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CRIMINAL LAW CASE NOTES AND COMMENTS

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CONGRESSIONAL INVESTIGATIONS

John W. Gilligan*

*"The Senatorial debauch of investigations . . . poking into political garbage cans and dragging the sewers of political intrigue . . . filled the winter . . . with a stench which has not yet passed away. Instead of employing the constitutional, manly, fair procedure of impeachment, the Senate flung self-respect and fairness to the winds. As a prosecutor, the Senate presented a spectacle [and] fell . . . in popular estimate to the level of professional searchers of the municipal dung-hills . . ."*¹

Casual reading of this excerpt would convince the average reader that he had happened on a current newspaper editorial. In fact this denunciation was written a quarter century ago by the great Dean Wigmore in the wake of another period of Congressional Committee activity. It serves to illustrate that, over the years, as the use of the investigatory power has waxed or waned it has evoked strong emotions branding it either an unmixed blessing or, as here, an unmitigated evil. History demonstrates that its opponents in one era may well become its proponents in another when investigation of a particular facet of the national life appears advantageous to their particular goals or conceptions of policy.² Use of the device can be taxed to no special political group and transitory abuse is largely the product of individual action.³

The power of the Congress to investigate may be justified on a number of grounds. Perhaps the most widely accepted is that it provides the best method whereby the legislative branch of our government may inform itself of the facts essential to intelligent legislation.⁴ Another, based on the financial

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1. Wigmore, *Legislative Power to Compel Testimonial Disclosure*, 19 ILL. L. REV. 452, 453 (1925) (The article preceded Mr. Daugherty's hearing before the Supreme Court, Note 47, *et seq.*, *infra*, and is of such a partisan nature that it is of little practical value today).

2. Contrast the differing attitudes of John Quincy Adams as set forth in Notes 25 and 29, *infra*. In our own time we have the following statement of Harry S. Truman, when head of an investigatory committee of the Senate: ". . . it is important that Congress not only continue but enlarge its work of investigation. In my opinion, the power of investigation is one of the most important powers of the Congress. The manner in which that power is exercised will largely determine the position and prestige of the Congress in the future. An informed Congress is a wise Congress; an uninformed Congress surely will forfeit a large portion of the respect and confidence of the people." 90 Cong. Rec. 6747 (1944); Contrast this utterance with the attitude of Senator Lucas, who as Majority Leader speaks for the President, in his attempts to curtail the powers of investigation, Notes 72 and 136, *infra*.

3. The most splenetic attacks on the Un-American Activities Committee were directed against it during the 80th Congress while Republican dominated. The Democrat-dominated Buchanan Committee has been vigorously criticized during the 81st Congress. In both cases, aside from any constitutional issues, the criticism has been directed at the apparent intent of individual members to pillory opposition groups in American society.

4. ART. I, U.S. CONST. Sec. 1—"All legislative powers herein granted shall be vested in

power, is the investigation of use or misuse of appropriated funds.⁵ The latter is also, in a sense, preliminary to legislation, since it may provide the foundation for corrective action. Still another justification originates in a desire to maintain the rules, dignity, and power of the legislative branch.⁶

Each of these justifications is an end in itself and the investigation only a means. But if the means is to be effective there must be an element of coercion. This element has been supplied by the development of the historical doctrine of contempt of the legislative body. It is the presence of this element which gives rise to the charges of abuse of the investigatory power.⁷ In order to understand the manner in which these independent Congressional prerogatives have become interrelated it is necessary to turn to a brief review of history.

British and Colonial Precedent

The United States Congress, aside from any questions raised by the Constitutional principle of separation of powers, is a direct descendent of the British Parliament. In its earliest form that Parliament was a gathering of the Lords and Burgesses of England and, as such, constituted a court.⁸ Somewhat later in English history the House of Commons became a distinct body, but about it lingered some of the judicial aura.⁹ As early as the 16th century there are records of that House committing persons for contempt. The procedure used was analogous to the present procedure—a citation for contempt followed by imprisonment until such time as the offender should purge him-

a Congress of the United States, which shall consist of a Senate and House of Representatives.”; See statement of Mr. Truman, Note 2, *supra*; “Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge . . .”, Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 205 (1926).

5. The first investigation conducted by the House of Representatives was based on this power. It consisted of an investigation into the military fiasco of General St. Clair. 3 ANN. CONG. 490-494 (1792); The first instance of a Senate investigation with subpoena powers was also into a military affair, the Seminole campaign of Andrew Jackson. 33 ANN. CONG. 76 (1818); In a debate over a resolution to investigate the conduct of General Wilkinson, the investigation was defended thusly: “. . . it is proper [for the Congress] to ascertain that those who reap the earnings of the people are worthy of the public confidence.” 21 ANN. CONG. 1746 (1810).

6. In *Re Chapman*, 166 U.S. 661, 670 (1897) (Purpose of investigation was to determine whether or not there had been bribery of Senators in the pending Tariff Bill. The Court reviews the cases in which action had been taken against members by the Congress itself).

7. Primarily the criticism arises when those in power use the investigatory tool, backed by the possible sanctions, to harass their opponents. Such harassment is legal as long as coupled with some legitimate objective and may be exercised in a discriminatory manner, *Barsky v. United States*, 167 F. 2d 241 (1947); *cert. den.* 334 U.S. 843 (1948); See NEW YORK TIMES, Section 7, p. 1, July 30, 1950 for a sympathetic review of Owen Lattimore's blast at his Senatorial tormentors, Lattimore, ORDEAL BY SLANDER (1950).

8. *Kilbourn v. Thompson*, 103 U.S. 168, 183-189 (1880) (A general historical review appears at the cited pages).

9. *Burdett v. Abbott*, 14 East. 1, 136 (1811) (Action against the Speaker of the House of Commons for having imprisoned a member in the Tower of London for alleged libel). The Court noted: “The separation of the two Houses seems to have taken place as early as the 49 H. 3 [1265] about the time of the battle of *Evesham*; . . .”; See also the companion case against the Sergeant-at-Arms, *Burdett v. Colman*, 14 East. 165 (1811); The historical basis of the Commons' powers was re-examined in a series of cases growing out of a libel action against the House printer in which the House threatened to imprison, and did imprison, the Sheriff ordered by the Court to enforce the libel judgment: *Stockdale v. Hansard*, 9 Ad. & E. 1 (1839); *Stockdale v. Hansard*, 11 Ad. & E. 253 (1840) (Court ordered Sheriff to pay over proceeds of judgment sale even though under threat); *The Sheriff of Middlesex' Case*, 11 Ad. & E. 273 (1840) (Court refused to grant *habeas corpus* to imprisoned Sheriff even though he had been imprisoned for obeying the Court's order).

self.¹⁰ In colonial legislatures, patterned after that body, it is not surprising that such a power should have been asserted since it was already supported by historical precedent.¹¹ Because these "little Parliaments" were faced with comparable problems it is easy to speculate that they would have developed an analogous procedure even without the available precedent.¹² When the Constitutional Convention met in 1787, the power of legislative bodies to investigate and to compel disclosure under penalty of contempt had become a part of our governmental tradition.¹³ Perhaps the long history of these practices influenced the draftsmen of the Constitution to omit any specific mention of them. The legislative branch is neither empowered nor forbidden to investigate nor, save in impeachments, to assume any of the prerogatives of a court. Neither is it granted general disciplinary powers against any but its own members.¹⁴

Congressional Practise to 1860

Congress, itself, has apparently never entertained any doubts as to its right to investigate the affairs of the nation with a view to correcting them, and to punish any and all who stood in its way. In 1792, when many framers of the Constitution were members, the House of Representatives voted an inquiry into the military fiasco of General St. Clair.¹⁵ This inquiry was based on the power of the Congress to appropriate and superintend the expenditure of public monies, in this case the funds for the Army. Again, in 1800, a Resolution was passed and an inquiry launched into the conduct of the Secretary of the Treasury.¹⁶ Still another investigation was devoted to the conduct of General Wilkinson, Governor of the Missouri Territory,¹⁷ and in 1818, a general investigation was undertaken of the various departments of the Executive Branch of the Government.¹⁸ In 1819 the Senate entered this field with an investigation of the conduct of General Andrew Jackson (later a favorite target of investigation committees) in his Florida campaigns.¹⁹ A report was submitted to the Senate in which irregularities in Jackson's con-

10. *Burdett v. Abbott*, 14 East 1, 141 (1811) (reviews cases of Parliament citing individuals for contempt, one as early as 1529, and comments: "... it shews at least that the House were in the habit of committing for contempt.").

11. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV. 691 (1926) (Reviews colonial and early state precedents).

