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COMMENTS

THE RIGHTS OF A WITNESS BEFORE A CONGRESSIONAL COMMITTEE

It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation. This . . . assumes that the . . . rights of witnesses will be respected by the Congress as they are in a court of justice.¹

On March 27, 1792, Congress inaugurated the first congressional investigation in America when it set up a committee to investigate the slaughter of General St. Clair and his army by several Indian tribes.² Thirty-five years later the House of Representatives employed for the first time a congressional committee backed by the contempt power.³ In 1859, the Senate used such a committee to inquire into the invasion and seizure of a United States armory and arsenal at Harper's Ferry.⁴ Today every standing committee of the Senate⁵ and certain committees in the House of Representatives⁶ possess the power to summon and punish witnesses for contempt.

The first hundred years of congressional investigatory activity was directed mainly toward the civil and military operations of the executive branch.⁷ Inquiries into varied socio-economic problems and into governmental scandals ensued.⁸ "In the decade following World War II, there appeared a new kind of congressional inquiry unknown in prior periods of American history. . . . This new phase of legislative inquiry involved a broad-scale intrusion into the lives and affairs of private citizens."⁹ The "new phase" highlights the inquiries of the present day and is epitomized by the investigations of the House Committee on Un-American Activities.¹⁰

Much has been written on the subject of congressional committees, examining their historical and constitutional foundations and appraising their present-

1. *Watkins v. United States*, 354 U.S. 178, 187-88 (1957), 106 U. Pa. L. Rev. 124. See Comment, 56 Mich. L. Rev. 272 (1957).

2. 2 Annals of Cong. 490 (1792). See Taylor, *Grand Inquest* 17-29 (1955).

3. 4 Cong. Deb. 889 (1827). For what is perhaps the earliest contempt prosecution by Congress, see 5 Annals of Cong. 166-95 (1795).

4. Cong. Globe, 36th Cong., 1st Sess. 141 (1859).

5. Legislative Reorganization Act of 1946 § 134, 60 Stat. 831.

6. Legislative Reorganization Act of 1946 § 121, 60 Stat. 822.

7. For a descriptive account of this period see Taylor, *Grand Inquest* 33-34 (1955).

8. Taylor, *Grand Inquest* 51-57 (1955).

9. *Watkins v. United States*, 354 U.S. 178, 195 (1957).

10. For the original enabling resolution of the committee see H.R. Res. 282, 75th Cong., 3d Sess., 83 Cong. Rec. 7568, 7586 (1938). See also Carr, *Investigations in Operation: The Un-American Activities Committee*, 18 U. Chi. L. Rev. 593 (1951).

day role in the American governmental system.¹¹ But the subject of the rights, defenses and privileges available to witnesses summoned to appear before such committees has been treated with less frequency.¹² Yet a witness "must decide at the time the questions are propounded whether or not to answer. . . . [He] acts at his peril. . . . An erroneous determination on his part, even if made in the utmost good faith, does not exculpate him. . . ."¹³ This comment attempts to examine generally the rights of witnesses before congressional committees.

I. CONSTITUTIONAL RIGHTS OF WITNESSES

A. *First Amendment*

The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . ."¹⁴ The amendment is designed primarily to protect beliefs and associational relationships from congressional legislation in order to insure free and open discussion of all ideas.¹⁵ Until 1957, its application to congressional investigations remained in doubt.¹⁶ In that year, *Watkins v.*

11. See generally Barth, *Government by Investigation* (1955); Carr, *The House Committee on Un-American Activities* (2d ed. 1955); Taylor, *Grand Inquest* (1955); Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 *Harv. L. Rev.* 153 (1926); McGeary, *Congressional Investigations: Historical Development*, 18 *U. Chi. L. Rev.* 425 (1951); Merry, *The Investigating Power of Congress: Its Scope and Limitations*, 40 *A.B.A.J.* 1073 (1954).

12. For three excellent treatments of this subject, see Liacos, *Rights of Witnesses Before Congressional Committees*, 33 *B.U.L. Rev.* 337 (1953); Comment, 70 *Harv. L. Rev.* 671 (1957); Comment, 5 *U.C.L.A.L. Rev.* 645 (1958).

13. *Watkins v. United States*, 354 *U.S.* 178, 208 (1957).

14. *U.S. Const. amend. I.*

15. *Whitney v. California*, 274 *U.S.* 357, 375 (1927) (Brandeis and Holmes, JJ., concurring); *Barsky v. United States*, 167 *F.2d* 241 (D.C. Cir.), cert. denied, 334 *U.S.* 843 (1948); 2 *Cooley, Constitutional Limitations* 885 (8th ed. 1927). The rights of the first amendment can justifiably be abridged by congressional legislation. E.g., *Schenck v. United States*, 249 *U.S.* 47, 52 (1919) ("clear and present danger test"); *United States v. Dennis*, 183 *F.2d* 201, 212 (2d Cir. 1950), aff'd, 341 *U.S.* 494 (1951) ("gravity of the evil, discounted by its improbability" test). See generally Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 *Colum. L. Rev.* 313 (1952); Comment, 65 *Yale L. J.* 1159 (1956).

16. Several courts of appeals previously had rejected claims based on the first amendment. E.g., *Marshall v. United States*, 176 *F.2d* 473 (D.C. Cir. 1949), cert. denied, 339 *U.S.* 933 (1950) (chairman of an organization refused to produce books, relating to solicitation and distribution of funds); *Lawson v. United States*, 176 *F.2d* 49 (D.C. Cir. 1949), cert. denied, 339 *U.S.* 934 (1950) (witness refused to answer questions in an investigation of motion picture industry); *Barsky v. United States*, 167 *F.2d* 241 (D.C. Cir.), cert. denied, 334 *U.S.* 843 (1948) (assumed that the first amendment applied to committees but justified the invasion); *United States v. Josephson*, 165 *F.2d* 82 (2d Cir. 1947), cert. denied, 333 *U.S.* 838 (1948) (applicability of amendment to investigations by Congress was rejected). In *Rumely v. United States*, a court of appeals upheld a first amendment defense in an investigation of "lobbying activities." 197 *F.2d* 166 (D.C.

