman to the stand. Instead, the lawyers came to the stand and said Bergman would not appear. He challenged the subpoena and wanted to make a statement. I told him to make it concise -- he is very eloquent. The argument he made which was intervened by certain members of the Committee on certain points -- at the conclusion of his argument, we consulted and decided that he had not presented a valid reason why Bergman should not be there, or made to appear. I once again asked if Dr. Bergman was going to come to appear as had been agreed at the previous hearing, that he was still under oath, that the investigation of the hearing was still going on. He had been placed under oath, the documents were in our possession, most of them, and Mr. Lewin said "No." So the Subcommittee at that point supported me and I made the ruling that Dr. Bergman was in contempt for refusing to come back to the Committee. That's where that issue stands now. If we proceed with this, the rules as I read them, requires that this Committee, and I want now to expand it to the full Committee -- this Committee makes a report to the Senate, which is a privileged matter, and the Senate then must decide whether or not to cite Dr. Bergman for contempt. If the Senate should so vote, then the matter goes to Federal court, where it would hear and impose any penalty it considered suitable, in this circumstance. I would like to do that.

Now, coming back to the subpoena part, I don't believe that there is anything wrong with those subpoenas, but the question has been raised also as to whether we ought to look again at our Committee rules to see if they should be any more explicit than they now are. One of the points that Lewin raised -- he said we didn't have a quorum of the Committee present when we issued the subpoenas. And the Committee rules provide that when the Subcommittee acts in executive session, we must have a majority present but it says a quorum for the purpose of a hearing taking testimony, etc., constitutes a quorum, one person constitutes a quorum.

BEALL: One Senator?

MOSS: One Senator constitutes a quorum, for that purpose, and this is what we were engaged in, when the subpoenas were issued. We have been very careful, they have never been issued without consulting with the Ranking Minority Member -- it has never been done, but I say we did not have a formal meeting in which the whole subcommittee voted on it. Do you have a comment there, Senator?

PERCY: Yes, I would like to comment. Senator Moss and I have worked very closely on this Subcommittee on all the hearings. Certainly we have on this one. As Ranking Minority Member, I have some proxies here this morning. Regretfully, this document was just handed to me by the staff now. Time has been

very short. I'm not a lawyer, and I've always tried to get the best lawyers I can, to know how to be guided by these.

But from a practical sense, even though I feel assured our ground has been strong, Senator Moss leaned over backwards to find a date that would be accommodating to Dr. Bergman, and it was clear that the subpoena was issued for the 21st, I think the necessary authority was there for the Subcommittee to carry on that hearing and to go into a line of inquiry that we had intended to do so, and had notified even that morning that we intended to do so, but our objective is not to wage a legal case but to make absolutely certain that we dispose of these matters, and get to the heart and truth of these matters as quickly as we can.

Are procedures so loose that this kind of fortune that has allegedly been accrued, running up to \$24 million in the operation of nursing homes -- is it possible that procedures are this loose? We are not interested in him so much as an individual but in the principles that would permit it there, or in many, many other places. We had reason in Chicago in 1971, to suspect that fortunes were being made in this field.

Would this be better, and I offer this as a possible suggestion, because the meeting on the 24th did say that it was adjourned -- it leaves some question open -- in the mind of a reasonable man, I don't see how Dr. Bergman could not fully understand that he should have been and was required to appear

on the fourth. But the possibility would exist even to lean over backwards, and not just get involved in contempt proceedings and lawsuits involving that, because there is an infinite number of lawyers up there that would be quite willing -- looking at that \$24 million -- to run this out to the limit. Would it be better for us as a full Committee now to vote out a subpoena ordering Dr. Bergman to appear down here where it is more convenient to us. We moved those hearings to New York for the convenience of many people who were up there. But now it is the second and third crack at it, and it ought to be at our convenience down here. Vote it out in full and every if, and, or but, comma and period put into it just to be absolutely certain that we have the authority to issue a subpoena that is crystal clear, and then if he does not appear, and does not testify, we would have the full weight and authority of this full Committee as well, and then can carry it right to the Senate. But I would rather just as our Chairman has, to lean over backwards to make certain that we try to get to the truth and not get involved in legal disputes, to lean over backwards once again to see whether or not we can pull it out.

