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No congressional investigating committee has ever had its work subjected to such a large measure of judicial review as has the House Un-American Activities Committee. Since its establishment as a permanent committee in 1945 it has been engaged in almost continuous conflict with its witnesses. This conflict in turn has resulted in a steady flow of cases to the courts raising legal questions as to the Committee's authority and procedures. Between 1946 and 1950 some nine such cases reached the federal appellate courts. These cases have aroused the hopes of many of the Committee's critics that it may finally find its Nemesis in the courts. Having failed to persuade the House of Representatives to abolish the Committee or to limit its authority or procedures, the Committee's opponents have transferred the struggle to the courts and have counted heavily upon favorable judicial rulings to curb the Committee's worst abuses, if, indeed, they have not expected the judiciary to declare the Committee unconstitutional and outlaw it completely. But these hopes and expectations have not been realized for not a single final judicial ruling adverse to the interests of the Committee has yet been made.[1] Moreover, it is significant that the United States Supreme Court has shown great reluctance to review the cases that have raised the most

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1. One witness, Richard Morford, who was prosecuted in the courts and found guilty on the charge of contempt, gained temporary relief when the Supreme Court ruled that he was entitled to a new trial on the ground that legal error, prejudicial to his interests, had occurred in the first trial. But upon being tried again he was found guilty a second time, and the appellate courts let this verdict stand.

serious constitutional issues concerning the work of the Committee and has seemingly been content to let the federal courts of appeals render final decisions upon these issues.

That congressional investigations should be subject to any judicial supervision whatsoever may well occasion surprise. It is one thing for the federal courts to invalidate the substance of a congressional statute on the ground that it conflicts with the Constitution; it is quite a different thing for the judicial branch to review the procedural activities of the legislature. Whether the jurisdiction granted to one of its committees by the House or Senate is proper constitutionally might well be viewed as a "political question" to be decided by Congress itself. With respect to committee procedures it may at first thought seem that private persons appearing before a congressional committee are entitled to protection under the Bill of Rights and to relief in the courts where their procedural rights are encroached upon. But examination of the Bill of Rights suggests that such famous procedural requirements as avoidance of unreasonable searches and seizures, allowing an accused person immunity against testifying against himself, making provision for the assistance of counsel or trial by jury are all closely associated with criminal proceedings in a *court*. When the Sixth Amendment to the Constitution says, "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 for his defense" it may well be asked how a provision, so worded, can have any possible bearing upon the rights of a witness before a committee of Congress or how it can possibly serve as a basis for judicial review of the proceedings of such a committee.

As a matter of fact for almost one hundred years the congressional investigation "flourished virtually free from judicial supervision or control." [2] Then in 1880 in what is still an exceedingly controversial decision, *Kilbourn v. Thompson*, the Supreme Court brought this activity of the national legislature under a very substantial measure of control by the courts and for the first and only time declared that a specific congressional inquiry

2. Morgan, Congressional Investigations and Judicial Review: Kilbourn v. Thompson Revisited, 37 Calif. L. Rev. 556 (1949). One authority on congressional investigations points out that there was disagreement in Congress from the beginning as to whether the Bill of Rights had any bearing upon congressional proceedings. Eberling, Congressional Investigations, 251, 283-288, 319 (1928).

was an improper one.[3] In spite of the fact that *Kilbourn v. Thompson* has not fathered subsequent Supreme Court decisions holding other congressional investigations improper it has never been repudiated by the Court, and it has encouraged successive generations of critics to hope that the "witch hunts" of the moment might be suppressed through judicial intervention. It is significant that liberals and conservatives have taken turns supporting and condemning judicial supervision of congressional investigations, as the inquiries themselves have ranged from liberal to conservative in motivation and character. During the 1920s and 1930s the inquiries were generally in the hands of liberal Congressmen and found staunch defenders in liberal commentators, whereas conservatives recalled *Kilbourn v. Thompson* and suggested the need for judicial intervention. In articles in learned journals and popular magazines alike such liberals as James M. Landis and Felix Frankfurter deplored the *Kilbourn* case and warned that the courts should "keep hands off" congressional investigations. On the other hand, such a conservative lawyer as Frederic R. Coudert gave to his article for a learned journal the title, "Congressional Inquisition vs. Individual Liberty," and was not unwilling to see the courts curb what Walter Lippmann was calling "that legalized atrocity, the congressional investigation."[4]