*United States*¹⁷ was decided by the Supreme Court. In reversing the contempt conviction of a former labor official who had refused to identify certain names propounded to him by a subcommittee of the House Committee on Un-American Activities, the Court stated, in dictum, that a congressional investigation "is part of lawmaking" and therefore subject to the prohibitions of the amendment.¹⁸ Shortly thereafter, in *Barenblatt v. United States*,¹⁹ the Supreme Court passed squarely on the first amendment question.²⁰ Finding it applicable to congressional investigations, a divided Court, nevertheless, held that the public need for information relating to the Communist Party outweighed the rights of the witness under the first amendment.²¹

The result of *Barenblatt* and *Watkins* can be summarized as follows. Whenever an investigation involves matters of speech or association, which perhaps is the case in all inquiries of the Un-American Activities Committee, the first amendment may be available to protect a witness' apparent right to silence or his associational relationships. A witness who refuses to testify or produce documents solely on the basis of the first amendment,²² however, does so at his peril. There is no independent body to rule on the propriety of the assertion while the hearing is in session. There can be no certainty until the matter is finalized by the judiciary, because the Supreme Court, in *Barenblatt*, committed itself to a "balancing test" whenever first amendment rights are at stake. The Court will balance the public need for information via the investigative pro-

Cir. 1952). The Supreme Court affirmed, but it did not base its decision on the first amendment. 345 U.S. 41 (1953). The failure of the Court to do so resulted in a concurring opinion by Justices Douglas and Black. *Id.* at 48.

17. 354 U.S. 178 (1957).

18. *Id.* at 197.

19. 360 U.S. 109 (1959), 28 *Fordham L. Rev.* 522.

20. Petitioner, a former teacher, argued that an investigation into matters of personal belief and association violated his rights under the amendment. His argument seemed to be based on the idea that the first amendment includes a right to remain silent and that to compel testimony is violative of this right. While there has never been a square holding on this question by the Supreme Court, there have been intimations that the amendment does include such a right. In *Kilbourn v. Thompson*, 103 U.S. 168 (1881), the Supreme Court stated that "neither [House of Congress] . . . possesses the general power of making inquiry into the private affairs of the citizen." *Id.* at 190. See, e.g., *Watkins v. United States*, 354 U.S. at 198; *McGrain v. Daugherty*, 273 U.S. 135, 173-74 (1927). It would appear that the so-called "right of privacy" is another way of saying that every investigation by Congress must be related to a valid legislative purpose. See *Lawson v. United States*, 176 F.2d 49 (D.C. Cir. 1949), cert. denied, 339 U.S. 934 (1950).

21. The Court placed heavy emphasis on the Government's "right of self-preservation" against Communist attacks. 360 U.S. at 128-29. "An investigation of advocacy of or preparation for overthrow certainly embraces the right to identify a witness as a member of the Communist Party. . . ." *Id.* at 130. Given subjects involving national security, a majority of the Court seems inclined to defer to the legislative exercise of the investigatory process because "of necessity [it] . . . must proceed step by step." *Ibid.*

22. It should be noted that a witness may raise more than one constitutional objection to a question. *Quinn v. United States*, 349 U.S. 155, 163 (1955).

cess against the private interests of the witness. In striking this balance, the Court will look at the legislative purpose behind the investigation,²³ though not the motives of the investigators,²⁴ the basis for the witness' appearance, and the pertinency of the questions asked by the committee to the subject under inquiry.²⁵

Barenblatt and subsequent cases indicate that the assertion of the first amendment is a futile gesture if communism is the subject under inquiry.²⁶ But it is to be noted that *Barenblatt* was decided by a five-to-four Court.²⁷ Thus a change in the composition of the Court might well reverse this trend.

B. Fourth Amendment

The fourth amendment guarantees protection against unreasonable searches and seizures,²⁸ whether accomplished actually or constructively via a subpoena duces tecum.²⁹ The availability of the amendment as a defense to witnesses appearing before congressional committees has never been clearly defined, though there is dictum by the Supreme Court that "witnesses . . . cannot be subjected to unreasonable search and seizure."³⁰ Consequently, it would ap-

23. See notes 102-06 *infra* and accompanying text. But the Court, citing *Watkins v. United States*, 354 U.S. at 200, stated that there is no "power to expose for the sake of exposure." 360 U.S. at 133.

24. "So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." 360 U.S. at 132, citing *Arizona v. California*, 283 U.S. 423, 455 (1931), and *McCray v. United States*, 195 U.S. 27, 55 (1904). The Court was explicit in saying that if a legislative purpose exists, the motives of the investigators are unimportant. 360 U.S. at 133. Accord, *Watkins v. United States*, 354 U.S. 178, 200 (1957).

25. See notes 86-93 *infra* and accompanying text. In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), wherein the Court overturned a state investigation of a teacher's lecture and Progressive Party affiliations, Mr. Justice Frankfurter, concurring, weighed each question asked the witness against the state's interest. *Id.* at 255. See *United States v. Peck*, 154 F. Supp. 603 (D.D.C. 1957), where the "balance" was struck in favor of the witness.

26. E.g., *Braden v. United States*, 272 F.2d 653 (5th Cir. 1960), cert. granted, 362 U.S. 960 (1960); *Wilkinson v. United States*, 272 F.2d 783 (5th Cir. 1959), cert. granted, 362 U.S. 926 (1960); *Davis v. United States*, 269 F.2d 357 (6th Cir. 1959). See *McPhaul v. United States*, 272 F.2d 627 (6th Cir. 1959), *aff'd*, 81 Sup. Ct. 138 (1960).

27. In the majority were Justices Harlan, Clark, Stewart, Whittaker and Frankfurter. Mr. Chief Justice Warren and Justices Black, Douglas and Brennan comprised the dissent.

28. U.S. Const. amend. IV.

29. In *Boyd v. United States*, 116 U.S. 616 (1886), the Supreme Court established that an "unreasonable search and seizure" within the meaning of the fourth amendment is not confined to actual entry upon premises but extends to enforced production of a person's papers and documents. See *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924) (writs of mandamus); *Wilson v. United States*, 221 U.S. 361, 375-76 (1911) (subpoenas duces tecum).

30. 354 U.S. at 188. For a precise holding where a subpoena issued by a committee constituted an unlawful search and seizure, see *Strawn v. Western Union Tel. Co.*, 3 U.S.L. Week 646 (D.C. Sup. Ct. March 11, 1936), 36 Colum. L. Rev. 841.

pear that if a committee employs a dragnet seizure of private papers, with the hope that something might turn up,³¹ or issues a subpoena duces tecum which lacks particularity,³² or subpoenas papers without legislative authority,³³ the amendment will be available as a defense. If there is a reasonable basis for the issuance of a subpoena, however, it will not be available. In the case of congressional committees, the expression "reasonable basis" is accorded a liberal interpretation and is largely a matter for Congress to determine.³⁴

A witness who possesses a defense under the fourth amendment or an analogous procedural objection regarding the subpoena should assert it at the hearing. In *United States v. Bryan*,³⁵ the Supreme Court made it clear that "to deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes."³⁶ And in the recent *McPhaul v. United States*³⁷ decision, the Court held that the Government did not have to prove at a contempt trial that the witness had possession or control of the subpoenaed documents or that they were even in existence, since the witness had failed to raise such an objection at the hearing.