I offer that as a suggestion, although I have no objection if the Chairman of the Subcommittee, Senator Moss, wants to move ahead, I think we have probably got sufficient legal authority for moving ahead but I just see lawsuits being filed by the other side and I can see it for a long time. . . .

CHURCH: Senator Percy. . .

PERCY: . . .the truth not coming out.

MOSS: I think you can count on there being lawsuits, no matter what we do, Chuck.

CHURCH: I was going to suggest, Chuck (Percy), that it might be possible to do both. That would be my suggestion. I don't think we have to choose between one or the other. We could proceed with a recommendation to the Senate for contempt, and issue another subpoena that would not be subject to question, issued by the whole Committee with a quorum present. . . .

BEALL: Mr. Chairman, I want to separate the discussion from subsistence matters from procedural views because it appears here on the surface, from what little I know of reading reports of the Committee in newspaper accounts, this is a matter which certainly merits a very deep investigation. It's something we ought to go into at the fullest extent possible. I'm not a lawyer either, and I'm perhaps not as familiar with the rules as I should be, but the matter of issuing subpoenas bothers me. It is my impression that on most of the Committees I serve, this is something that is a right very jealously guarded, and is done with the utmost care by the Committee. I was under the impression that whenever subpoenas were issued, in any instance, it is generally done with the live consent, or at least a verbal

acquiescence on the part of the majority of members of the Committee. I would like some enlightenment on the procedures, in the Senate generally, with regard to the issuance of subpoenas because I must admit I never thought an individual member of the Senate, a Chairman or otherwise, had the authority on his own to issue subpoenas, without. . . .

CHURCH: Well, I can speak for that question, because the rules of this Committee are rather typical of the general rules of other Committees of issuing subpoenas. I have been conducting extensive investigations, as you know, on multinational investigations, and we have frequently had to rely upon. . . . And our rule is the same as the rule of this Committee -- that the Chairman of the Subcommittee may issue subpoenas. Now, in practice, this is done in consultation and usually with the conference of the Ranking Minority Member. It is rarely done without that concurrence, but that doesn't mean in this case me as Chairman of the Subcommittee on International Corporations that the lead power of issuing subpoenas. . . . I always consult with the Ranking Minority Member. Never on my own do I exercise that power.

MOSS: I read from the Senate Resolution here on this point -- S. Res. 267, of the 93rd Congress, passed on the first of March 1974, Section 3-A, just last year

SEC. 3. (a) For purposes of this resolution, the committee is authorized from March 1, 1974, through February 28, 1975, in its discretion (1) to made expenditures from the contingent fund of the Senate, (2) to hold hearings, (3) to sit and act at any time or place during the sessions, recesses, and adjournment periods of the Senate, (4) to require by subpoena or otherwise the attendance of witnesses and the production of correspondence, books, papers, and documents, (5) to administer oaths, (6) to take testimony orally or by deposition,

BEALL: Mr. Chairman, it says the Committee, not the Chairman. It says the Committee is authorized to do that. It doesn't say the Chairman. . . .

MOSS: Then you have to refer back then to Rule Four on Subcommittees. "Each Subcommittee is authorized (a) to hold and report hearings; (b) to sit and act during meetings of the Senate during recess and adjournment of the Senate; (c) to require by subpoena or otherwise the attempt to witness production of documentary evidence."

RULE 3. And than a QUORUM. A majority of the Committee or Subcommittee shall constitute a quorum sufficient for the conduct of business at executive sessions. One member shall constitute a quorum for the receipt of evidence, the swearing of witnesses and the taking of testimony at hearings.