12. In point of fact most of the British colonies, both before and after our Revolution, did just that. See the review of instances in *Kielly v. Carson*, 4 Moo. P.C. 63; 13 Eng. Rep. 225, 227 (1841) (Newfoundland Assembly held defendant in contempt for insulting a member. On appeal to the Privy Council it was said: "It is monstrous to suppose for an instant, that there can be a *lex et consuetudo* of an Assembly like Newfoundland, whose constitution existed only since 1832. The principles on which the English Parliament rests its rights and privileges cannot be extended to Colonial Assemblies." Further, that the colonial assemblies derived their powers from the Crown which could not give privileges of the legislative branch. This case had a decided influence on our Supreme Court in the *Kilbourn* case).

13. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 169 (1926) ("Legislative power in 1789 already possessed a content sufficiently broad to include the use of committees of inquiry with powers to send for persons and papers . . ."); The first investigation conducted by our House of Representatives, 3 Ann. Cong. 490-494 (1792) Note 5, *supra*, was conducted with this power granted.

14. ART. I, U.S. CONST.

15. Note 5, *supra*.

16. 10 Ann. Cong. 796 (1800).

17. 21 Ann. Cong. 1606-1607 (1810) (Proposed); *Id.* at p. 1755 (Adopted); 22 Ann. Cong. 432-449 (1810) (Renewed in next Congressional Session).

18. 31 Ann. Cong. 783-786 (1818).

19. 33 Ann. Cong. 76 (1818); In 1819 the House also investigated this campaign, but with an eye to the use of public monies by Jackson, 35 Ann. Cong. 717 (1819).

duct were found, but no action was taken.²⁰ During these investigations the various committees appear to have had little difficulty in obtaining the attendance and response of witnesses, but by the late 1820s the power to send for persons and papers was generally included in all enabling resolutions.²¹

One of the surest sources of Congress' interpretation of its own power is to be found in the debates of this early era. The discussions which revolved about the issue of the power of subpoena are illuminating in this respect. As late as 1827 we find a Congressman from New York insisting that there was no power of subpoena except in the case of impeachment or contested elections.²² This contention was brilliantly rebutted by Buchanan of Pennsylvania.²³ Throughout the 1830's there was a running skirmish between the Executive Branch and the Congress, highlighted by an investigation in 1832 of the President and his cabinet.²⁴ In the same year John Quincy Adams opposed an investigation into the affairs of the National Bank on the grounds that it involved inquiry into personal affairs.²⁵ Nevertheless the investigation proceeded and resulted, in 1834, in the directors of that institution being reported to the House as being in contempt for refusing to answer Committee questions.²⁶

In 1836 a situation arose which is strongly anticipatory of the current Congress. President Jackson had introduced his Democratic party members, without regard for competence, into virtually all federal offices. A political opponent, Congressman Wise, moved an investigation of the situation, based on the contention that efficiency was suffering, a legitimate interest of the Congress since it involved expenditure of public funds.²⁷ When the Committee met, Wise found himself in the minority since the Committee was dominated by Jacksonian Democrats. The President then refused to make available to the Committee the requested papers and reports on which a case might have been based. The majority of the Committee accepted this refusal and turned in an innocuous report, but Congressman Wise refused to acquiesce

20. Sen. Rep. No. 100, 15th Cong. 2d Sess., Ser. No. 15.

21. In every case, however, it was regarded as necessary to make this a positive clause in the enabling resolution. In 1827 John C. Calhoun, then Vice President, requested that his conduct as Secretary of War be examined. A committee was established with powers of subpoena. 3 Con. Deb. 576 (1827). However, when it reported, Mr. Calhoun bitterly assailed its acceptance of certain letters in evidence, although it appears that they were provided voluntarily by a witness, perhaps in anticipation of a *subpoena duces tecum*. *Id.*, at p. 1153.

22. 4 Con. Deb. 874-875, 882 (1827) (During the debate one Congressman observed: "... the power asked by the committee was not only novel and extraordinary, but wholly unnecessary.")

23. 4 Con. Deb. 875-876 (1827) (The gentleman likened the power to that of a court in ordinary litigation and concluded: "This power has never before been questioned, . . ."); Mr. Randolph of Virginia cited his 30 years experience in the House to support the power of giving oath to witnesses and, inferentially, of compelling their testimony. *Id.*, at p. 836.

24. 8 Cong. Deb. 1309-1386 (1832) (Resolution and Debate).

25. 8 Cong. Deb. 2160 (1832). Mr. Adams based his opposition, directed in form at the scope of the inquiry, on the grounds that the investigation would involve asking the Directors their political views . . . "an improper inquiry." Notably, the investigatees were of Mr. Adams political complexion. In 1834 he advanced substitute resolutions which would have repudiated the adverse findings of the majority of the committee and resulted in a complete vindication of the Directors. 10 Cong. Deb. 4320-4321 (1834).

26. This report dictated Adams action in offering the substitute resolutions, Note 25, *supra*.

27. 13 Con. Deb. 1057-1067, 1081-1109 (Proposed and debated in purple prose. This was one of two investigations which were more or less concurrent, the other dealing primarily with the affairs of the National Bank, but interrelated politically. Mr. Wise was a member of both committees); The resolution was adopted 165-9. *Id.*, at pp. 1399-1411;

and submitted a minority report.²⁸ The recent Tydings "Whitewash" Committee, therefore has a close historical parallel.

Apparently influenced by the activities of this Committee, John Quincy Adams had reversed himself and demanded that powers of subpoena not be weakened in the House Resolution establishing the Committee.²⁹

There was a multitude of investigations conducted between this date and the War between the States, but they were more or less routine and followed patterns already established by the earlier investigations.³⁰

Meanwhile Congress was "making law" through its attitude towards its power of disciplining witnesses. In 1837 it summoned Reuben Whitney before it to explain his refusal to answer a subpoena of the House Banking Committee. He appeared and defended on the grounds that he had previously been before the Committee and been mistreated by men who were still members of it. The House found his allegations true and the complaint of the Committee was dismissed without action against Whitney.³¹ Again in 1858 another recalcitrant witness was haled before the Bar of the House, but when threatened with imprisonment his resolution wilted and he surrendered to the power of the Congress.³² In the 3rd Session of the previous Congress a newspaper reporter had refused to divulge to a Committee investigating Congressional corruption the names of his informants and for his pains had been remanded by the Senate to the custody of the Sergeant-at-arms until he should prove more cooperative.³³

By 1857 the volume of Congressional investigations had grown to large proportions and, in that year, an Act was passed which permitted either chamber to certify to the District Attorney from the District of Columbia that an individual had committed contempt.³⁴ The District Attorney would then have a grand jury investigation of the charge, followed in regular order by an indictment and trial for the specific offense, declared to be a misdemeanor. This statute has been retained with minor modifications down to the present time.³⁵

28. 13 Cong. Deb. 2143 (1836); The reports are contained in H.R. Rep. No. 194, 24th Cong. 2d Sess., Ser. No. 307 (1837); Prior to the submission of the report there was a vitriolic debate as to the manner in which Reuben Whitney had been questioned before the committee dealing primarily with the Bank question. 13 Cong. Deb. 2102-2138 (1836).

29. The authorizing resolution, Note 27, *supra*, contained the terminology that the Committee would have subpoena powers "if they deem it necessary." Mr. Adams moved to strike this clause with the effect that the resolution was strengthened. The resolution was adopted in the altered form by a vote of 165 for, 9 against; 13 Cong. Deb. 1411 (1836).

30. Typical are the following: Cong. Globe, 29th Cong. 1st Sess., 734 (1846) (Investigation of informational "leaks" from the State Department); Cong. Globe, 33rd Cong. 2d Sess., 282-283 (1855) (Management of the Smithsonian Institute); Cong. Globe, 35th Cong. 1st Sess., 61 (1857) (Financial houses in the District and means of regulation).

31. Cong. Globe, 24th Cong. 2d Sess., 176-238 (1837).

32. Cong. Globe, 35th Cong. 1st Sess., 505, 553-554, 581-585, 595-596 (1858).

33. Cong. Globe, 34th Cong. 3rd Sess., 403-404, 407-410, 413, 426, 538, 630 (1857) (Note the relevance of this case to the later judicial decisions on freedom of speech).

34. 11 STAT. 155 (1857).