In many instances, a defense under the fourth amendment may equally be available under the fifth amendment, either through the self incrimination³⁸ or

31. See *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951) (subpoena duces tecum invalid in part, so the entire subpoena fell); *FTC v. American Tobacco Co.*, 264 U.S. 298, 305 (1924) (investigation of violations of antitrust laws; writs of mandamus too broad). Compare *Brown v. United States*, 276 U.S. 134 (1928) (subpoena calling for "all letters, telegrams or copies" over a five and one-half month period valid); *Wheeler v. United States*, 226 U.S. 478 (1913) (subpoena for "all letters and telegrams, all cash books, ledgers, journals" for three months' period valid). For cases where general subpoenas were held valid see *CAB v. Hermann*, 353 U.S. 322 (1957); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943).

32. See *Hale v. Henkel*, 201 U.S. 43 (1906) (grand jury investigation; subpoena duces tecum too broad); *Annot.*, 130 A.L.R. 327 (1941). Compare *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).

33. *United States v. Patterson*, 206 F.2d 433 (D.C. Cir. 1953). See *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936) (dictum).

34. See *Driver, Constitutional Limitations on the Power of Congress To Punish Contempts of Its Investigating Committees*, 38 Va. L. Rev. 837, 901-02 (1952).

35. 339 U.S. 323 (1950).

36. *Id.* at 333. Accord, *United States v. Fleischman*, 339 U.S. 349 (1950). See *Richardson v. United States*, 273 F.2d 144 (8th Cir. 1959), where the court stated: "A court is not compelled to believe the testimony or explanation of a witness." *Id.* at 148.

37. 81 Sup. Ct. 138 (1960) (five-to-four decision).

38. A subpoena duces tecum usually involves papers and documents which contain incriminating material. Therefore, if a person is compelled to produce such, he may assert his privilege against self incrimination, provided that the papers and documents are of a personal nature. *Boyd v. United States*, 116 U.S. 616, 630 (1886). See notes 46-49 *infra* and accompanying text. On the other hand, a corporation does not have any protection under the fifth amendment guarantee against self incrimination. *Wilson v. United States*, 221 U.S. 361 (1911). Yet it has some protection under the fourth amendment. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 205, 205 & n.35 (1946) (dictum).

due process clauses.³⁹ Alone, however, the fourth amendment defense affords little protection to a witness.

C. Fifth Amendment

The fifth amendment contains a privilege against self incrimination and a guarantee that no person shall "be deprived of life, liberty, or property, without due process of law. . . ."⁴⁰

1. Self Incrimination

The privilege that "no person shall be . . . compelled in any criminal case to be a witness against himself . . ." originated at the common law as a reaction against the trials by inquisition of the Star Chamber.⁴¹ Adopted as a basic part of the Bill of Rights in 1791, it was not until the Supreme Court's decision in *McCarthy v. Arndstein*⁴² that its applicability to civil proceedings was firmly established. Whether it was available to witnesses appearing before congressional committees, however, was in doubt until the 1955 decisions of the Supreme Court in *Quinn v. United States*⁴³ and *Emspak v. United States*.⁴⁴ In *Quinn*, the Court upheld the invocation of the privilege before a committee and stated that

the Self-Incrimination Clause "must be accorded liberal construction in favor of the right it was intended to secure." Such liberal construction is particularly warranted in a prosecution of a witness for a refusal to answer [before a committee]. . . .⁴⁵

Although the Supreme Court has given a liberal construction to the use of the privilege before congressional committees, the privilege is not all encompassing. It is not available to corporations⁴⁶ or unincorporated organizations.⁴⁷ Rather, it is a personal privilege for natural persons.⁴⁸ Nor is it available to cor-

39. A subpoena duces tecum must request papers and documents material to the subject under inquiry or else the due process requirement of pertinency will not have been satisfied. See notes 89-93 *infra* and accompanying text. See also *United States v. Orman*, 207 F.2d 148 (3d Cir. 1953).

40. U.S. Const. amend. V.

41. See Wigmore, *The Privilege Against Self-Crimination, Its History*, 15 Harv. L. Rev. 610 (1902). See also Griswold, *The Fifth Amendment Today* (1955); Williams, *Problems of the Fifth Amendment*, 24 Fordham L. Rev. 19 (1955).

42. 266 U.S. 34 (1924). The Court stated: "The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies both to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it." *Id.* at 40. See *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

43. 349 U.S. 155 (1955).

44. 349 U.S. 190 (1955).

45. 349 U.S. at 162.

46. *Rogers v. United States*, 340 U.S. 367, 371-72 (1951); *Wilson v. United States*, 221 U.S. 361 (1911).

47. *United States v. White*, 322 U.S. 694, 704 (1944).

48. *United States v. Murdock*, 284 U.S. 141, 148 (1931); *Hale v. Henkel*, 201 U.S. 43, 69 (1906); *McAlister v. Henkel*, 201 U.S. 90, 91 (1906).

porate officers with respect to corporate papers and documents,⁴⁹ even if they would incriminate the officers. Public records do not fall within the ambit of the privilege.⁵⁰ It appears that the privilege is applicable only "against prosecution by the government compelling the witness to answer . . ."⁵¹ and that it does not protect against possible violations of state law,⁵² or, for that matter, prosecutions which would be barred by the statute of limitations, or because of a pardon.⁵³ Moreover, the privilege does not relate to future acts⁵⁴ or anticipated questions⁵⁵ which might subject a witness to incrimination.

Though it may sometimes appear to the contrary, a witness is not excused from testifying before a committee "merely because he declares that in so doing he would incriminate himself. . . ."⁵⁶ The testimony sought must be such that it would support a conviction under a federal criminal statute or furnish a link in a chain of evidence leading toward a criminal prosecution.⁵⁷ A question

49. *Rogers v. United States*, 340 U.S. 367, 372 (1951); *United States v. White*, 322 U.S. 694, 699 (1944). See *McPhaul v. United States*, 81 Sup. Ct. 133 (1960); *Boyd v. United States*, 116 U.S. 616 (1886).

50. *Shapiro v. United States*, 335 U.S. 1 (1948). See *Wilson v. United States*, 221 U.S. 361, 380 (1911), where the Court stated that this "principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." See the cases cited by the Court. *Id.* at 381.

51. *United States v. Murdock*, 284 U.S. 141, 149 (1931); *United States v. Greenberg*, 192 F.2d 201 (3d Cir. 1911). But see *United States v. Di Carlo*, 102 F. Supp. 597 (N.D. Ohio 1952).