A generation later the shoe was on the other foot. The Un-American Activities Committee and other congressional committees with a conservative orientation had liberals sadly disturbed and inclined to look to the courts for help, whereas conservatives found it convenient to argue that it would be unfortunate were the courts to attempt to check these committees. One cannot avoid a sense of amazement at coming upon a law review article by that

3. 103 U.S. 168 (1880).

4. Among the articles protesting either expressly or by implication against judicial intervention were: Frankfurter, Hands Off the Investigation, 33 New Republic 329 (1927); Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926); Potts, Power of Legislative Bodies to Punish for Contempt, 74 U. of Pa. L. Rev. 691 (1926); Wigmore, Legislative Power to Compel Testimonial Disclosure, 19 Ill. L. Rev. 452 (1924).

The position of the above authorities is well expressed by the assertion of Potts that: "Public policy would seem to require that only in the clearest cases of want of jurisdiction and of oppression should the courts interfere with the legislative investigations." (74 U. of Pa. L. Rev. 691, 829.)

Among the articles attacking the use of investigating power by Congress and looking with favor upon the possibility of a judicial check to the use of the power by Congress were Courdert, Congressional Inquisitions v. Individual Liberty, 15 Va. L. Rev. 537 (1929); Loring, Powers of Congressional Investigation Committees, 8 Minn. L. Rev. 595 (1924).

bitter, and once implacable critic of judicial review, Louis B. Boudin, in which he enthusiastically supports a judicial check on congressional committees as a means of safeguarding personal rights.[5] On the other hand, Gerald D. Morgan, former Assistant Legislative Counsel for the House of Representatives, has recently renewed the attack upon *Kilbourn v. Thompson*, asserting that the effect of this Supreme Court decision "was to treat the Senate and House of Representatives, when exercising an inherent power at the very threshold of the legislative process, as having a status analogous to that of an inferior court of limited or special jurisdiction." Morgan reminds his readers of Justice Holmes' words that it "must be remembered that legislatures are ultimate guardians of the liberties of the people in quite as great a degree as the courts" and of Justice Frankfurter's assertion that "interference by the courts is not conducive to the development of habits of responsibility," and comes to the conclusion that we should "return the workings of the legislative process to the exclusive jurisdiction and control of the legislature." [6]

Review by the courts of the work of the Un-American Activities Committee must be examined against this background of alternate distrust by liberals and conservatives of judicial interference with the investigative function of Congress. Moreover, the actual record of the Committee's relations with the courts can be understood and evaluated only if the court-promulgated rules of constitutional law concerning the investigating power of Congress are kept in mind.

It is now clearly established by decision of the Supreme Court that Congress possesses implied power to seek factual information through committee investigations to enable it to exercise its lawmaking powers. The decision of the Court in the *Kilbourn* case seventy years ago was but a temporary check to the establishment of this rule. In that case the Court held that the House of Representatives had exceeded the limits of its power

5. Boudin, Congressional and Agency Investigations: Their Uses and Abuses, 35 Va. L. Rev. 143 (1949). Another recent discussion in support of judicial supervision of congressional investigations is Note, 47 Col. L. Rev. 416 (1947).