35. In its present form the statute reads as follows:

Sec. 191 U.S.C.A. *Oaths to witnesses*. The President of the Senate, the Speaker of the House of Representatives, or a chairman of a Committee of the Whole, or any committee of either House of Congress, is empowered to administer oaths to witnesses in any case under their examination. Any Member of either House of Congress may administer oaths to witnesses in any matter depending in either House of Congress of which he is a Member, or any committee thereof. (R.S. §101; June 26, 1884, c. 123, 23 STAT. 60)

Sec. 192. *Refusal of witness to testify*. Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who having appeared, refuses to answer any

Constitutionality of Contempt and Investigatory Powers

Contempt was the first of these interrelated powers to be challenged in the courts. In *Anderson v. Dunn*³⁶ the plaintiff brought an action for assault and battery against the Sergeant-at-Arms of the House who had acted against him under the Writ of the Speaker. The case reached the Supreme Court in 1821 and the question was squarely posed as to whether the Congress possessed any Constitutional right to commit for contempt. The Court held that it had on the theory of *McCulloch v. Maryland*, i.e., that the United States government possessed all powers incidental and necessary to the proper execution of its granted powers.³⁷ Since no other branch of the government is given the duty of protecting the Congress from contempt, then it must, out of common sense be implied that the Constitution meant to confer that right on the Congress itself in order to prevent frustration of its functions.³⁸ The holding is that either house of Congress has full power to punish for any contempt of itself, and that this power is not restricted to those specific instances enumerated in the Constitution.³⁹ The prerogative of coercion extends beyond the halls of Congress and is confined only by the territorial limits of the United States.⁴⁰ The physical limitations of the power of punishment are said to be "the least possible power adequate to the end proposed" which seems to be defined as imprisonment until the expiration of the Congress which imposed it.⁴¹ The decision is grounded on the necessities of self-preservation.

Clearly *Anderson v. Dunn* does not decide the right to investigate,⁴² but

question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100, and imprisonment in a common jail for not less than one month nor more than twelve months. (R.S. §102) (Directly derived from the Act of 1857, 11 STAT. 155)

Sec. 193. *Privilege of witness.* No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous. (R.S. §103.)

Sec. 194. *Witnesses failing to testify.* Whenever a witness summoned as mentioned in section 192 of this title fails to testify, and the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action. (R.S. §104) (Directly derived from the Act of 1857, 11 STAT. 155)

Sec. 195. *Fees of witnesses in District of Columbia.* Witnesses residing in the District of Columbia and not in the service of the government of the said District or of the United States, who shall be summoned to give testimony before any committee of the House of Representatives, shall not be allowed exceeding \$2 for each day's attendance before said committee. (May 1, 1876, c. 88, 19 STAT. 41.)

36. 6 Wheat. 204 (U.S. 1821).

37. 4 Wheat. 316 (U.S. 1819) (Deciding that the National Bank was Constitutional as a necessary implementation of the specifically granted powers of Congress).

38. *Anderson v. Dunn*, 6 Wheat. 204, 224-226 (U.S. 1821).

39. *Id.*, at p. 228: "The House must have this power to protect itself from contempt . . . in order to carry out deliberative functions."

40. *Id.*, at p. 234: ". . . it is very clear that there exists no reason for confining its operation to the limits of the District of Columbia; after passing those limits, we know no bounds that can be prescribed to its range but those of the United States . . . Such are the limits of the legislating powers of that body . . ."

41. *Id.*, at p. 231: ". . . duration of imprisonment . . . must terminate with . . . adjournment."

42. The view may be taken that it did for the reason that investigation of some type is necessary to determine the facts in as conceded Constitutional an exercise of power as judging elections to Congress under ART. I, Sec. 5-1, U.S. CONST. By authorizing the contempt power to enforce other powers the Court may have impliedly granted the existence of the more basic power.

since investigation is completely dependent on the ability to compel, the case must be regarded as the basis on which all investigatory cases rest. In addition the theory of implied powers there enunciated is equally applicable to investigation.

Over half a century passed before the next authoritative discussion of either question, and then *Kilbourn v. Thompson* specifically reviewed the power of investigation.⁴³ Kilbourn, in a damage action, alleged that he had been unconstitutionally summoned before a committee of the House of Representatives by a *subpoena duces tecum* and questioned relative to his associations with the bankrupt firm of Jay Cooke & Company. Upon his failure either to produce the desired records or to answer the questions, he had been cited, tried and convicted of contempt by the House. He contended that Congress lacked power either to inquire into the private affairs of a citizen or to try him for failure to respond to such an inquiry. In upholding the contention of the plaintiff the Supreme Court used extremely strong language limiting the investigatory and contempt powers of Congress to an implementation of the specific grants in the Constitution.⁴⁴ A great deal of the opinion is devoted to an historical analysis of the legislative branch, culminating in the conclusions that our Congress is not the direct heir of the Houses of Parliament, and that *Anderson v. Dunn*, if directly in point, was not decided correctly, but under an erroneous historical view.⁴⁵ *Kilbourn v. Thompson* clearly limits the earlier case to its assumed fact⁴⁶ and rejects its broader implications. However, it in turn has been so limited and qualified in later holdings as to retain little vitality except as a generalization to the effect that Congress may not ransack a witness' private affairs unless a legitimate Congressional purpose may be shown.

By 1927 the Court had moved away from this hostile position and, in *McGrain v. Daugherty*, restated much of the earlier doctrine:

"* * * the two Houses of Congress, * * * possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; * * * neither house is invested with 'general' powers to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of Constitutional interpretation just stated is rightly applied."⁴⁷

Further, the Court held that there was a presumption that Congress, in investigating, was acting with a legitimate purpose.⁴⁸ If this be accepted, then any objection based on *Kilbourn v. Thompson* was irrelevant.⁴⁹ Therefore

43. 103 U.S. 168 (1880) (Because the action on which the Plaintiff based his case was contempt much of the language of the case relates to the contempt power).

44. *Id.*, at pp. 189-190 the specific instances in the Constitution are enumerated and an explanation given of why the Congress must exercise contempt powers in those cases. *Id.*, at p. 197: "But we do not concede that the Houses of Congress possess this general power of punishing for contempt. The cases in which they can do this are very limited . . ."

45. *Id.*, at pp. 183-189 (Review of British precedent intended to distinguish Congress from the British Parliament). *Id.*, at p. 198 (The *Anderson* case was a case of first impression in this country decided under the influence of early 19th century English decisions which were later discredited in the English courts.).

46. *Id.*, at pp. 196-197 (It was assumed that *Anderson* dealt with Congress' right to control its own members.).

47. 273 U.S. 135, 173-174 (1927).

48. *Id.*, at p. 178: "The only legitimate object the Senate could have was to aid it in legislating; . . . the presumption should be indulged that this was the real object."

49. *Id.*, at p. 177: "[Despite personal cast of the investigation of the Attorney General] Plainly the subject [Department of Justice] was one on which legislation could be had and

a recusant witness acted at his peril. However, the opinion stated a vague new criterion upon which a witness might base a refusal: "[he] may rightfully refuse to answer when the bounds of the power [to investigate] are exceeded or the questions are not pertinent to the matter under inquiry."⁵⁰ Obviously the witness is faced with the unenviable task of determining first whether the investigation is, or might be, in pursuit of a legitimate Constitutional objective, and secondly, whether the specific query is "pertinent" to that legitimate objective. Should he decide negatively he must then overcome a judicial presumption that it was. Moreover, the cases indicate that the courts will be astute to discover some legitimate objective no matter how remote.⁵¹ It has even been held that statements of committee members denying the assumed purpose will not rebut the presumption if the court-assumed intent is the only legitimate one possible.⁵²

It is difficult to escape the logic of this approach once the sovereign power to legislate exists. Legislation requires knowledge and, in turn, essential knowledge might be withheld without some means of compulsion. If the courts were to break any link in this chain on constitutional grounds the effect would be to declare undevised legislation unconstitutional. The presumption of validity applied to the means is comparable to, if not dictated by, the oft-enunciated rule of construction in favor of the constitutional validity of a statute which represents the end. In those cases involving impeachment and discipline the problem may readily be resolved in terms of specific Constitutional authorization.

Statutory Treatment of Contempt

The previously noted Act of 1857,⁵³ as modified, received its first major test in 1897 when one Chapman, a sugar broker supposed to have information relative to Senatorial corruption, was convicted under it for refusal to answer questions. He brought *habeas corpus* alleging unconstitutionality of the act. The Supreme Court assumed inherent Congressional power to punish contempt of itself and held that legislation in aid of this power was constitutional.⁵⁴ The opinion seems to confine the power and its statutory implementation to cases in which there may properly be Congressional action, but found that this particular situation involved not an implied but a granted power,⁵⁵ therefore the larger problem of general investigation was not involved.

would be materially aided by the information which the investigation was calculated to elicit." *Accord*, *Sinclair v. United States*, 279 U.S. 263, 294 (1929) (Congress had full power over public lands, therefore any personal investigation of the defendant which aided the exercise of that power was permissible).

50. *McGrain v. Daugherty*, 273 U.S. 135, 176 (1927).

51. Note 49, *supra*; *United States v. Josephson*, 165 F. 2d 82, 90 (2d Cir. 1947) (Necessary to learn facts re: Communism to determine whether or not it was a clear and present danger requiring regulatory legislation); *cert. den.* 333 U.S. 838 (1948); *Accord*, *Eisler v. United States*, 170 F. 2d 273 (CA, DC, 1948); *cert. den.* 335 U.S. 857 (1948).