52. Considerable doubt exists concerning the present worth of the Supreme Court's decision in *United States v. Murdock*, 284 U.S. 141 (1931). In *Murdock*, the Court said that the privilege against self incrimination does not extend to future prosecutions under state law. *Id.* at 148-49. Yet in a few cases the Court has granted witnesses immunity from future prosecutions under state law apparently to replace the protection afforded by the privilege. E.g., *Reina v. United States*, 81 Sup. Ct. 260 (1960) (grand jury investigation of violations of federal narcotics law); *Ullmann v. United States*, 350 U.S. 422 (1956) (grand jury investigation of attempts to endanger the national security). See *Adams v. Maryland*, 347 U.S. 179 (1954) (disclosed testimony at a Senate investigation excluded from state prosecution). See generally Danforth, *Another Feldman—Another Day—The Use in Federal Criminal Proceedings of Testimony Compelled by a State Immunity Statute—A Fair Solution*, 29 *Geo. Wash. L. Rev.* 75 (1960).

53. *Hale v. Henkel*, 201 U.S. 43, 66 (1906); *Brown v. Walker*, 161 U.S. 591, 593-99 (1896) (dictum); *United States v. Thomas*, 49 F. Supp. 547, 550 (W.D. Ky. 1943) (dictum).

54. *United States v. Kahriger*, 345 U.S. 22 (1953).

55. *United States v. Greenberg*, 187 F.2d 35, 38 (3d Cir. 1951).

56. *Hoffman v. United States*, 341 U.S. 479, 486 (1951), 50 *Mich. L. Rev.* 605 (1952).

57. *Id.* at 486; *Emspak v. United States*, 349 U.S. 190, 194 (1955). See *Blau v. United States*, 340 U.S. 159 (1950), where the Court said that the question "were you ever employed by the Communist Party . . ." will justify a reliance on the privilege against self incrimination. Compare *Mason v. United States*, 244 U.S. 362 (1917) (reasonable cause to apprehend danger from a direct answer), with *United States v. Coffey*, 193 F.2d 438 (3d Cir. 1952) (innocuous question may support the assertion of the privilege).

may be innocuous on its face and the privilege still available if there are reasonable grounds for believing that the answer might subject the witness to incrimination.⁵⁸ It may be incumbent upon the witness to offer a plausible reason at a contempt trial why his answers are likely to incriminate.⁵⁹ In *Hoffman v. United States*,⁶⁰ the Supreme Court said that it would sustain the privilege unless it is "'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate."⁶¹

A witness must affirmatively assert his privilege against self incrimination, though no "ritualistic formula" is necessary for its assertion.⁶² A pleading via "the fifth amendment"⁶³ or "the first amendment supplemented by the fifth amendment"⁶⁴ has been found sufficient. A witness, however, may unwittingly waive the privilege. "Disclosure of a fact waives the privilege as to details."⁶⁵ The privilege is not waived by a witness if he asserts that he "always upheld the Constitution"⁶⁶ or says that an admission would not subject him to a criminal prosecution.⁶⁷ It is waived as to the contents of an article if he admits authorship of the article,⁶⁸ or as to the identity of a person receiving books belonging to the Communist Party if he admits membership in the Party, and possession and delivery of the books to that person.⁶⁹

Unlike the first amendment, the invocation of the privilege against self incrimination before congressional committees has met with general success. Yet it has failed to protect witnesses from disgrace, obloquy and scorn resulting from community attitudes.⁷⁰ Consequently, witnesses in recent years have come to use the first amendment more often.

58. See *United States v. Coffey*, supra note 57. Compare *Hoffman v. United States*, 341 U.S. 479, 486-88 (1951).

59. *Estes v. Potter*, 183 F.2d 865, 868 (5th Cir. 1950).

60. 341 U.S. 479 (1951).

61. *Id.* at 488.

62. *Emspak v. United States*, 349 U.S. 190, 194 (1955). See also *Quinn v. United States*, 349 U.S. 155, 170 (1955).

63. *United States v. Fitzpatrick*, 96 F. Supp. 491 (D.D.C. 1951). See *Smith v. United States*, 337 U.S. 137, 142 (1949) ("I want to claim privilege as to anything that I say.")

64. *Quinn v. United States*, 349 U.S. 155 (1955).

65. *Rogers v. United States*, 340 U.S. 367, 373 (1951).

66. *United States v. Costello*, 198 F.2d 200, 202 (2d Cir. 1952).

67. *Emspak v. United States*, 349 U.S. 190, 197 (1955).

68. *Buckeye Powder Co. v. Hazard Powder Co.*, 205 Fed. 827 (D. Conn. 1913).

69. *Rogers v. United States*, 340 U.S. 367 (1951). See Note, 61 *Yale L. J.* 105 (1952). See also *Brown v. Walker*, 161 U.S. 591, 597 (1896); *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942) (all elements of crime revealed before assertion of the privilege); Annot., 147 *A.L.R.* 255 (1943).

70. See *Brown v. Walker*, 161 U.S. 591, 598 (1896), where the Court said that the privilege does not protect against such. 52 Stat. 942 (1937), 2 U.S.C. § 193 (1958), provides: "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 joint committee established by a joint or concurrent resolution of the two Houses of Congress,

Immunity

A grant of immunity to a witness against future prosecution resulting from his testimony may dispense with the privilege against self incrimination. Such a possibility was suggested by the Supreme Court as early as 1892. In *Counselman v. Hitchcock*,⁷¹ a unanimous Court invalidated an immunity statute⁷² pertaining to witnesses before grand juries on the basis that it merely excluded disclosed testimony at a future prosecution and did not afford protection against a prosecution based on such testimony. The Court declared that "in view of the constitutional provision [fifth amendment], a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates."⁷³ Another statute was enacted⁷⁴ to afford such immunity and was held constitutional in *Brown v. Walker*.⁷⁵

The present immunity statute governing witnesses before congressional committees is of recent origin. Enacted in 1954,⁷⁶ it relates to investigations concerned with national security subjects and provides that

no . . . witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding . . . against him in any court.

Whether this specific immunity provision will survive constitutional attack is uncertain. An analogous provision⁷⁷ in the same section was tested in *Ullmann v. United States*⁷⁸ and found constitutional because it was coextensive with the privilege against self incrimination. The Court held that the immunity of the

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."

71. 142 U.S. 547 (1892).

72. Rev. Stat. § 860 (1875).

73. 142 U.S. at 586. See *United States v. Fitzpatrick*, 96 F. Supp. 491 (D.D.C. 1951).

74. Act of Feb. 11, 1893, ch. 33, 27 Stat. 443, 49 U.S.C. § 46 (1958).

75. 161 U.S. 591 (1896).