6. Morgan, supra note 2, at 556. The Holmes quote is from the Court opinion in Missouri, Kansas, and Texas Ry. v. May, 194 U.S. 267, 270 (1904) and the Frankfurter quote from the Court opinion in Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 146 (1940). Another recent article which looks generally with disfavor upon the prospect of judicial supervision of congressional investigations is Ehrmann, The Duty of Disclosure in Parliamentary Investigation: A Comparative Study, 11 U. of Chi. L. Rev. 1, 117 (1943, 1944).

in authorizing one of its committees to inquire into the failure of the banking house, Jay Cooke and Company, even though the Secretary of the Navy had made "improvident deposits" of federal funds with the company. In the resolution authorizing the inquiry the House had failed to point out that the findings of the committee might result in the enactment of remedial legislation, and the Court concluded that the investigation was a "fruitless" undertaking.[7] The Court found its position strengthened by the fact that the failure of the banking house had already become the subject of litigation in the courts, and also by its feeling that the congressional committee had encroached improperly upon the privacy of witnesses called before it.

The use of the investigating power as a means of obtaining information essential to the enactment of legislation was expressly approved by the Supreme Court for the first time in 1927 in the well-known case of *McGrain v. Daugherty*. In an opinion for a unanimous Court Justice Van Deventer said:

> "We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . .
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> ". . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it." [8]

Moreover, the Court held that a Senate inquiry to determine whether or not the Department of Justice was properly performing its duties was a valid one even though the Senate had neglected to make specific reference in the resolution authorizing the inquiry to the possibility that legislation might result from it.

There has never been a specific Supreme Court decision up-

7. The Court commented upon the resolution as follows:
"The resolution contains no hint of any intention of final action by Congress on the subject. In all the argument of the case no suggestion is made of what the House of Representatives or the Congress could have done in the way of remedying the wrong or securing the creditors of Jay Cooke and Company, or even the United States. Was it simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country. By 'fruitless' we mean that it could result in no valid legislation on the subject to which the inquiry referred." 103 U.S. 168, 194 (1880).

8. 273 U.S. 135, 174-175 (1927).

holding the investigative power of Congress as a means of achieving the two other purposes which have in practice figured so prominently in many investigations: checking the administrative branch of the government, and influencing public opinion. As a matter of fact, there has been no real need for the Court expressly to lend its approval to the use of the investigatory power for these purposes, for in practice no investigation in which either of these motives is present is ever utterly devoid of legislative possibilities. It has always seemed enough to the courts that a specific inquiry might result in legislation; speculation as to other motives or results has seemed superfluous. Morever, since 1880 no specific inquiry has been disapproved by the Supreme Court on the ground that it was a "fruitless" one that could not result in legislation. While the range of subject matter that has sooner or later been brought within the scope of its inquisitorial power by Congress has indeed been wide, it is doubtful whether Congress has ever conducted an investigation that could not possibly have supplied information for some kind of legislation of undoubted constitutionality.[9] Accordingly, the principle that a congressional investigation must be a potentially fruitful one has not had much meaning in practice, and it may be doubted whether the courts will ever find occasion to use it as the basis for a ruling that a specific inquiry is unlawful because of its subject matter.[10]

The Supreme Court has ruled that a congressional investigating committee is limited in its examination of witnesses to the asking of questions pertinent or relevant to the matter under inquiry. In particular, the Court has reiterated the point that a witness need not answer a question that has no other purpose than to probe into his personal or private affairs. And yet, apart

9. In the Jay Cooke investigation the legislative possibilities were obvious. To mention only one possibility, a law might have been passed to prevent subsequent "improvident deposits" of federal funds by government officials.

10. It should be added that the Supreme Court has approved the use of the investigative power by Congress for other purposes than supplying information for legislation. Congress may also seek information essential to a "wise" decision as to the expulsion of a member of the impeachment or conviction of a public officer. See In re Chapman, 166 U.S. 661 (1897) in which the Court held that the Senate might properly authorize an investigation into charges that certain senators "were yielding to corrupt influences in the consideration of . . . legislation." The Court has also approved the use of the investigating power to scrutinize campaign expenditures in a congressional election looking toward a possible refusal to seat the winning candidate. Barry v. Cunningham, 279 U. S. 597 (1929). On the other hand, the Court has held that Congress's power to punish private persons for contempt does not extend to a situation where a libelous attack is made on a congressional agency in a newspaper, there being no indication of a resulting immediate obstruction of the legislative process. Marshall v. Gordon, 243 U.S. 521 (1917).