BROCK: There is a specific distinction between the issuance of subpoena in executive action and the conduct of a hearing. . . of the taking of testimony. I agree with the evidence in this case -- I'm distressed by this investigation -- I think we ought to proceed with it. I think the facts are obvious, that Senator Moss's study. . .but I think we are absolutely within every documentary. . .of our rules and regulations.

MOSS: There is another further factor that should be considered. Dr. Bergman accepted the subpoena, he complied with it, brought his records in, he came, he was sworn and testified before the Committee so he accepted and proceeded under the subpoena up to this point and then suddenly didn't want to come back, I guess the heat got a little hot, didn't want to come back and so then he protested the subpoena for -- to the very thing that he is responsible for.

HARTKE: Mr. Chairman let me ask you though, under the legal procedures wouldn't that be if the subpoena was not proper in the first instance and when the legal consequences to. . .and be illegal from the very beginning the mere fact that he even participated partially would not be. . .

MOSS: Well, I am not an expert on a Committee but in a court once the witness has come in and acknowledged jurisdiction of the court, no he can't.

HARTKE: Now I understand that, but I mean that is not true on the subpoena necessarily as I understand it either. That's true on testifying but I do not know that what you'd have a violation, you might have a violation or contempt of him refusing to go ahead and testify, but if the original subpoena was not valid, then you are back to the proposition that the whole thing obonitio was valid. I think that you've got two problems here. Is there any reason why you cannot follow Senator Percy's suggestion of just issuing a new subpoena?

MOSS: No, we can forget in light of all of that and start over again. We probably have to throw in the transcript too if the obonitio is bad and anything else he said I guess he can now back up on and say my oath doesn't count and that it isn't evidence. I don't see how he can do that.

MUSKIE: I don't know that that's true Mr. Chairman.

MOSS: Mr. Chairman, excuse me for one moment. In other words, I don't think that makes as much difference, but I do think that if there is a chance at this time to go ahead and proceed, why go ahead and take a chance of having a long strung out legal battle when you can move under established procedure for which probably everyone here would agree to move.

CHURCH: May I just say, that I'm going to have to leave, for reasons I've previously explained. But, it seems to me in my

brief opportunity to review the rules here that although the Subcommittee is clearly clothed with the power to issue a subpoena that would normally be done by a majority vote of the Subcommittee, unless specific authority is deferred upon the chairman for this purpose by the Subcommittee or by the full Committee. That is not expressly contained in the rules. Therefore a legal argument can be made that the subpoenas lack validity. Since the legal argument not only can be made but if it is being made, I would suggest that rather than pursue a course that might end in an adverse ruling by the court. So we now as a full Committee with a quorum present issue a subpoena that is clearly valid.

CHILES: I think so too, because I think the situation here is that if we end up going to the Senate with a citation, ah we don't want to make any bad law here. You know this is a thing that we I think do jealously guard as our right to issue subpoenas and the right to contempt to the Senate and it isn't anything that we want a Federal court getting in, you know, and making some bad law. I would just mention one other thing and that maybe well has done it, but the Committee on Government Operations with its permanent investigation committee gets into this an awful lot. I think some of those subpoenas over the years have been tested. There have been contempt of the Senate citations issued from that over the years so I think there is a large file and a lot of expertise there maybe in some of the counsel or just in the file

of that Committee and I think that it might be well to avail ourselves with that kind of knowledge because they have been in it over the years of the subject of subpoenas.

CHURCH: My point is why spend months and months in courts if we can issue a ballot subpoena and bring this man here before the Subcommittee?

WILLIAMS: Can I ask a practical question?

MOSS: Yes.

WILLIAMS: You said a motion was made in the Federal district court by Lewin on something, now who represented us in that action?

MOSS: The U.S. Attorney for the district of New York.

WILLIAMS: Now that answer leads to my next question. Now if we did proceed with a contempt in taking a voting here to go to the Senate and if it were valid, who would handle it? It would be a long involved legal case. This Lewin is, as you suggested, a very capable man to carry a long legal argument. Now who would represent our position there.