76. 18 U.S.C. § 3486(a) (1958). Although the statute would seem to require a prior assertion of the fifth amendment before a grant of immunity can be given, it has not been so construed. *Adams v. Maryland*, 347 U.S. 179 (1954). The statute expressly excepts from its coverage a subsequent prosecution for perjury committed in giving the testimony. See also *United States v. Bryan*, 339 U.S. 323 (1950), where the Court said that the statute did not bar the use of disclosed testimony at a trial for willful default. Compare Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 156, which precluded a subsequent prosecution based on material disclosed by a witness before a committee. Five years later, this statute was amended to exclude only the use of the disclosed testimony at a subsequent prosecution. Act of Jan. 24, 1862, ch. 11, 12 Stat. 333.

77. 18 U.S.C. § 3486(c) (1958).

78. 350 U.S. 422 (1956). *Accord*, *Reina v. United States*, 81 Sup. Ct. 260 (1960). See *Adams v. Maryland*, 347 U.S. 179 (1954).

provision under consideration extended to prosecutions under state law. That the Court had to so hold is questionable because the privilege itself apparently does not extend to violations of state law.⁷⁹

Probably because of the suspicion that the statute may be unconstitutional, congressional committees have rarely used this immunity provision. It has been urged that the entire section is unconstitutional because it does not protect against prosecutions in which the disclosed material sets in motion a chain of events leading "to numerous accusations not within the purview of the question and answer."⁸⁰ The dissent in *Ullmann* suggests a case where a witness who has testified before a committee commits a subsequent act for which his testimony can be used against him.⁸¹ It can be argued that the suggested case is not a good one because the immunity should not be construed to apply to future acts. It is not "an invitation to commit crime," but rather a protection for acts committed prior to the giving of the testimony. A more difficult case would be where the witness' testimony furnishes a clue or hint as to a past act not "within the purview of the question and answer."⁸² No definitive answer can be given as to this kind of case, but it would appear that if a direct answer would incriminate the witness for any past act, the immunity would be available.

2. Due Process

Since the power to investigate is almost always enforced through the federal judiciary,⁸³ the due process safeguards of criminal justice become operative.⁸⁴ It is axiomatic that every federal statute must be definite enough to inform those who are subject to it what conduct on their part will constitute a crime.⁸⁵ The statute applicable to witnesses appearing before congressional committees requires as a basis for a contempt conviction either a willful default to produce documents or a refusal to answer any question "pertinent to the question under inquiry."⁸⁶ Initially, however, the question under inquiry must be related to a

79. See note 52 *supra* and accompanying text. But see *United States v. Di Carlo*, 102 F. Supp. 597, 606 (N.D. Ohio 1952), where a witness was allowed to invoke the privilege against self incrimination with respect to questions addressed to violations of state law.

80. *Ullmann v. United States*, 350 U.S. 422, 444 (1956) (dissenting opinion).

81. *Id.* at 445.

82. See *Mason v. United States*, 244 U.S. 362, 365-66 (1917); *Heike v. United States*, 227 U.S. 131, 143-44 (1913); *United States v. Coffey*, 198 F.2d 438, 440 (3d Cir. 1952).

83. See notes 132-33 *infra* and accompanying text.

84. *Sacher v. United States*, 356 U.S. 576, 577 (1958), 11 *Stan. L. Rev.* 164.

85. See *United States v. Harriss*, 347 U.S. 612, 617-24 (1954); *United States v. Cardlff*, 344 U.S. 174, 176 (1952); *Connally v. General Constr. Co.*, 269 U.S. 385, 391-93 (1926); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89-93 (1921). See also *Watkins v. United States*, 354 U.S. 178, 208 (1957).

86. 52 Stat. 942 (1938), 2 U.S.C. § 192 (1958). See text accompanying note 133 *infra*. It should be noted that the statute applies to a witness who appears before a committee but leaves the room without testifying. *Townsend v. United States*, 95 F.2d 352 (D.C. Cir.), cert. denied, 303 U.S. 664 (1938).

valid legislative purpose⁸⁷ and be within the jurisdiction of the particular committee.⁸⁸

Certain procedural rights for witnesses have been established by case law. A witness is entitled to know what subject is under inquiry, what legislative purpose is being furthered, and what connection exists between the questions asked and the subject under inquiry.⁸⁹ If he objects to a question on grounds of pertinency, the committee must inform him that his answer is wanted regardless of the objection.⁹⁰ In *Watkins v. United States*, the Supreme Court explicitly stated that pertinency of the questions must appear "with undisputable clarity."⁹¹ It is to be noted, however, that pertinency relates to the subject, and not the person,⁹² and that it is not the same as relevancy in the law of evidence.⁹³

Just when a question will be pertinent can only be determined by an examination of the subject under inquiry in the context of the particular hearing. If a

87. *Sinclair v. United States*, 279 U.S. 263, 299 (1929) (investigation of existing laws); *McGrain v. Daugherty*, 273 U.S. 135, 176 (1927) (investigation for future legislation). See *Kilbourn v. Thompson*, 103 U.S. 168 (1881), discussed at note 104 infra and accompanying text. See Comment, 5 U.C.L.A.L. Rev. 645, 649-52 (1958).

88. E.g., *United States v. Rumely*, 345 U.S. 41 (1953) (inquiry by House of Representatives invalidated); *United States v. Kamin*, 136 F. Supp. 791 (D. Mass. 1956) (Senate inquiry improper). See also *Sacher v. United States*, 356 U.S. 576 (1958); *United States v. Patterson*, 205 F.2d 433 (D.C. Cir. 1953); notes 107-08 infra and accompanying text.

89. *Barenblatt v. United States*, 360 U.S. 109, 123-25 (1959); *United States v. Watkins*, 354 U.S. at 208-09; *Davis v. United States*, 269 F.2d 357, 361 (6th Cir. 1959). See *United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956).

90. *Quinn v. United States*, 349 U.S. 155, 165-66 (1955). A witness must be "confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt." *Id.* at 166. Given such a choice and a subsequent refusal to answer, the necessary criminal intent will have been established. See *Flaxer v. United States*, 358 U.S. 147 (1958); *Braden v. United States*, 272 F.2d 653 (5th Cir. 1959), cert. granted, 362 U.S. 960 (1960); *United States v. Kamp*, 102 F. Supp. 757 (D.D.C. 1952). See also *Davis v. United States*, supra note 89, at 362, where the circumstances indicated that the witness had a fair appraisal of the committee's ruling.

91. 354 U.S. at 214. See *Barenblatt v. United States*, 360 U.S. at 124. In *Watkins*, the Court said that pertinency could be established by reference either to the authorizing resolution of the committee, the opening statement of the chairman, the nature of the proceedings, the questions asked, or the chairman's response to an objection. 354 U.S. at 209-15.