from the *Kilbourn* case, the Court has never ruled that the particular questions asked a witness before a committee were not pertinent; nor has it ever ruled that a particular inquiry encroached improperly upon a witness's privacy. But the Court has frequently warned against these forbidden practices. In the *McGrain* case the Court said, ". . . a witness rightfully may refuse to answer where the bounds of the [investigatory] power are exceeded or the questions are not pertinent to the matter under inquiry." [11] Two years later in 1929 in *Sinclair v. United States*, it added, "It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary, or unreasonable inquiries and disclosures in respect of their personal and private affairs." [12] But in both of these cases, after having uttered these inspiring generalizations concerning the right of witnesses to refuse to cooperate when confronted by lines of inquiry encroaching upon their purely private affairs, the Court went on to hold that the actual inquiries and questions involved were proper.[13] Indeed, it may be asked whether the ruling of the Court that an investigating committee is limited to the asking of pertinent questions can have much vitality in practice. The operation of the rule is such that a substantial burden is placed on the witness who refuses to answer questions. He takes a large risk, for, unless he is sustained by the courts in his assertion that the questions are impertinent, punishment for contempt will be his fate. This is a risk that most witnesses will be reluctant to take, particularly if the stubborn fact is brought to their attention by their attorneys that there is still not a single case in which the courts have ruled that a committee has actually exceeded the bounds of its authority by asking improper questions.[14]

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11. 273 U.S. 135, 176 (1927).

12. 279 U.S. 263, 292 (1929). In *Kilbourn v. Thompson* the Court had said, "We are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen." 103 U.S. 168, 190 (1880).

13. In the *Sinclair* case the witness appeared before a Senate committee but refused to answer certain questions. The Court ruled that the questions were pertinent and should have been answered. Daugherty refused to appear before the congressional committee that had subpoenaed him; thus there was no actual issue of the pertinency of questions in that case.

14. A possible exception to this is found in In re Pacific Railway Commission, 32 Fed. 241 (N.D. Calif. 1887). In this case a federal circuit court refused

Constitutional law with respect to the procedural side of congressional investigations is less easily stated than is the law concerning their substantive side. In spite of the fact that the actual language of the Constitution suggests otherwise it has long been accepted that some, if not all, of the procedural guarantees of the Bills of Rights do apply to congressional investigations. But an accurate statement of the specific guarantees that do apply and of the effect or extent of their application is very difficult to make. On one hand, there is not the slightest suggestion in any court ruling that the Sixth Amendment guarantee that an accused person "shall . . . have the assistance of counsel for his defense" requires a congressional committee to permit witnesses to enjoy such assistance. On the other hand, while there is no clear-cut ruling to this effect, the courts have intimated that the ban of the Fourth Amendment against unreasonable searches and seizures does bind such committees as well as ordinary law-enforcement officers.[15]

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to aid the Pacific Railway Commission, which had been created by act of Congress to conduct an investigation of certain railroads, to compel Leland Stanford to answer certain questions. But see Nutting, Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs, 47 Mich. L. Rev. 181 (1948). This author holds "the so-called limitation of pertinence has been reduced to almost complete insignificance." (Id. at 216.) The general inclination of the courts to grant legislative committees very considerable leeway in fixing the bounds for pertinency is illustrated by the opinion of the Court of Appeals for the District of Columbia in the case of *Townsend v. United States*. It will be recalled that Dr. Townsend appeared before a House committee which was investigating old age pension plans but took offense at the proceedings and walked out of the committee room. Townsend was charged with contempt and convicted. In its decision upholding this conviction the court of appeals said:

"A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress. . . . A judicial inquiry relates to a *case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. 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. Many a witness in a judicial inquiry has, no doubt, been embarrassed and irritated by questions which to him seemed incompetent, irrelevant, immaterial, and impertinent. But that is not a matter for a witness finally to decide. Because a witness could not understand the purpose of cross-examination, he would not be justified in leaving a courtroom. The orderly processes of judicial determination do not permit the exercise of such discretion by a witness. The orderly processes of legislative inquiry require that the committee shall determine such questions for itself. Within the realm of legislative discretion, the exercise of good taste and good judgment in the examination of witnesses must be entrusted to those who have been vested with authority to conduct such investigations." 95 F. 2d 352, 361 (D.C. Cir. 1938).