52. *United States v. Josephson*, 165 F. 2d 82, 89 (2d Cir. 1947) (If the statute creating the Committee sets forth a legitimate aim then statements of the Committee members will not create a presumption that there is another and illegitimate purpose directing the investigation); *cert. den.* 333 U.S. 838 (1948).

53. See Note 34, *supra*; 11 STAT. 155 (1857).

54. In *Re Chapman*, 166 U.S. 661, 671-672 (1897): "It was an act necessary and proper for carrying into execution the powers vested in Congress and in each House thereof. . . . [There is an] essential and inherent power to punish for contempt, in cases to which the power of either House properly [extends]."

55. *Id.*, at pp. 668-670 (The Court noted that each House had the right to discipline members under ART. I, Sec. 5-2 U.S. CONST. and that this proceeding was in aid of that power. A historical survey of previous disciplinary actions is given by the Court).

Further, the Court held that the power to punish still remained in each house, but commented that it was "improbable that in any case cumulative penalties would be imposed."⁵⁶

In 1935, in *Jurney v. MacCracken*, it was made abundantly clear that Congress was still able to utilize the traditional method of procedure. In that case the Supreme Court held that the Act of 1857 was merely to supplement what might otherwise prove to be an inadequate punishment.⁵⁷ Thus there is no bar to either House of Congress citing a recalcitrant witness before its own bar, holding him for as long a period as it may deem necessary, and then certifying him to the Courts of the District of Columbia for further statutory action based on the same facts.

Although today Congress generally follows the statutory method in dealing with uncooperative witnesses, the years immediately after the enactment of the statute were marked by many uses of the more traditional method, together with an occasional case where both methods were employed.⁵⁸ Perhaps the leading case during this period involved Thaddeus Hyatt, an associate of the infamous John Brown in his inflammatory attack on Harper's Ferry. Hyatt refused to appear before a Senate Committee investigating the abortive rising, whereupon the Senate voted his arrest, and arraigned and tried him on a charge of contempt. Even though some members questioned their powers to proceed in this fashion, the defendant was convicted and sentenced to jail.⁵⁹ He made no effort to appeal to the courts. The issue of whether or not the statutory procedure was exclusive came before the courts in 1873 when a witness was sentenced to thirty days by Congress for refusal to divulge the name of a business client.⁶⁰ In his subsequent action against the Speaker and Sergeant-at-Arms it was held that the House retained power to so confine him for contempt and, since the defendants were merely carrying out ministerial duties, he had no action against them.⁶¹ In 1875 a witness, then imprisoned in the District jail, brought *habeas corpus*, but his writ was denied on the ground that jurisdiction so to imprison existed in the Congress.⁶² Neither case was carried to the Supreme Court.

Preliminary Summary

After the great cases of the 1920's, in the aftermath of the Teapot Dome scandal, the major Constitutional problems had been solved. Since that date the defensive contentions raised by persons who have fallen afoul of Congress seem to bear, not on the basic Constitutionality of the twin powers, but rather on alleged deviations from the announced doctrines or on claims of

56. *Id.*, at p. 672.

57. 294 U.S. 125, 151 (1935). "The power of either House of Congress to punish for contempt was not impaired by the enactment in 1857 of the statute . . . making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor . . . The statute was enacted . . . because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses . . . The purpose of the statute was merely to supplement the power of contempt by providing for additional punishment . . ."

58. Shull, *Congress and Its Witnesses*, 5 TEMPLE L.Q. 425 (1931) (Contains a digest of the bulk of these cases).

59. Cong. Globe, 36th Congress, 1st Session (1860), pp. 848-850, 999-1000, 1076-1086, 1100-1109, 2908-2909, 3006-3007.

60. Cong. Globe, 42nd Congress, 3rd Session (1873), pp. 952-956, 982-989. (In that case the witness was a broker for members of Congress, therefore the facts are very close to the *Chapman* case, Note 54, *supra*, and text thereto).

61. *Stewart v. Blaine*, 1 McArthur 453 (D.C. D.C. 1874).

62. See Note 58, *supra*, *Op. cit.* at 432-433.

personal immunity. Typically, a defendant being prosecuted for contempt of Congress will concede both the power to investigate and that to commit for contempt, but will attempt to avoid the consequences of his own actions by attempting to establish that the investigation was proceeding in some unauthorized direction or by some procedure devised to invade his rights under the Constitution. In the succeeding section some of these defensive "attacks" will be explored.

What May A Witness Expect?

In an era when the government has expanded into fields completely unsuspected by earlier Congresses and concerning which the present members of Congress, responsible for enabling and regulatory legislation, may have little accurate information it becomes increasingly likely that a growing number of persons will find themselves in the role of witnesses supplying the needed information.⁶³ In addition, Congress now employs the "roving" subcommittee, holding hearings throughout the nation; consequently, the privilege of testifying has become available to many who may have been unable to attend a fixed site of hearings in the past. Because of this expansion of the device it might be well to review some of the mechanics of a Congressional investigation with the intent of indicating what one may expect should he find himself, willingly or unwillingly, before such a body. Treatment will be chronological from authorization of the investigation through dismissal of the witness with comments interspersed as to possible pitfalls at each stage either to the government or the witness.

Either House of Congress may take the initial step by passing a Resolution authorizing an investigation and a committee to pursue it.⁶⁴ There are many

63. Meader, *Limitations on Congressional Investigation*, 47 MICH. L. REV. 775, 776 (1949): "Congress must be strengthened if balance of separate governmental powers is to be restored. That [may be accomplished] by the development and effective use of the Congressional Investigatory functions."; Shull, *Answer That Question: The Congressional Witness and His Quandary*, 23 TEMPLE L.Q. 117 (1949) (Recent sessions have intensified use of the device, especially in view of the government's preoccupation with business regulation and social legislation); Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153-221 (1926) (The author concludes that with the increase of "expert agencies" Congress will have the additional burden of acting as a check on their operation. Investigation is essential to such a role as it is to passage of new or refining legislation to guide such agencies); The activities of the "Kefauver" Committee investigating interstate crime, on the spot, have brought home the use of the device to any reader of popular periodicals.

64. The following House Resolution 298 of the 81st Congress, first session, is illustrative of the general form employed:

"Resolved, That there is hereby created a Select Committee on Lobbying Activities to be composed of seven Members of the House of Representatives to be appointed by the Speaker, one of whom he shall designate as chairman. Any vacancy occurring in the membership of the committee shall be filled in the manner in which the original appointment was made.

The committee is authorized and directed to conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation.

The committee may from time to time submit to the House such preliminary reports as it deems advisable; and prior to the close of the present Congress shall submit to the House its final report on the results of its study and investigation, together with such recommendations as it deems advisable. Any report submitted when the House is not in session may be filed with the Clerk of the House.

For the purposes of this resolution the committee, or any subcommittee thereof, is authorized to sit and act during the present Congress at such times and places, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses (*sic*) and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas (*sic*) may be issued under the

standing committees which enjoy statutory authorization, but each originated in a resolution sometime in the past.⁶⁵ The resolution must set forth with reasonable certainty the subject matter of the investigation.⁶⁶ Although some question might arise as to the subpoena power of a given committee, the question is academic since it is included in all resolutions as a matter of course.

The Committee, once its members are appointed, will meet and decide what its rules of procedure are to be, whether or not to create subcommittees, and which members are to possess the right to sign subpoenas. It is in the decisions of this organizational stage that a subsequently cited witness may find grounds for avoiding punishment, for should the Chairman fail to designate a member with powers of signing subpoenas⁶⁷ a witness may argue that the particular subpoena served on him was invalid. Equally important is a definitive ruling on the requirement of a quorum, for a cited witness may argue that he never refused testimony before a committee competent to hear him.⁶⁸ Obviously, an established quorum rule not observed in practice will provide a defense to a contemptuous witness.⁶⁹ It will readily be appreciated that a committee can be very inventive in making its rules sufficiently elastic to cover almost any situation which may later arise, but counsel for witnesses will be equally inventive in discovering fatal omissions in those rules.

The Chairman will then direct a subpoena signed by himself, or a member

signature of the chairman of the committee or any member designated by him, and may be served by any person designated by such chairman or member. The chairman of the committee or any member thereof may administer oaths to witnesses."

H.R. Rep. No. 3133, 81st Cong., 2d Sess. 1 (1950).

65. An illustrative case history is provided by the House Committee on Un-American Activities which originated as House Resolution No. 5 of the 79th Congress, 90 Cong. Rec. 10, 15 (1945). The Resolution was carried into the Rules of the House as Rules X(a)-17 and XI(q)-1 and later into the Legislative Reorganization Act of 2 August 1946, 60 STAT. 812, 828.