92. See *United States v. Orman*, 207 F.2d 148, 153 (3d Cir. 1953), and cases cited therein. In *Morford v. United States*, 176 F.2d 54 (D.C. Cir. 1949), rev'd on other grounds, 339 U.S. 258 (1950), the court of appeals stated: "Authoritative determination of pertinency is a function of the court; and the witness acts at his peril in refusing to answer." *Id.* at 57.

93. "A legislative inquiry anticipates all possible cases which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry, which generally is very broad." *Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir.), cert. denied, 303 U.S. 664 (1938). See *United States v. Deutch*, 147 F. Supp. 89, 92 (D.D.C. 1956), aff'd, 280 F.2d 691 (D.C. Cir. 1960).

question has a reasonable connection with the subject under inquiry, so that a possible, and not actual, answer might be pertinent, the question will be deemed pertinent.⁹⁴ Some questions are usually found to be pertinent, e.g., "are you a member of the Communist Party," "have you ever been a member of the Communist Party," and "were you ever a member of X Club of the Communist Party while at X University?"⁹⁵ Questions of the "whether-you-know-a-certain-person" and "do-you-know-a-certain-person" type are of doubtful validity.⁹⁶ One distinction between the two lines of questioning lies in the fact that the former relates to the witness' actual participation in an activity, while the latter to another's participation.

D. Sixth Amendment

The sixth amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel. . . ."⁹⁷ In a congressional hearing, a witness has no right to counsel, confrontation of witnesses, or cross-examination.⁹⁸ It has been suggested that this result is correct because such a witness should have no greater rights than a witness in a court of law.⁹⁹ As a practical matter, however, witnesses are usually allowed to confer with counsel, inside and outside the committee room.¹⁰⁰

II. JURISDICTIONAL DEFENSES

A. Objection to Jurisdiction of Congress

The power of Congress to conduct investigations is nowhere expressed in the Constitution. Yet, through use and judicial construction the power is well-established. It may only be exercised as an incident to an express or implied power, *i.e.*, in furtherance of a legislative purpose.¹⁰¹ The courts will presume

94. *United States v. Orman*, 207 F.2d 148 (3d Cir. 1953); *United States v. Kamin*, 135 F. Supp. 382, 388 (D. Mass. 1955). See *Sinclair v. United States*, 279 U.S. 263, 299 (1929). It should be noted that both parts of a question must be pertinent. *United States v. Kamin*, *supra* at 385.

95. *Barenblatt v. United States*, 360 U.S. 109, 114 (1959); *Lawson v. United States*, 176 F.2d 49, 53 (D.C. Cir. 1949), cert. denied, 339 U.S. 934 (1950).

96. See *Bowers v. United States*, 202 F.2d 447, 452 (D.C. Cir. 1953); *United States v. Kamin*, 135 F. Supp. 382 (D. Mass. 1955).

97. U.S. Const. amend VI.

98. See Liacos, *Rights of Witnesses Before Congressional Committees*, 33 B.U.L. Rev. 359-60 (1953); Merry, *The Investigating Power of Congress: Its Scope and Limitations*, 40 A.B.A.J. 1100-01 (1954).

99. Wiles, *Congressional Investigations: A Re-examination of the Basic Problem*, 41 A.B.A.J. 538 (1955).

100. See *Davis v. United States*, 269 F.2d 357, 361 (6th Cir. 1959). But see *United States v. Fleischman*, 339 U.S. 349, 374 (1950) (dissenting opinion).

101. *McGrain v. Daugherty*, 273 U.S. 135, 173-76 (1927). See *United States v. Norris*, 300 U.S. 564 (1937) (investigation of campaign expenditures); *Sinclair v. United States*, 279 U.S. 263 (1929) (investigation of a lease of government oil reserves); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929) (inquiry into election returns); In re

a legislative purpose if Congress can legislate in the investigated area and if the information sought might materially aid the congressional consideration.¹⁰² The courts generally are hesitant to question the motives of the investigators.¹⁰³

Judicial upheaval of an investigation on grounds that Congress lacks jurisdiction has been infrequent. In *Kilbourn v. Thompson*,¹⁰⁴ decided in 1881, the Supreme Court for the first time held a particular investigation to be outside the power of Congress. There the Court reasoned that an investigation into the workings of a real estate pool in which the United States Government was a creditor was judicial in nature and therefore beyond the power of Congress. Also beyond the power of Congress is an investigation into matters which are exclusively local in nature.¹⁰⁵ In *Watkins v. United States*, the Court unequivocally stated that there is no congressional power "of exposure."¹⁰⁶ Therefore, it would seem that an investigation for this purpose is beyond the power of Congress.

Since there are few matters beyond the scope of Congress' powers, lack of jurisdiction is not an effective defense. However, it remains a defense whenever Congress fails to act for a bona fide legislative purpose.

B. *Objection to Jurisdiction of Committee*

Contempt proceedings have failed in several cases because the particular committee did not act within the confines of its enabling resolution.¹⁰⁷ In *United States v. Rumely*,¹⁰⁸ the Supreme Court invalidated a House investigation of "lobbying activities." The approach of the Court was to interpret the committee's authorizing resolution in order to ascertain whether the committee had authority to conduct the investigation in question. The Court narrowly interpreted the resolution and found the investigated activity to be outside the scope of that resolution. If it had found authority for the investigation, the Court would have been faced with the constitutional question of Congress' jurisdiction.¹⁰⁹

The resolution of the Committee on Un-American Activities has received considerable attention by the courts.¹¹⁰ Though attacked for its broad scope, it has been found constitutional.¹¹¹

Chapman, 166 U.S. 661 (1897) (investigation of speculation by Senators in sugar stocks where a tariff bill was before the Senate).

102. *Barenblatt v. United States*, 360 U.S. 109 (1959); *McGrain v. Daugherty*, supra note 101, at 178; *United States v. Orman*, 207 F.2d 148, 157 (3d Cir. 1953). Cumulative testimony is permissible if there is a valid legislative purpose in the first instance. *United States v. Icardi*, 140 F. Supp. 383, 388 (D.D.C. 1956).

103. See note 24 supra and accompanying text.

104. 103 U.S. 168 (1881).

105. *United States v. Di Carlo*, 102 F. Supp. 597, 601-02 (N.D. Ohio 1952) (dictum).

106. 354 U.S. at 200.

107. See note 88 supra.

108. 345 U.S. 41 (1953).

109. *Id.* at 44, 58.

110. For a detailed history of the committee's authorizing resolution see *Barenblatt v. United States*, 360 U.S. at 118-22 and the authorities cited therein.