15. There is no ruling by an appellate court that the Fourth Amendment controls congressional committees. In Strawn v. Western Union Telegraph Company, 3 U.S. Law Week 646 (D.C. Cir. 1936) a District of Columbia court granted an injunction to restrain the Western Union Company from handing over to a Senate committee all copies of telegrams sent or received by the

Much of the argument concerning the applicability of the procedural clauses of the Bill of Rights to congressional investigating committees has centered in the self-incrimination clause of the Fifth Amendment which says, "No person . . . shall be compelled in any criminal case to be a witness against himself." On its face this language would seem to have no bearing whatsoever upon the status of a witness before a legislative committee. Indeed, read literally the clause would seem to restrict the right solely to the *defendant* in a *criminal* case actually under way.[16] However, tradition and precedent have long given the right to be free from self-incrimination a broader application than is suggested by the language of the Fifth Amendment. It is now generally recognized that the right may be claimed by witnesses as well as the defendant in a criminal case, by parties and witnesses in civil cases, and by witnesses in non-judicial proceedings, to justify a refusal to give any testimony that might be used as a basis for later criminal proceedings against them.[17] Moreover, it was long ago asserted that the right might be claimed by a witness before a congressional committee. Indeed, as early as 1857, Congress endeavored to remove the threat to legislative

plaintiff during a ten-month period on the ground that the subpoena duces tecum issued by the committee violated the Fourth Amendment. See also the New York Times, March 12, 1936; McGeary, The Developments of Congressional Investigative Power, 106-108 (1940); Hearst v. Black, 87 F. 2d 68 (D.C. Cir. 1936).

16. Edward S. Corwin has written, "Considered in the light shed by grammar and the dictionary, the words of the self-incrimination clause appear to signify simply that nobody shall be compelled to give oral testimony against himself in a criminal proceeding under way in which he is defendant." (The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 1, 2 [1930]. Reprinted in 2 Selected Essays on Constitutional Law 1398, 1399 [1938]). E. M. Morgan, professor at Harvard and Vanderbilt Law Schools, has written, "If this language were to be construed as fixing the limits of the privilege without regard to the existing precedents, it would be difficult to contend that it could be legitimately claimed in a civil action in law or equity, or in any proceeding which was not to be used as a foundation for a criminal prosecution." The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 23 (1949).

17. Wigmore, the great authority on evidence, says the protection of the privilege against self-incrimination "extends to all manner of proceedings in which testimony is to be taken, whether litigious or not, and whether 'ex parte' or otherwise. It therefore applies in . . . investigations by a legislature or a body having legislative functions, and in investigations by administrative officials." 8 Wigmore, Evidence (3 ed. 1940) § 2252(c). Supreme Court cases in which broad protection of the privilege has been recognized are: Boyd v. United States, 116 U.S. 616 (1886) (privilege applied to statutory proceedings for forfeiture of goods); Conselman v. Hitchcock, 142 U.S. 547 (1892); Blau v. United States, 19 U.S. Law Week 4062, 4094 (1950, 1951) (privilege applied to grand jury proceedings); Brown v. Walker, 161 U.S. 591 (1896) (privilege assumed to apply to Interstate Commerce Commission proceedings); McCarthy v. Arndstein, 266 U.S. 34 (1924) (privilege applied to bankruptcy proceedings).