66. *Barsky v. United States*, 167 F. 2d 241, 247-248 (CA, DC 1947) (It was contended that the Resolution, cited at Note 65, *supra*, was too vague to make known to the defendant's specifically what was being investigated, therefore that they were unable to determine the pertinency of a given question. The Court analyzed the Resolution and held that at least one subclause was sufficiently clear to make known what was intended. The implication is that some part of the enabling Resolution must be definite and certain); *cert. den.* 334 U.S. 843 (1948).

67. See the last paragraph of House Resolution 298, 81st Congress, First Session, printed verbatim at Note 64, *supra*; Such a contention would seem rather weak in view of the holding that all circumstances are to be considered in determining the intent of the Congress in order to prevent frustrating that intent through technicalities of service, *McGrain v. Daugherty*, 273 U.S. 135, 155 (1927); It would seem to have no validity at all, if the witness appeared in response to the invalid summons, in view of the holding in *Eisler v. United States*, 170 F. 2d 273, 279 (CA, DC 1948) that a witness might be dragged before a committee by force without affecting his duty to testify; *cert. den.* 335 U.S. 857 (1948).

68. *United States v. Cristoffel*, 338 U.S. 84 (1949) (In prosecution for perjury before a Congressional Committee the defendant, a Communist labor leader, raised the defense that a quorum had not been present at his hearing. The contention was permitted, the Court holding that the prosecution for perjury was only available to the government when the Committee had met all formal rules established by the parent body. Presence of a quorum was one of these under the Legislative Reorganization Act of 2 August 1946, 60 STAT. 812, 813); Note, *Absence of Committee Quorum as Defense to Perjury Charge*, 49 COL. L. REV. 1007 (1949) (Points out that all that was decided was whether the Congress had observed its own rules. Therefore, there was no ruling on the validity of the rules and Congress was free to change them with the result that the decision would be avoided). *United States v. Bryan*, 339 U.S. 323, 327-30 (1950) (If no appearance at all then quorum need not be present).

69. The device of appointing a subcommittee of one is available to the Congress. The presence of the one member is then presence of all and the rebuttable presumption becomes irrebuttable. This device was employed by the Senate Committee on inter-state crime in its Chicago hearings in October-November 1950.

delegated the power, to a desired witness. This subpoena will be addressed to some specific individual to procure service, but a failure by that designated person to himself serve the witness will not vitiate the intent of the Committee, for the Court will look to all the circumstances, the Resolution authorizing the Committee, the actual fact of service by some person, and the assumed intent of Congress and will not upset a conviction solely on the ground of inadequate service.⁷⁰ The witness, once having been served, no matter by whom, will then be forced to comply with the subpoena if physically possible.⁷¹ It is assumed by Committees that personal service is essential, but, in the case of one known to be evading service in the United States, Congress may direct a warrant of arrest which may result in apprehension of such an individual.⁷² Presently the Senate Committee investigating interstate crime is faced with the problem of subpoenaed witnesses who have avoided service by taking up residence in foreign countries. In the past judicial dicta have implied that the power of subpoena is restricted to the territorial limits of the United States;⁷³ however, Congress might see fit to pass legislation utilizing our diplomatic service to procure such witnesses. Although the famous *Blackmer* case involved judicial action⁷⁴ it might provide a precedent for comparable action by the Congress in aid of its legislative functions. Action of this type would seem consistent with the doctrine of "necessity" and should meet with judicial approval.

The functions of the subpoena are to obtain the appearance of the reluctant witness fearful of forced disclosures, or to provide impetus to the witness desirous of testifying, but lacking the initiative to do so voluntarily. It must be emphasized that once a purely voluntary witness has appeared he stands in no better position than had he been subpoenaed. The voluntary witness is as liable to the other provisions of the applicable statutes or the residuary power of the Committee as is the summoned witness.⁷⁵ Perhaps the clearest case indicating that the method utilized in obtaining a witness' appearance is of little consequence is that of Gerhart Eisler, an alien, who was brought before the Un-American Activities Committee by force. A subpoena had been

70. *McGrain v. Daugherty*, 273 U.S. 135, 155 (1927).

71. *Wilson v. United States*, 221 U.S. 361, 374-376 (1911) (Corporate officers guilty of contempt for failure to see that corporation produced corporate books even though individually they might not have control of the documents); *Accord*, *Barsky v. United States*, 167 F. 2d 241, 251 (CA, DC 1947) (Government need not prove that individual served with *subpoena duces tecum* has custody, dominion nor control over subpoenaed documents); *cert. den.* 334 U.S. 843 (1948).

72. *Anderson v. Dunn*, 6 Wheat. 204, 209 (U.S. 1821) (A warrant of arrest was issued by the House of Representatives in that case containing the following language: "... take into custody the body . . . wherever to be found, and the same forthwith to have before the said House, at the bar thereof, then and there to answer to the said charge; . . . and to be dealt with by the said House, according to the Constitution and laws of the United States . . ."); On December 5th, 1950 Senator Kefauver, Chairman of the Senate Committee in Interstate Crime, requested that body to take such action against 10 witnesses who had evaded service. A hot debate ensued in which Senator Lucas, Administration Senate Leader, maintained that the Senate had no such authority and the request was referred to the Judiciary Committee for "study." CHICAGO DAILY TRIBUNE, Part 2, p. 2, 6 December 1950.

73. See Note 40, *supra*.

74. *Blackmer v. United States*, 284 U.S. 421 (1932) (Blackmer, involved in the Teapot Dome Scandals, was proceeded against for contempt of court under a special Act of July 3, 1926, 44 STAT. 835, Tit. 28 U.S.C. §§711-718. This statute permitted a court, on request of the Attorney General, to issue and cause to be served a subpoena in a foreign country.)

75. *Sinclair v. United States*, 279 U.S. 263, 291 (1929): "[§102] plainly extends to a case where a person voluntarily appears as a witness without being summoned as well as to the case of one required to attend."

served, but it was feared that Eisler would flee without appearing, hence government agents took him into custody. The Court held that, even though his appearance was secured by force, it was irrelevant and, once he had appeared, he was in the same position as any other witness.⁷⁶ In the same case another possible defense against the duty to appear was destroyed, for it was held that the congressional power to summon and question extended to all persons within the borders of the United States and that mere lack of citizenship did not excuse noncompliance.⁷⁷

Once the hypothetical witness has appeared he has several choices. He may attempt an argument as to the jurisdiction of the Committee, although that appears to be a procedural courtesy which the Committee need not grant him.⁷⁸ He may refuse to take the oath, and if the Committee makes a regular procedure of giving the oath, then that in itself will be refusal to testify.⁷⁹ In case the Committee does not give the oath, but merely asks questions, he may refuse to answer. This would appear to constitute the same offense. In any case, in these preliminary steps the criterion would seem to be that a choice which would operate to obstruct in any way the course of the inquiry is, in effect, contempt and punishable as such.⁸⁰ Since all of these steps merely relate to making it possible for an individual to testify, none of the really important questions are reached, and so the witness would be well advised to comply with any and all requests of the Committee which are merely preliminary to his actual testimony.

A problem allied to mere appearance is the question of whether or not a witness, once he has appeared, must then be excused from further appearance to avoid contempt. In *Townsend v. United States* the witness, after having been sworn and after having testified, was allowed to leave, but was apparently aware that he would be asked to testify further.⁸¹ However, he decided that the Committee was both hostile to him and not really intent on producing proper remedial legislation. He thereupon failed to reappear and raised the contention, on trial for contempt, that Sec. 102 of the statute only applied to initial appearance. The argument was overruled⁸² and it was held that all that need be shown to constitute an offense was a "wilful default."⁸³ The opinion would seem to indicate that in such a situation a defense might be raised that there was no legitimate or proper legislative purpose, and on a finding that this was true, there would be no breach of the "default" provision of the statute. However, that would be a question of law and a mistake in the law would not be sufficient justification to prevent punishment for breach

76. *Eisler v. United States*, 170 F. 2d 273, 279 (CA, DC 1948); *cert. den.* 335 U.S. 857 (1948).

77. *Ibid.*

78. *Id.*, at p. 280.

79. *Ibid.*; All circumstances will be considered to determine whether there was a "wilful" refusal to answer: *Fields v. United States*, 164 F. 2d 97 (1947); *cert. den.* 332 U.S. 851 (1948); *Townsend v. United States*, 95 F. 2d 352, 358 (1938) (A "wilful" default is required, but may be justified. A mistake of law is not justification). *cert. den.* 303 U.S. 664.

80. *Journey v. MacCracken*, 294 U.S. 125, 147-148 (1935) (No act of a citizen is punishable as contempt of the Congress unless it obstructs the duties of the legislature. "But, when the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance [and the offense is complete].")

81. 95 F. 2d 352 (1938); *cert. den.* 303 U.S. 664 (1933).

82. *Id.*, at p. 356 (Language of the statute does not sustain the contention that all that Congress intended was to force appearance).