111. *Watkins v. United States* cast grave doubt on its validity under the first and fifth

The objection to a committee's jurisdiction is interrelated with the pertinency objection. A question may be pertinent to the subject under inquiry and yet that subject may be outside the jurisdiction of the committee.¹¹² In such a case, there can be no contempt. Moreover, a question may be pertinent to some aspect of the committee's jurisdiction but not to the particular subject under inquiry.¹¹³ Here, also, there can be no contempt.

III. OTHER PRIVILEGES AND DEFENSES

A. Confidential Relationships

Whether the privileges arising out of confidential relationships, such as attorney-client, physician-patient, clergyman-penitent and husband-wife, are available before congressional committees has received little attention by the courts. There is dictum in some cases, however, that the privileges are available.¹¹⁴ A Senate report indicates that it has been committee practice to observe these privileges.¹¹⁵

B. Executive Privilege

The existence of a privilege on the part of the executive branch to withhold information from Congress has been a subject of some dispute.¹¹⁶ References in several cases seem to indicate that no such privilege exists.¹¹⁷ It is argued that there should be a distinction between "state secrets" and other than state secrets.¹¹⁸ The former, it is said, concerns diplomatic and military matters and therefore should be privileged.

amendments. 354 U.S. at 201-05. The strictures which existed in that opinion were qualified by the Supreme Court's language in *Barenblatt v. United States*, 360 U.S. at 116-23.

112. See *United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956).

113. See Comment, 5 U.C.L.A.L. Rev. 648 n.33 (1958).

114. See *McMann v. SEC*, 87 F.2d 377 (2d Cir. 1937); *United States v. Keeney*, 111 F. Supp. 233 (D.D.C. 1953), rev'd on other grounds, 218 F.2d 843 (D.C. Cir. 1954). But see *MacCracken v. Journey*, 72 F.2d 560 (D.C. Cir. 1934), rev'd on other grounds, 294 U.S. 125 (1935).

115. Staff of Subcomm. on Rules and Administration, 83d Cong., 2d Sess., Rules of Procedure for Senate Investigating Committees (Subcomm. Print 1955), which stated: "[I]t has been committee practice to observe the testimonial privileges of witnesses with respect to communications between clergyman and parishioner, doctor and patient, lawyer and client, and husband and wife."

116. See Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 Calif. L. Rev. 3 (1959).

117. See *Jencks v. United States*, 353 U.S. 657, 670-71 (1957); *Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951), rev'd on other grounds, 345 U.S. 1 (1953). In *Reynolds*, the court of appeals said that a "sweeping privilege against any disclosure" would be against public policy. *Id.* at 995. *Crosby v. Pacific S.S. Lines*, 133 F.2d 470, 475 (9th Cir.), cert. denied, 319 U.S. 752 (1943). See generally 8 Wigmore, *Evidence* § 2378a (3d ed. 1940).

118. *United States v. Reynolds*, supra note 117, at 9-10. When "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged . . . the occasion for the privilege is appropriate. . . ." *Id.* at 10. See also Schwartz, *op. cit.* supra note 116, at 41-45.

C. Lack of Quorum

Article 1, Section 5, Clause 2 of the Constitution permits each House of Congress to determine the rules of its proceedings.¹¹⁹ Consequently, a procedural defense such as that of lack of quorum must be viewed in the context of the rules governing the particular committee. A one-man subcommittee may be a duly constituted body.¹²⁰ A witness would be well-advised to raise a quorum objection at the committee hearing. Failure of the witness to do so in *United States v. Bryan*¹²¹ made impossible a defense based on lack of quorum at the contempt trial.

D. Atmosphere

Regulation of the committee atmosphere is largely a matter for Congress.¹²² Yet there is authority for the proposition that if the committee room does not lend itself to a deliberate and truthful disclosure of facts, a witness can properly refuse to testify. In *United States v. Kleinman*,¹²³ a district court stated, in acquitting defendants of a contempt charge, that "there were, in close proximity to the witness, television cameras, newsreel cameras, news photographers with their concomitant flashbulbs, radio microphones, a large and crowded hearing room with spectators standing along the walls. . . ."¹²⁴ In *United States v. Moran*,¹²⁵ however, it was no defense that microphones, television cameras and photographers were present in the hearing room. *United States v. Orman*¹²⁶ has suggested as a test whether the presence of such enters into the determination not to answer. If they do, the witness has a defense.¹²⁷

IV. CONTEMPT PROCEDURES

When a witness summoned to appear before a congressional committee refuses to testify or produce requested documents and papers, what contempt procedures are available to Congress?¹²⁸ The contumacious witness may be

119. U.S. Const. art. 1, § 5, cl. 2.

120. E.g., *Flaxer v. United States*, 358 U.S. 147 (1958); *United States v. Moran*, 194 F.2d 623, 627 (2d Cir. 1952); *United States v. Di Carlo*, 102 F. Supp. 597, 599 (N.D. Ohio 1952).

121. 339 U.S. 323 (1950). But see *Christoffel v. United States*, 338 U.S. 84, 89-90 (1949), where the Court held that the presence of a quorum is a necessary element for the crime of perjury. See also *Meyers v. United States*, 171 F.2d 860, 811 (D.C. Cir. 1949) (dictum).

122. See *Justice and Television: Some Thoughts on Congressional Investigations*, 38 A.B.A.J. 15 (1952).

123. 107 F. Supp. 407 (D.D.C. 1952), 51 Mich. L. Rev. 1072 (1953), 37 Minn. L. Rev. 297 (1953).

124. *Id.* at 408.

125. 194 F.2d 623, 627 (2d Cir. 1952).

126. 207 F.2d 148, 159 (3d Cir. 1953).

127. See *United States v. Kamin*, 136 F. Supp. 791 (D. Mass. 1956). There the court said that a witness should raise an objection to committee atmosphere at the hearing and not for the first time at the contempt trial. *Id.* at 794 & n.2

128. A witness can also be prosecuted for perjury. 18 U.S.C. § 1621 (1953). See, e.g.,

brought before the bar of the House or Senate, tried for his refusal and punished, either by fine, reprimand or imprisonment.¹²⁰ This procedure was formally sanctioned by the Supreme Court of the United States as long ago as 1821, where, in *Anderson v. Dunn*,¹³⁰ Congress punished a private citizen for attempting to bribe a member of Congress. The reasoning of the decision was that Congress has an inherent power to punish recalcitrant witnesses for contempt so as to prevent obstructions to the legislative process.¹³¹ Since 1857,¹³² Congress has rarely resorted to this inherent power, relying instead upon a federal act making contempt of Congress a misdemeanor "punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment . . . for not less than one month nor more than twelve months."¹³³ Criminal contempt, embodied in Section 192 of Title 2 of the United States Code, is handled by the United States Attorney

United States v. Norris, 300 U.S. 564 (1937); *United States v. Moran*, 194 F.2d 623, 626 (2d Cir. 1952) (testimony must have a natural tendency to influence, impede or dissuade the committee). See also *Christoffel v. United States*, 338 U.S. 84 (1949); *United States v. Fraser*, 145 F. 2d 145 (6th Cir. 1944), cert. denied, 324 U.S. 842 (1945).