inquiries, which repeated assertion of the claim might entail, by enacting legislation granting witnesses absolute immunity against prosecution for any crimes revealed by their testimony and in turn compelling them to testify.[18] It took this step even though there was no Supreme Court ruling that the right not to testify against oneself could be claimed by a witness before a congressional committee. In fact, there has been no such flat ruling from the Court even to this day, although, as one authority has pointed out, there are Supreme Court opinions whose "fair inference . . . is that the privilege as established in the Fifth Amendment protects witnesses in congressional investigations as fully as in judicial proceedings." [19] At any rate for at least a century Congress seems to have recognized the right of witnesses to refuse to testify before its committees on this ground, and it has either attempted to compel testimony by granting immunity, or has allowed witnesses to assert the right without challenge, even though the right rests on no more than "assumptions and intimations" in Supreme Court decisions.[20]

18. 11 Stat. 155 (1857). Chief Justice Vinson has stated that the 1857 statute was "designed on the one hand to compel the testimony of witnesses and on the other hand to protect them from prosecution for crimes revealed by their testimony." (United States v. Bryan, 339 U.S. 323 [1950].) The Supreme Court has held that Congress may withdraw the privilege against self-incrimination by granting a witness before the Interstate Commerce Commission complete immunity against any prosecution on account of any transaction to which he may testify. That the statute could not also shield him against personal disgrace or opprobrium was held immaterial. (Brown v. Walker, 161 U.S. 591 [1896].) See also Hale v. Henkel, 201 U.S. 43 (1906). In the latter case the Supreme Court said, ". . . if the criminality has already been taken away the [5th] amendment cases to apply. The criminality provided against is a present, not a past criminality, which lingers only as a memory, and involves no present danger of prosecution. . . . It is here that the law steps in and says that if the offense be outlawed or pardoned, or its criminality has been removed by statute, the amendment ceases to apply." (201 U.S. 43, 67.)

19. E. M. Morgan, supra note 16, at 31. Professor Morgan points out that there are square rulings in the state courts to the effect that state legislative committees are bound by the self-incrimination clauses in state constitutions. See Emery's Case, 107 Mass. 172 (1871); Matter of Doyle, 257 N.Y. 244, 177 N.E. 489 (1931).

20. E. M. Morgan, supra note 16, at 33. Actually Congress seems to have gone even further than have the courts in recognizing the right. Professor Corwin points out that with respect to a witness in a judicial proceeding, "The privilege must . . . be claimed in each instance, and by the witness himself, and must in each instance be passed upon by the Court—the witness is not the final judge. Also, while the claim must relate to a past act, it must not be one that is so long past that under the statute of limitations the witness is no longer subject to prosecution on account of it." (Corwin, supra note 16, at 1426.) The rulings of the federal courts concerning the circumstances in which a party or witness to a judicial proceeding may properly refuse to answer questions on the ground of self-incrimination are not as clear as they might be. In the early circuit court case, Burr v. United States, 25 Fed. Cas. No. 14,692e, at 38, 40, Chief Justice Marshall said: "When a question is

The legislative grant of absolute immunity against later prosecution for crime given by Congress in 1857 to witnesses before its committees was allowed to stand for only five years. In 1862 this provision of the Act of 1857 which had been passed by overwhelming majorities in both houses was unanimously repealed

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propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims."

In Mason v. United States, 244 U.S. 362 (1917), the Supreme Court held that a witness before a grand jury might properly be directed to answer a question which did not bear upon conduct which is criminal under the law, and that continued refusal to answer such a question on the ground of self-incrimination might properly be punished as contempt. The court quoted with approval the following language:

". . . a Judge is, in our opinion, bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril.

"Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." 244 U.S. 362, 365-366.

On the other hand, the federal courts have frequently recognized that a witness may claim the privilege with respect to a seemingly harmless question because of the relation it may bear, however distant, to criminal conduct. Marshall pointed the way to this holding in his opinion in the *Burr* case: "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. . . . It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws." 25 Fed. Cas. No. 14,692e, at 40 (1807).