83. *Id.*, at p. 358 (The defendant erred in deciding that the investigation had no legitimate purpose. His refusal to reappear, based on this determination, was a mistake of law and constituted a "wilful default" which is a complete offense under the statute).

of the law.⁸⁴ To avoid these difficulties the witness should ascertain beyond question if he had been excused permanently from the hearings upon completion of his testimony.

Once a witness is sworn he is launched on a sea of possible difficulties. He can neither dictate the terms under which he will testify, nor limit the questions to agreed topics.⁸⁵ If he should choose to argue before the Committee the broad issue of constitutionality of purpose he will risk an unfavorable ruling. If he then stands on his argument and refuses to answer questions he will probably be cited for contempt. In any resultant trial he will be met with the decisions holding that there is a presumption of constitutionality of purpose,⁸⁶ that Congress need not declare in advance what action it means to take as a result of the investigation,⁸⁷ that there need be neither resultant legislation nor proposals for legislation from any Committee,⁸⁸ and that the fact that the legislation finally recommended might be constitutionally invalid does not bear upon the right to require testimony.⁸⁹ Since the courts have encountered little difficulty in discovering some legitimate purpose behind a Congressional investigation, there would seem to be little advantage and much danger in an attack on the constitutionality of the enabling resolution.⁹⁰

Once the witness has reached that point in the proceedings at which he permits himself to be asked specific questions he may or may not have legal grounds for refusing to answer. It is at this stage that whatever vestigial vitality the *Kilbourn* case⁹¹ still has may provide some basic protection in that the witness may base his refusal on a claim that the questions and the general investigation are merely directed to canvassing his private affairs. If he can prove this to be the fact then he may successfully employ it as a defense if tried for his refusal. However, it is more than likely that the Court will find that, although the questions are personal, they also involve a public interest, in which event the claimed immunity is of no value to the witness.⁹²

84. *Ibid.*

85. *Eisler v. United States*, 170 F. 2d 273, 280 (CA, DC 1948) *cert. den.* 335 U.S. 857 (1948).

86. *McGrain v. Daugherty*, 273 U.S. 135, 178 (1927) ("The only legitimate object the Senate could have . . . was to aid it in legislating; . . . the presumption should be indulged that this was the real object."); *In Re Chapman*, 166 U.S. 661, 670 (1897) ("We cannot assume on this record that the action of the Senate was without a legitimate object, and so encroach upon the province of that body . . .").

87. *In Re Chapman*, 166 U.S. 661, 670 (1897) (" . . . it was certainly not necessary that the resolution should declare in advance what the Senate meditated doing when the investigation was concluded.").

88. *Eisler v. United States*, 170 F. 2d 273 (CA, DC 1948); *cert. den.* 335 U.S. 857 (1948); *Townsend v. United States*, 95 F. 2d 352, 355 (CA, DC, 1938) (Whether or not Congress ever recommends any remedial legislation " . . . is clearly beside the point."); *cert. den.* 303 U.S. 664 (1933).

89. *Barsky v. United States*, 167 F. 2d 241, 245 (CA, DC 1947) ("Obviously, the possibility that invalid as well as valid legislation might ensue from an inquiry does not limit the power of inquiry; invalid legislation might ensue from any inquiry.").

90. See Notes 83 and 84, *supra*, and text thereto.

91. *Kilbourn v. Thompson*, 103 U.S. 168 (1880); See Notes 43-46, *supra*, and text thereto; See Landis, *Constitutional Limitations of the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 214-218 (1926) (Sharply criticizes the case and contends that it varies from the line of decisions because of the facts that the Court, in 1880, contained no members with administrative experience and, also, because counsel for the government failed to properly present the issues); Shull, *Congress and Its Witnesses*, 5 TEMPLE L.Q. 425, 433-436 (1931) (The case clouded the issues by interjecting talk of separation of powers and merely decided that Congress must have a legislative purpose and not just an intent to investigate a given individual).

92. *United States v. Josephson*, 165 F. 2d 82, 89 (CA 2d 1947) ("Surely, matters which potentially affect the very survival of our Government are by no means the purely personal

Whenever such a claim is raised it would appear that, if the courts can discover that the information desired could possibly aid any facet of the declared purpose of the investigation, assuming a proper purpose, it is related to the public interest and, therefore is a permissible query.

The Personal, Statutory and Constitutional Privileges

Business Privilege:

Closely allied to this area of the "personal" question are the possible claims of privilege. These have not been raised often, but in all cases appear to have fallen before the rulings of the committee concerned. Two cases involve a "business" privilege. The witness in each claimed that for reasons of business he, as a broker, could not reveal the names of clients.⁹³ In both cases the claim was denied. The permitted committee ruling in *Jurney v. MacCracken* that the lawyer-client privilege did not protect the witness is even stronger.⁹⁴ A practical precedent to the effect that a newspaper reporter could not conceal his sources of information is afforded by the *Simonton* case, where the witness was committed for contempt without a court proceeding.⁹⁵ The issue was never carried to the courts despite the possible argument that the inquiry, of itself, operated as a restriction on the freedom of speech or of the press in that sources of information vital to the public might be cut off through fear of disclosure or political harassment. It may be expected that an allied argument will be advanced by certain individuals recently indicted for refusal to name supporters and subscribers to their publications.⁹⁶ The rationale of these decided cases seems to be either that allowance of a privilege is a matter of Congressional grace or that if the privilege were allowed it might result in detriment to a public interest. If the latter, the rule would seem identical in result to that governing so-called "personal" investigations.

Husband-Wife Privilege:

As yet the often recognized judicial privilege protecting husbands and wives from testifying against each other has not been litigated. However, in the recent hearings of the Senate Committee on inter-state crime the wife of an alleged underworld leader invoked some form of the privilege.⁹⁷ Should her conduct be made the subject of a contempt citation the courts will, of necessity, rule on the matter. Applying the rationale advanced it may be predicted that the claim of privilege will fail.

concern of anyone. And investigations into such matters are inquiries relating to the personal affairs of private individuals only to the extent that those individuals are a part of the Government as a whole."); See Note 49, *supra*.

93. In *Re Chapman*, 166 U.S. 661 (1897); *Stewart v. Blaine*, 1 McArthur 453 (1874).

94. 294 U.S. 125, 146 (1935) (The Court merely noted the fact in passing and it was not ruled on).

95. See Note 33, *supra*.

96. General Interim Report of the House Select Committee on Lobbying Activities, 81st Cong. 2d Sess., October 20, 1950, pp. 35-36 (Refusal of Mr. Rumely to give the names of contributors to his Committee for Constitutional Government); He was indicted on November 27, 1950 by a Federal Grand Jury for this contempt, CHICAGO DAILY TRIBUNE, Part 2, p. 3, 28 November 1950.

97. Mrs. Ann Fischetti in the Chicago hearings of the subcommittee. It is not clear whether she relied on the common law incapacity of a spouse to testify for or against the other or on the more modern rule which exempts confidential communications. Neither branch of the privilege has been litigated as a result of a Congressional investigation.

"Official Document" Privilege:

Two major privileges remain which have not been attacked directly either in the courts or before the Congress. The first is that relating to official documents insofar as the Executive Branch refuses to divulge their contents. Congress has seen fit to exempt such material from the scrutiny of the courts by statute,⁹⁸ but there have been repeated attempts to obtain it in Congressional investigations.⁹⁹ To date the refusal of the Executive has been acquiesced in and, in the event that Congress pressed the issue in the courts, it would probably receive little cooperation and it may be anticipated that the judiciary would take refuge in the doctrine of separation of powers to justify denial of aid.¹⁰⁰ It is interesting to speculate on the result should the Congress decide to interrogate an Executive official as to the contents of a given document without demanding the document. Should he refuse to answer on the ground of this privilege and the Committee involved deny the ground, the Congress might then cite and try him before its own bar. Would the courts then intervene or would the Executive attempt a rescue? Since the principle of separation of powers implies some restraint as between the three branches of government it is doubtful that such an ultimate question would ever be raised.

Privilege Against Self-Incrimination:

The second major privilege, as yet technically undisturbed, is that against self-incrimination. Since there is a constitutional guarantee against such testimonial compulsion in the courts,¹⁰¹ there may be an argument against an equivalent practise by the legislature. The issue does not seem to have been squarely raised by the cases, but there is judicial language suggesting that some vestige of the privilege is available in legislative investigations.¹⁰² The problem is interwoven with the legislative grant of immunity for testimony given before legislative committees.¹⁰³ To the extent that such immunity supplies protection against "incrimination" the problem of Constitutional

98. McAllister, *Executive or Judicial Determination of Privilege of Government Documents?* 41 J. CRIM. L. & CRIMINOLOGY 330 (1950).