MOSS: Well the U.S. Attorney if the Senate voted to cite for contempt the U.S. Attorney would have the . . . after Bergman has taken his fourth to court in terms of what if any penalty. Jennings I think wants to say something.

HARTKE: Can I comment on this note?

MOSS: The two are getting mixed-up a little bit. One is up there on the records from the bank and the other citation for contempt there are two things.

EAGLETON: Mr. Chairman, while we have a quorum present do you want to vote a subpoena before we lose our quorum, I have to leave shortly?

CHURCH: I don't see what we could lose by that Ted.

MOSS: Well it, by that you mean to wipe out anything that's been done until now and start. . .

CHURCH: We're not wiping out anything we were just issuing now a subpoena that the full committee issues with the quorum present that is not subject to any. . .for what we uh

MUSKIE: The record still stands for whatever proven value it has.

PELL: Well if he has testified under oath he's testified under oath.

MUSKIE: Sure he has, you can't take that away once that happens.

MOSS: I think so too but you're going to be in court on that.

CHILES: No, no he testified under oath.

BROCK: That's not the point. The point is do we need to have a valid subpoena now.

MOSS: Well, if you want to have a vote before they go off, we could very well do that whether the full Committee authorizes the issuance of subpoena for Dr. Bernard Bergman at some unspecified date in the future to come and bring his records I suppose it would be as it was written before and I would suggest that perhaps he ought to be brought to Washington to testify I'm getting tired of going back to New York and having him. . . .

RANDOLPH: Mr. Chairman, that is a point that I wanted to raise which I doubt has been raised in the past. It would seem to me that here in Washington, D.C., would be the place for Dr. Bernard Bergman to testify. And I want the record also to show that in prior investigations of nursing homes throughout America that we discovered in many instances almost tragic conditions with those who are living in the homes. This continuing subject, and I comment Senator Moss on the efforts that he has made particularly in the New York area hearing I think that I fully agree with my colleague of the Committee Mr. Chairman, that nothing will be lost, the record will have been made and now let's call him by subpoena of the Committee itself to Washington where he will have the opportunity either to renege upon what he has said or reaffirm what he has already told us.

DOMENICI: Mr. Chairman, I hate to delay things but I was not able to attend the first hearing but I was in on a very heated second one and I was there all day. Excuse me if I sound like I have a mouthful of goulash, I just came from the dentist this past hour but I really think we ought to consider a few. . .

(1) It seems the application that he filed with us to quash a subpoena on a third party's bank is in court. Is that not right? Well, I asked the lawyer if he was questioning the procedural aspects of that subpoena. I assumed he was. Now he said he was not in question on that subpoena. He was talking about with us. Is he now in court questioning the procedural aspects of that or not?

VAL: He is.

DOMENICI: He is. Then I concur that we should issue a valid subpoena if there is any question akin to it.

(2) On Bergman, himself, Mr. Chairman, he is not going to testify, in my opinion; on the second subpoena, he is going to come and take the stand and do precisely what the C.P.A. did and bring two lawyers and say he is going to claim the fifth from the exception by his terms. . . .

PERCY: Would it be possible for me to make a motion?

CHURCH: I wanted to invite the motion at this time as the Chairman of the full Committee and with a quorum present. Will the motion please be made.

PERCY: I liked to make a motion that the full Committee issue a subpoena to Dr. Bergman for a specific date to be determined by the Chairman of the Subcommittee and the Ranking Minority Member. His presence be required for that specific date and also for the duration of the hearings upon written notice by the Chairman and the Ranking Minority Member. So, if the hearing needs to be continued the subpoena would clearly cover his term as required in the subpoena for all future dates until those hearings are closed. The breadth of the subpoena should be broad enough to cover the full mandate of this Committee to inquire into both matters related to this investigation. . . .

MOSS: I would add with respect to that. . . Beall does that cover the second subpoena that Senator Domenici talked about -- subpoenas to the bank to produce his records or was that required?