129. See *Jurney v. MacCracken*, 294 U.S. 125 (1935); *In re Chapman*, 166 U.S. 661 (1897). But see *Marshall v. Gordon*, 243 U.S. 521 (1917) (slandorous attacks presented no immediate obstruction to legislative processes). See also *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929) (witness called before Senate after having given testimony before a committee). *McGrain v. Daugherty*, 273 U.S. 135 (1927) (refusal to obey a committee subpoena followed by a warrant requiring witness to appear before the bar of the Senate).

If tried before Congress, a witness may obtain judicial review of the proceeding. *Jurney v. MacCracken*, supra (habeas corpus); *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (suit for false imprisonment).

130. 19 U.S. (6 Wheat.) 204 (1821).

131. It was stated in *Anderson* that imprisonment under the inherent contempt power cannot extend beyond the adjournment date of Congress. *Id.* at 231, where the Court stated: "[T]he existence of the power that imprisons is indispensable to its continuance: and although the legislative power continues perpetual, the legislative body ceases to exist, on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment."

132. Act of Jan. 24, 1857, ch. 19, § 1, 11 Stat. 155.

133. 52 Stat. 942 (1938), 2 U.S.C. § 192 (1958). The statute has application to witnesses voluntarily appearing before congressional committees. *Sinclair v. United States*, 279 U.S. 263, 291 (1929). It is of interest to note that the existence of a statutory crime of contempt does not impair the inherent power of Congress to punish a witness for contempt. *In re Chapman*, 166 U.S. 661 (1897). This power of Congress can be exercised even though the act of contempt has been completed. *Jurney v. MacCracken*, 294 U.S. 125 (1935). The act, however, must present an obstruction to the legislative process. *Marshall v. Gordon*, 243 U.S. 521 (1917).

An interesting question arises as to the applicability of the due process safeguards when Congress itself exercises the contempt power. Intimations exist that such safeguards do not apply. See *Marshall v. Gordon*, supra at 542-43, 548. The only requirement would appear to be that the matter under investigation be within the jurisdiction of Congress. *Kilbourn v. Thompson*, 103 U.S. 168 (1881). Yet a witness could probably purge himself of contempt, which would be for Congress to decide. *Jurney v. MacCracken*, supra at 152.

General's Office.¹³⁴ The committee before which the offense occurs must initially report and file a statement of the facts constituting the offense with either the President of the Senate or the Speaker of the House. If either body approves, the respective officer must certify the statement of facts to the appropriate United States attorney. A grand jury will investigate the matter and perhaps render an indictment alleging the necessary elements for the crime of contempt.¹³⁵ This is followed by a jury trial, at which the adversaries are put to their proof.¹³⁶

CONCLUSION

Unquestionably Congress has a right and duty to use investigating committees in aid of legislation and to insure the effective administration of existing laws. At the same time, Congress has a responsibility to the witnesses appearing be-

134. 52 Stat. 942 (1938), 2 U.S.C. § 194 (1958).

135. See Fed. R. Crim. P. 7(c). In *United States v. Lamont*, 18 F.R.D. 27 (S.D.N.Y. 1955), *aff'd*, 236 F.2d 312 (2d Cir. 1956), a district court stated that the indictment must contain the following essentials: "(1) that the committee before which the alleged refusal to answer occurred was duly empowered by either House of Congress to conduct the particular inquiry, setting forth the source of this authority; (2) that the inquiry was within the scope of the authority granted to the committee; (3) that the questions which the witness declined to answer were pertinent to the subject matter of the inquiry then being conducted by the committee; and (4) that the witness' refusal to answer was willful, or deliberate and intentional." *Id.* at 37. See Note, 30 So. Calif. L. Rev. 223 (1957). See also *United States v. Deutch*, 235 F.2d 853 (D.C. Cir. 1956) ("unlawfully refused to answer" sufficient allegation).

136. The Government has the burden of proving beyond a reasonable doubt that the questions asked by the committee are pertinent. E.g., *Bowers v. United States*, 202 F.2d 447 (D.C. Cir. 1953). It has been held that pertinency is a question of law and, consequently, a matter for the courts to decide. *Sinclair v. United States*, 279 U.S. 263, 293 (1929). But see *United States v. Orman*, 207 F.2d 148 (3d Cir. 1953), where a court of appeals said: "In the instant case, however, evidence aliunde was introduced to prove pertinency. The weight and probative value of this evidence was for the jury, particularly since pertinency was an element of the criminal offense. We conclude that in this situation the trial court, taking the evidence as true, retains the power to decide that pertinency has not been established. But if the court concludes that pertinency has been proven, it is proper for it so to rule and then to submit the question and the evidence to the jury under appropriate instructions." *Id.* at 156. It is to be noted that a mistaken belief on the part of the witness as to the law is no defense. *Sinclair v. United States*, 279 U.S. 263, 299 (1929).

Each refusal to answer may constitute a separate contempt unless "the separate questions seek to establish but a single fact, or relate to but a single subject of inquiry. . . ." *United States v. Orman*, *supra* at 160. In such a case, there can be only one contempt. *Ibid.* See also *Yates v. United States*, 355 U.S. 66, 68 (1957); *United States v. Costello*, 193 F.2d 200, 204 (2d Cir. 1952); *United States v. Orman*, 207 F.2d 148, 160 (3d Cir. 1953). If there are separate counts but only one punishment, that punishment cannot exceed the maximum penalty for any one count. See, e.g., *Gilmore v. United States*, 223 F.2d 121, 124 (5th Cir. 1956); *Estep v. United States*, 223 F.2d 19 (5th Cir. 1955). The above cases also establish that a contempt conviction will be sustained as long as one count is valid. See also *Barenblatt v. United States*, 360 U.S. at 115, and the cases cited by the Court.

fore its committees. Supervision of committee personnel is an important part of this responsibility. Also important is regulation of committee procedures guaranteeing witnesses a fair hearing. The present status of the law in this area is, unfortunately, somewhat unsettled. Witnesses must invoke constitutional rights and raise procedural defenses at their peril. Only after a prolonged and expensive contempt proceeding does the validity of the defense or objection become certain. Yet, what is true in one case may not be true in the next. It is apparent, therefore, that only congressional legislation can change the situation, particularly inasmuch as an investigation is a legislative function and the hearing itself is not a judicial trial. Given legislation, witnesses would be more prone to testify and cooperate with Congress, which, after all, is the purpose behind a witness' appearance before a committee.