99. For an early instance see Report referred to in Note 28, *supra* (Refusal of President Jackson to provide either lists of appointees without Senatorial approval or of the salaries paid to those appointees); For a recent illustration see: *McCarthy, Still a Battle*, NEW YORK TIMES, Section 4, p. 2, 23 July 1950 (Account of the Tyding's Report wherein the President refused to disclose contents of security files of State Department employees).

100. The situation would be analogous to that in *Marbury v. Madison*, 1 Cranch. 137 (U.S. 1803) (President Jefferson would not have obeyed an order of the Supreme Court). In the final analysis it would seem that each branch of the government is the judge of its own powers.

101. U. S. CONST., AMEND. V; For an exhaustive recent survey of the privilege see Inbau, *Self-Incrimination*, (First Edition, 1950).

102. *United States v. Josephson*, 165 F. 2d 82, 98-99 (2d Cir. 1947) (Judge Clark dissenting): "... objections [to specific questions] available at the examination proper . . . will include personal privileges, such as that against self-incrimination, in whatever attenuated form they still exist in legislative investigations, and the pertinency of the questions to the inquiry." The case never raised a question specific enough to which to plead a self-incrimination defense; *cert. den.* 333 U.S. 838 (1948). In *Barsky v. United States*, 167 F. 2d 241 (D.C. Cir. 1947) there was some floundering about self-incrimination in the Communist inquiry, but there was no holding as to the right to insist on an answer if the self-incrimination defense had been specifically raised; *cert. den.* 334 U.S. 843 (1948).

103. *Testimony before Congress; Immunity*: No testimony given before either House, or before any committee of either House, or before any joint committee . . . shall be used as evidence in any criminal proceeding against [the witness] in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper on record produced by him is not within the said privilege. (18 U.S.C. §3486, 25 June 1948).

privilege is largely academic. It has been suggested that because of the immunity provision, the privilege against self-incrimination could not be used to "excuse testifying, but only to prevent use of the testimony for later criminal prosecutions."¹⁰⁴ If it is thought that some privilege exists independent of the statutory immunity, the suggestion would be valid only if the statutory immunity is interpreted as being as broad as the privilege.¹⁰⁵ If analogy to the extent of the privilege in judicial proceedings is appropriate, then this would have to embrace immunity not only against the use of the testimony, but also against the use of derivative evidence. Whether the statutory immunity goes so far is in doubt.¹⁰⁶

Even if the immunity is broad enough to prevent direct or derivative use of the testimony, a practical argument can be raised that the privilege against self-incrimination is still subject to abuse. The casual ease with which it may be waived is a trap for all but the most wary.¹⁰⁷ A more significant possibility of abuse is raised by the practice of the Committee on Un-American Activities of requiring witnesses to state whether they were members of the Communist Party.¹⁰⁸ Since the Smith Act,¹⁰⁹ this might amount to technical self-incrimination and was so held in the case of testimony before a grand jury;¹¹⁰ whether it would be held likewise in a legislative investigation is probably academic because of the immunity given witnesses from the use of their testimony in any prosecution except for perjury.¹¹¹ But before the Smith Act this practice did not amount to technical incrimination, and so there was no plea of privilege available. Regardless of whether the answer is compelled for lack of privilege or because technical immunity is available, the disclosure could result in considerable social punishment.¹¹² This practice, in un-American activity investigations, was justified by the courts on the grounds

104. *United States v. Josephson*, 165 F. 2d 82, 98 at n. 10 (Judge Clark dissenting).

105. Even Judge Clark, who made the suggestion, *Ibid.*, seems to concede this. "Next, if I understand the opinion correctly, it employs a view of immunity . . . as applying only to the use of the actual testimony itself, a view which I had supposed was . . . repudiated [citing cases]. Such a limited immunity does not satisfy the Fifth Amendment which protects an individual from giving evidence only tending to criminate himself, and applies to testimony which may merely furnish the background which leads to the ultimate conviction. And a statute is not adequate unless it grants complete immunity, 'in all respects commensurate with the protection guaranteed by the constitutional limitation.'" *United States v. De Lorenzo*, 151 F. 2d 122, 127 (2d Cir. 1945) (Judge Clark dissenting). Thus, though he later spoke of the privilege as "attenuated" (Note 102, *supra*) he thought the roots to be constitutional and not merely statutory; *United States v. Bryan*, 339 U.S. 323, 337-343 (1950) (Statute does not apply in prosecution for contempt).

106. See Note 105, *supra*. *May v. United States*, 175 F. 2d 994, 1001 (D.C. Cir. 1949).

107. *Ibid.*, (Where testimony is voluntarily given no immunity is invoked. Defendant, a former Congressman being tried for war frauds, contended that §192, Note 35, *supra*, must be read in conjunction with the Immunity Statute and since his revelations were compelled before the Mead Committee that immunity was automatically invoked. The Court held that he must invoke the Fifth Amendment to achieve this result and, further, that the immunity of the statute only extended to admission of the testimony before the committee and did not operate to cut off prosecution based on the same facts.); *United States v. De Lorenzo*, 151 F. 2d 122, 124 (2d Cir. 1945) (Statute only operates to make testimony unavailable in a later prosecution, it does not prevent the prosecution).

108. *Barsky v. United States*, 167 F. 2d 241, 244-245 (CA, DC 1947): "We think that even if the inquiry here had been such as to elicit the answer that the witness was a believer in Communism or a member of the Communist Party, Congress had power to make the inquiry."; *cert. den.* 334 U.S. 843 (1948); *But cf.* Note 107, *infra*.

109. 62 Stat. 808, 18 U.S.C. §2385 (Supp. 1948).

110. *Blau v. United States*, ___ U.S. ___, 19 U.S.L. WEEK 4062 (U.S. S. Ct., Dec. 12, 1950).

111. See Note 103, *supra*. Note 105, *supra*, and text thereto is relevant also.

112. *Cole v. Loew's Inc.*, 8 F.R.D. 508 (DC, Calif. 1948) (Plaintiff, a movie writer, sued former employer for discharge based on his reply to the "Communist" question before the Un-American Activities Committee).

that it was necessary for the Congress to know the personnel of a movement which they had good reason to believe was dedicated to an unconstitutional method of altering the present form of government.¹¹³ In those cases powerful dissents indicate that, in the view of the dissenting justices at least, Congress has developed a weapon with which to deal with groups to which it is opposed. The dissenters contend that, although no legislation could be passed which would outlaw the activities of these individuals, they can be effectively prevented from expressing their views through the medium of unfavorable publicity to be achieved by the use of an unlimited investigatory power.¹¹⁴ It is debateable whether such a result could be reached in the face of legislation which requires a Communist to register as such providing that he had failed to so register.¹¹⁵ Registration also implies publicity.

Mere likelihood, or even certainty, that the answer required will defame the witness will not protect him from prosecution if he fails to answer.¹¹⁶

Throughout these cases runs the theme of an alleged unconstitutional restraint of free speech. The courts recognize that the right to express one's views may be as effectively inhibited by the fear of economic and social reprisal as by formal legislation, but meet the argument either on the ground that the non-conformist must be a man of sufficient fortitude to ignore such consequences or that certain forms of free speech may constitute such a clear and present danger to our form of government that they may be constitutionally inhibited in a Congressional effort to carry out its duty of preserving that form of government.¹¹⁷

It was once thought that the fact that a judicial proceeding was pending, based on the same facts, was a justifiable reason for refusal to answer a question.¹¹⁸ However, when specifically offered by a witness the defense was held to be inadequate on the ground that the Congressional right to demand facts relative to a constitutional objective was not impaired by the fact that a pending suit, even a criminal suit, involved the same facts.¹¹⁹

Closely integrated problems of general defense result from the issuance of a *subpoena duces tecum*. Nor are the answers materially different, for the witness will raise the same issues of self-incrimination, personal affairs, affairs of clients,¹²⁰ no relation to the inquiry, or no proper objective. Slight varia-

113. *United States v. Josephson*, 165 F. 2d 82, 91 (2d Cir. 1947); *cert. den.* 333 U.S. 838 (1948); *Barsky v. United States*, 167 F. 2d 241, 246 (CA, DC, 1947); *cert. den.* 334 U.S. 843 (1948).

114. In the *Josephson* case, at p. 98, Circuit Judge Clark, dissenting, stated: "A doctrine that the lesser legislative power always justifies the exercise of the greater investigative power, including control over opinion, will lead to strange analogies indeed."

115. The McCarran Act, 22 U.S.C.A. §§611-618, 64 STAT. 1005 (23 Sept. 1950).

116. See §193, quoted, Note 35, *supra*.

117. See Note 113, *supra*.

118. *Kilbourn v. Thompson*, 103 U.S. 168 (1880) (One factor dictating the decision of the Court was the pendency of a bankruptcy suit against the Jay Cooke Co. in the federal court. The information desired by the Congress was of a type which might have been useful to the government as a possible creditor in that proceeding).