CHURCH: No, no this as I understand it is a motion to secure the presence of Dr. Bergman for the purpose of testifying. And the previous subpoena being questioned now in the courts, are not affected by this motion.

BEALL: That's not my question. Is this motion for the subpoena broad enough to include the records that are being asked for of the bank?

CHILES: It certainly should. It should be for his presence and his records.

PERCY: If you would like to move to amend my motion, I will second it.

MOSS: Well, I would suggest that it be not only Dr. Bergman, but all the signatories on the Towers Account of the bank. We have to get the members of his family in here and let them all take the fifth.

DOMENICI: I believe the motion should be amended to include those parties the Chairman mentioned and, including, what was the name of the bank?

VAL: American Bank and Trust.

CHILES: Then is it clear Mr. Chairman, that the motion includes not only the presence of these people but any records that the Subcommittee should specify that they bring?

PERCY: Any and all records without exception.

CHURCH: That is correct.

DOMENICI: Mr. Chairman, I think the motion settles all matters raised. But on another subject they are also contending that the Chairman does not have to determine whether or not television can be present, and whether or not it is a public hearing. I think if you added that to the motion it would clarify it -- our position is we have to have a Committee meeting or at least a full Subcommittee meeting on that matter. And I think that we could conclude it by giving the Chairman the authority.

CHURCH: That really entails a change of rules and obviously separate from this motion. But, I think this motion should be broad enough and as amended is broad enough to cover all parts of the case. Is that correct Senator Moss? Everyone understands the motion? How many are in favor of the motion?

MUSKIE: Should we have a roll call vote?

CHURCH: I think we should have a roll call vote.

STRICKLER: Senator Williams. Aye.

Senator Randolph. Aye.

Muskie. Aye.

Moss. Aye.

Moss/Kennedy. I offer his proxy. He votes Aye.

Mondale. Aye.

Hartke. Aye.

Pell. Aye.

Eagleton. Aye.

Moss/Tunney. He votes Aye, by proxy.

Chiles. Aye.

Hansen/Fong. May I say Mr. Chairman, that I will not be voting for Senator Fong as proxy as he has just by specific direction instructed me to vote for the issuance of a new subpoena, but I don't think as I interpret this, it will not go broadly enough to include the subpoena of the records. So having said that I will not vote.

Hansen. Aye.

Brooke.

Percy. Aye.

Percy/Stafford. Aye by written proxy

Beall. Aye.

Brock. Aye.

Bartlett. Aye.

Church. Aye.

MOSS: Well, we do have a matter of. . . .

CHURCH: That makes it unanimous. I have to go.

MOSS: Mr. Chairman, there is one important matter that I wish you'd stay long enough for. This takes care of the Bergman matter and effectively says that we will drop any attempt for I guess at contempt, although the Subcommittee ^{announced} after consulting there on the stand that we as a subcommittee found him in contempt and would seek a Senate citation. I take it the Committee says to drop that. They are not going to seek it.

EAGLETON: Are we going to move to keep the record open?

PERCY: Keep the record open long enough to determine the vote.

MUSKIE: Mr. Chairman, I would not think that we need to make that. You still reserve the right, whatever rights you want to pursue later. I don't think that you need to announce that you are going to pursue that. Just leave that in abeyance, in suspension until we move this other direction. Because that implies some lack of, if you were to make that kind of announce-

ment implies some lack of conviction as to the merit of your case, knowing him, I think is prejudging that.

MOSS: We aren't talking about the bank case.

MUSKIE: No, I understand that.

MOSS: This is on Bergman.

CHILES: You just don't have to make that decision.

WILLIAMS: Well this is an effort to get here, to give him another shot to get here so we can get the questions to him; isn't that what this ^{is} all about? Rather than waiting six months of litigation, give him another chance to come.

MUSKIE: I don't think we have a right to move on the record as it stands.

MOSS: Well, I don't know of any limitations, statute of limitations on that so perhaps we can put that over. Now what I think we have to do is clarify since we now decided that there was enough doubt about the rule, is to amend the rule of the Committee about the issuing of the subpoenas and I think we ought to follow exactly what the Permanent Investigation Subcommittee follows -- the Chairman of the Subcommittee conferring with the minority member on issuing the subpoena. He wants to compel testimony, so I suggest that we adopt as an amendment to the rules, and I don't know how much of an amendment is is, but at least it

makes it clear each Subcommittee Chairman with the concurrence of the Ranking Minority Subcommittee Member or majority of the Subcommittee members is authorized to require by subpoena or otherwise the attendance of witnesses and the production of documentary evidence, I would move that this amendment to the rules be adopted.

BEALL: Mr. Chairman, with respect. . .I think we should approach this with a great deal of care. I think you should give members notification that you intend to propose an amendment to the rules of the Committee so that there will be an adequate period to take a look at this. I have been told by staff that legislative counsel, that they have doubts about the validity of some of these exchanges. . .at the present time. But in any event, I think this is something you shouldn't do; just walk into a room cold and do on the spur of the moment. I think we ought to have due notice.

MOSS: I might observe that I've sat on this Committee about 12 years and I've never seen this many members present, ever. I mean ever at a meeting of this Committee. I would say we might never get them again.

CHILES: Shows what you get when you ask.

BROCK: This is a very important privilege. And I think. . . .

MOSS: I would just submit that this ^{is} what is done by our Investigations Subcommittee. This is what has been the rule around here and just putting in our rules makes it clear that we too fol-

low what is the rule of the Senate.

BROCK: With all respect, that is not the rule around here and to the best of my knowledge the Investigations Subcommittee has a very special purpose and function. . . .

MOSS: I would like to tell you, if we don't have the power to subpoena we're not going to ever dig into any of these God-damn rotten situations such ^{as} we're in in New York.

BROCK: There is no question about the power to subpoena, the question is who grants it.

MOSS: Well, as I say, how you grant it if you are trying to get a man in from Florida as we've had before. And we had to get him in by subpoena to come and testify. We had to subpoena the auditor then he took the fifth and we got him. But we wouldn't even have got before us to take the fifth if we couldn't issue a subpoena. We wouldn't have gotten any of those records, we got a truckload of records up there that we got our hands on to look at. We wouldn't have seen them if we couldn't issue a subpoena. You may as well give up trying to dig into anything that's nasty. . . .

BEALL: I think you miss the point. I think some of us feel we should have been consulted about subpoenas when they are going to be requested. Now I've been on the Committee two years and until yesterday I had never been asked to express an opinion on it. I said sure, but on the other Committees on which I serve,

I get requests from time to time from the Chairman and the Ranking Member if I would acquiesce or agree to the issue of the subpoena. Generally without exception I have done so. I think we ought to know exactly what we are doing when we're changing the rules of the Committee. I submit speaking for myself only. I don't know exactly what the impact of this suggested change in our rules is today. All I would like is a sufficient time for a couple of days to study or change the rules to see if it is in conformity with other rules in the Senate.

MOSS: There is a motion before the Committee, any further discussion on it?

PELL: The present rule as I understand it is provided the majority of the Subcommittee, or Ranking Member of the Minority and Chairman decide to do it.

MOSS: That is the way it is spelled out. Now you have to depend on what is a quorum and what should a quorum do. . . .

BROCK: Is the Chairman compelled to get the advise of the Minority Member?

MOSS: Doesn't have to advise he has to get his concurrence.

HANSEN: Mr. Chairman, Bill Ticer the Assistant Counsel or the Legislative Counsel is here, I think it would be appropriate to ask him for some observations. I think he is prepared maybe to tell us what his interpretation is of what the legislative

reorganization act calls for. With that would you care to recognize him Mr. Chairman?

MOSS: By all means -- Mr. Ticer.