119. *Sinclair v. United States*, 279 U.S. 263, 295 (1929) (Mr. Sinclair stated that he refused to tell anything in regard to the oil leases since the matter was then before the courts. The Court refused this as a justification for refusing to answer the questions of Senator Walsh, stating: "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.")

120. This actually was the contention raised before the committee in *Jurney v. MacCracken*, 294 U.S. 125, 146 (1935) (The witness asked permission of his clients to produce the papers demanded and, it appears, that one of the clients burned the paper requested).

tions might exist in that a propounded question would be known and there might be some legal judgment as to its pertinence without an answer, while as to documents it might be impossible to tell whether they were relevant without actually disclosing their contents. Failure to produce them would certainly constitute an offense under the statute¹²¹ and their destruction is equally an offense¹²² as an obstruction of Congress. Once there has been a refusal the offense is complete and a later offer of the demanded documents will not purge the contempt.¹²³

Assuming then, that the hypothetical witness cannot refuse to answer on any of the grounds discussed, how may he avoid general questioning?¹²⁴ On what criterion can he rely in deciding whether or not to answer? Since all that Congress can compel is a "pertinent" disclosure,¹²⁵ it is apparent that the witness must decide whether a given question is pertinent to the subject under investigation. On trial, should he be cited for contempt,¹²⁶ the question of pertinence will be decided as a question of law not of fact.¹²⁷ The same reasoning, applied by the courts in discovering legal bases for an investigation, will probably be used in deciding pertinency. In short, these presumptions will probably result in a finding favorable to the Committee.¹²⁸ Should the witness take the initial position that nothing he knows could be pertinent and refuse any answer, the question of pertinency will shade into the earlier question of general refusal to testify. It will then be presumed that the questions which might have been asked would have been pertinent and the government may plead that he refused to answer any and all questions.¹²⁹ Since there would appear to be no "right" to the advice of counsel, the witness is forced to make a decision on a question of law without either the opportunity to ponder the issue or the benefit of legal advice.¹³⁰ If he errs it

121. *Barsky v. United States*, 167 F. 2d 241 (CA, DC, 1947) (True, even though government had not shown actual custody); *cert. den.* 334 U.S. 843 (1948).

122. See Note 120, *supra*.

123. *Jurney v. MacCracken*, 294 U.S. 125, 148 (1935) ("... the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance [and the offense is complete].")

124. The word "general" as used here implies something in the nature of a "fishing expedition," a type of questioning not permissible in a judicial proceeding: *Hickman v. Taylor*, 329 U.S. 495 (1947) (Even the accepted federal method of discovery depositions can become a forbidden "fishing expedition" "... when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to inquiry." The thing which makes discovery permissible today is its mutuality, certainly not present in a committee hearing).

125. *Sinclair v. United States*, 279 U.S. 263, 299 (1929) ("The gist of the offense [under §192, Note 35, *supra*] is refusal to answer pertinent questions."); *McGrain v. Daugherty*, 273 U.S. 135, 176 (1927) ("... a witness rightfully may refuse to answer when ... the questions are not pertinent to the matter under inquiry.").

126. This would involve, first, a vote by the committee followed by a report to the House of Congress concerned, next the certification of the President of the Senate or Speaker of the House, then the action of the grand jury in the District of Columbia.

127. *Sinclair v. United States*, 279 U.S. 263, 298-299 (1929) ("The question of pertinency under §102 [is] one of law. It [does] not depend upon the probative value of the evidence." Therefore it will not go to the jury).

128. See Notes 47-52, *supra*, and text thereto.

129. *United States v. Josephson*, 165 F. 2d 82, 86-88, (2d Cir. 1947) (This plea may be used once it is clear that the witness refuses to answer); *cert. den.* 333 U.S. 838 (1948).

130. In the December 12, 1950 hearings of the Senate Committee on interstate crime the attorney acting for Salvatore Morretti, a witness, protested questions of the committee. Senator Kefauver, presiding, told the attorney, "take your seat" and then advised him that he was merely a "guest" of the committee. CHICAGO DAILY TRIBUNE, Part 2, p. 1, 13 December 1950; In the November 17, 1950 hearings of the same Committee Ralph O'Hara, a witness, refused to testify without legal advice. After consultation with the presiding

will be an error of law and, as such, no defense in a subsequent prosecution.¹³¹

When before a Committee, a witness will be subject to questioning by the members, by any staff that the Committee may have retained, and, since each Committee establishes its own rules, may even be questioned by persons who have no official position if the rules so permit. He must be prepared for almost any abuse that can be devised by politically hostile members.¹³² The cases are replete with statements that abuse of the power must be borne.¹³³

Legal Recourse for an Improper Conviction of Contempt

In the event that our hypothetical witness is cited for and convicted of contempt, either under the applicable statutes or by the Congress itself, but the conviction is subsequently reversed by an Appellate Court, what are his remedies? There are two possible groups against whom a damage action might be brought: the Congressmen who actually contributed to his citation and the Congressional employees who carried out the orders of the Congress. It has been held that the former enjoy a Congressional immunity from suit for any action undertaken in the course of their Congressional duties and that this is true even in the presence of malice.¹³⁴ As to the latter they have been held to be ministerial officers and therefore justified in any actions they undertake pursuant to proper authorization.¹³⁵ Remedies, if any exist, are woefully inadequate to the great harm that may be done a victim of the abuse of its powers by the Congress.

Legislative Proposals

In the 81st Congress proposals were advanced by Senator Lucas, for enactment of "Rules" to govern the conduct of Congressional Committees.¹³⁶ The general intent of the rules was to restrict the possibilities of abuse by providing a forum for witnesses to reply to accusations. The proposals have

investigator he was allowed to set over his testimony until he could obtain legal counsel. CHICAGO DAILY TRIBUNE, Part 2, p. 6, 18 November 1950.

131. See Note 127, *supra*.

132. *Barsky v. United States*, 167 F. 2d 241 (CA, DC 1947) (Discrimination against a group is permissible on the ground that Congress may legislate against only part of an evil if it so desires); *cert. den.* 334 U.S. 843 (1948); *Townsend v. United States*, 95 F. 2d 352 (CA, DC 1938) (The defendant contended that the committee was hostile to his old-age assistance plan on political grounds); *cert. den.* 303 U.S. 664 (1939); During one Committee hearing in the summer of 1950 a negro witness insulted the state of Georgia with the result that a Georgia member of the committee attacked him physically.

133. *Anderson v. Dunn*, 6 Wheat. 204, 232 (U.S. 1821) (A bland assumption that Congress will not abuse its power); *McGrain v. Daugherty*, 273 U.S. 136, 175-176 (1927) ("We must assume, for present purposes, that neither house will be disposed to exert the power [of investigation] beyond its proper bounds, or without due regard to the rights of witnesses.")

134. *Kilbourn v. Thompson*, 103 U.S. 168, 202-204 (1880) (Derives the protection of members of Congress from the English Acts of Parliament which followed the Revolution of 1688; reason: it protects not the members as individuals, but rather the rights of the people whom they represent); *Burdett v. Abbott*, 14 East. 1, 20 (1811) (Traces the privilege of members of Parliament back into very early times, a case in 10 Edw. 2 [1317] is cited).

135. *Anderson v. Dunn*, 6 Wheat. 204 (U.S. 1821) (Writ of Speaker of House sufficient justification for act of the Sergeant-at-Arms); *Burdett v. Colman*, 14 East. 165 (1811) (Companion case to *Burdett v. Abbott*, Note 134, *supra*, and an action against the Sergeant-at-Arms of the House of Commons).

136. 95 Cong. Rec. 51 (1949); The same proposal had been advanced by the Senator in 1948, 94 Cong. Rec. 1675 (1948); Representative McCormick, the House Majority Leader presented identical proposals in the House, H. Con. Res. 3, 81st Cong, 1st Sess. (3 January 1949).

been assailed by those who feel that the power of investigation is a genuine benefit, even granting abuse.¹³⁷ It may be hazarded that, the legislation will find little acceptance in a new Congress generally unfavorable to the Administration responsible for these proposals. In a political situation as bitter as the present one investigation obviously is a weapon of great importance to the party out of power.

Conclusion

For better or worse, investigation has become a firmly established power of the Congress. Penalties for opposing it are both numerous and serious, perhaps more so than was contemplated by the Congresses and courts who contributed to its gathering strength. The individual who finds himself the object of legislative scrutiny, either voluntarily or involuntarily, would do well to heed the injunction of Mr. Justice Johnson: " * * * there is no difficulty in observing [proper] deportment . . ." ¹³⁸

137. Meader, *Limitations on Congressional Investigation*, 47 MICH. L. REV. 775, 785 (1949) ("Congress needs help in obtaining facts, not restrictions making it more difficult.")

138. *Anderson v. Dunn*, 6 Wheat. 204, 235 (U.S. 1821).