TICER: Mr. Chairman under Section 134 "C" of the Leg Reorganization Act each standing Committee is authorized and each Subcommittee is authorized to issue a subpoena. And whatever investigations are conducted the subpoena power is used under that Section the case is Shelton v. U.S. decided here in D.C. The courts have held that that includes to take a vote of the Subcommittee or Committee as appropriate to decide the conditions of the subpoenas. Administerial acts of signing the subpoena can be delegated to the Chairman. As I understand your resolution authorizing the existence of the Special Committee on Aging, you have the power, as authorized Subcommittees have the power, to issue subpoenas. There is nothing in that resolution that authorizes the delegation of the governmental functions particularly subpoenas to the Chairman alone.

BROCK: So we could get back. . . .

TICER: That's the real point you see. . . executive session.

MOSS: I can tell you my experience and it tells me that would slow down immensely the investigation we have tried to make. Maybe you're up in New York; maybe you find some guy there that you want to get in the next morning. You've got the ranking man there. Why can't you get out a subpoena give it to the marshal

and bring that guy in tomorrow.

BROCK: Because the subpoena is a powerful weapon to use upon an individual.

MOSS: Yes it is.

BROCK: . . .I am concerned about the protection of the individual against government. I think you run a rather serious hazard when you go beyond the extent of your legislative authority. You're not only subject to challenge in court but also by the people of this country to make it for whatever reason valid or not.

MOSS: I am trying to bring it into conformance with what the Government does and I should think it would be a valid way to do it.

HARTKE: Mr. Chairman, why is it necessary, I know you're losing your quorum here anyway I mean you talk about that. Why can't we follow Senator Beall's suggestion and think about this a day or two and come back and have a discussion on it. Because I can have a little bit of agreement with what Senator Brock said you recall during the McCarthy era as a Chairman of the Committee to issue a subpoena and could damage a man's reputation for life without much thought happening. I mean I think in this situation the difficulty is to try to make the law in accordance with the facts. I think is rather dangerous. I do think that there is no serious problem if we think about this a day or two and come back.

BARTLETT: I'd like to point out, I think that is the form. . . of the Investigation Committee with the concurrence of the Ranking Minority Subcommittee Member. I understand that part, what does it mean to get a quorum with the concurrence of the majority of Subcommittee members? And does it necessarily include himself? You mean the majority of the Subcommittee members are authorized or does it mean the Chairman with the concurrence of the minority member?

MOSS: Concurrence means that they must, of course, approve of what he proposes. They have concurred with him. . . It would take one more than the majority.

BARTLETT: You mean get the majority. . . The Chairman plus the majority.

MOSS: Yes it would, if you use that second clause and as far as I am concerned you can drop out that ranking minority and just say Chairman with concurrence of the majority of the Subcommittee members.

MUSKIE: Mr. Chairman, I used to be a member of the Investigation Subcommittee some years ago now, but as I recall the facts that time, I don't know what it is now, Senator McClellan was the Chairman of that Subcommittee always meticulously as I recall and my memory may be wrong, meticulously sought to get a vote of the Subcommittee on subpoenas that regarded a particularly

important and subject to the possibility of a court test. As I recall at that change in the Government Operations Committee rules took place somewhere in the period that I served, and I think it would be helpful really to consult with the counsel of the Subcommittee on Investigations and give us the benefit. I really don't know whether or not issuance of subpoenas by the Chairman with the concurrence with the minority's ranking republican has ever been challenged. I think that would be useful information. I don't know whether any staff here knows the answer to that question. I understand the importance of the frustration that Senator Moss has expressed. It is difficult to be Chairman of one of these Committees to get a majority assembled for business important or unimportant, and I sympathize with that and I suspect, Senator Moss that after you've had the kind of careful examination that Senator Beall requests it may not be too difficult to get concurrence in this but if we can get some of the background from the Subcommittee on Investigations it might be very helpful. And I can assure you that I'd attend the next meeting if we consider this matter and I'd make a special effort to do so.

MOSS: Thank you, no quorum here and I withdraw the motion

ADJOURN.