Recently the Court of Appeals for the Tenth Circuit stated, after analyzing earlier federal rulings, ". . . we conclude the rule to be that the witness is not the sole judge as to whether his answer will tend to incriminate him; that when the question arises, it is for the court to determine from all the facts whether the question is of such a nature as might reasonably be expected to incriminate the witness, depending upon the answer thereto. If there is reason to believe that the answer might tend to incriminate the witness, he cannot be compelled to answer; neither can he be required to state why the answer might tend to incriminate him, because that would in itself to some extent constitute giving testimony against himself. Furthermore, a witness may not be required to give an answer which furnishes a link in a chain which would enable the Government to obtain the facts showing his guilt of a crime." Rogers v. United States, 179 F. 2d 559, 562 (10th Cir. 1950), affirmed 19 U.S. Law Week 4155 (February 26, 1951).

At other times the courts have suggested that a witness may arbitrarily

on the ground that it had "cheated justice of its dues more often than it had aided its administration, and its existence had come to be a crying evil." [21] It was stated in debate that the provision had operated in practice to induce criminals to appear before congressional committees in order thereby to gain a general pardon for all offenses which they might mention in the course of their testimony. Reference was made to specific instances in which this result had prevailed during the five-year period the act had been in effect.[22]

In repealing the grant of absolute immunity Congress substituted for it a grant of relative immunity which has remained in effect to the present time. The substitute provides only that the actual testimony given by a witness shall not be used against him as evidence in any subsequent criminal proceeding. It does not protect the witness against prosecution for a crime that may be disclosed in his testimony where law-enforcement officials can find other evidence than the witness's own testimony as a basis for a case against him. Moreover, official papers or records produced by a witness are specifically exempted from the ban on subsequent use as evidence in a criminal proceeding. In substituting a limited immunity for the earlier absolute immunity, Congress nonetheless left in effect that portion of the 1857 statute which stated flatly that a witness might not refuse to testify or to produce papers on the ground that such testimony or produc-

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refuse to answer only those questions which *on their face* appear to call for incriminating answers, and that he must assume the burden of proof with respect to other questions and justify refusal to answer them by showing that he has substantial reason to believe his answers will be incriminating. See United States v. Rosen, 174 F. 2d 187, 188 (2d Cir. 1949); Alexander v. United States, 181 F. 2d 480, 482 (9th Cir. 1950).

It would appear that some if not all congressional committees have allowed the witness himself to judge whether his testimony, if given, would prove incriminating, and there does not appear to have been regular insistence upon testimony being given where the statute of limitations has run concerning any crime that might be disclosed.

21. 12 Stat. 333 (1862), 2 U.S.C. § 193 (1938).

22. See Eberling, op. cit. supra note 2, at 319 et seq. Eberling quotes Senator Wade as stating during debate over the repealer in the Senate: "... I have not dared to enter upon certain investigations before a committee of which I am a member, for the reason that the law as it is now, exculpates great rascals from the responsibility they owe to the government, and gives entire immunity to any man touching any matter you see fit to inquire of him about. I wonder how such a law was ever passed. I never should have believed that such a law was on your statute book if it had not been suggested to me, and I had not found it. I was astonished to find a law in existence providing that if you inquired of any witness in regard to any delinquency that had arisen, he should be exculpated from that moment from the consequences of his crime." (Id. at 322-323.)

tion of papers would incriminate him. As found in the present United States Code these two companion provisions are as follows:

> "Title 18, Section 3486. No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege." [23]
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> "Title 2, Section 193. 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, 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." [24]

There has been a good deal of doubt about the constitutionality of this arrangement whereby a grant of partial immunity is combined with an absolute denial of the right to refuse to testify on grounds of self-incrimination. A somewhat similar statutory arrangement with respect to testimony given in any judicial proceeding was declared unconstitutional by the Supreme Court in 1892 in *Counselman v. Hitchcock.* The Court held that the right established by the Fifth Amendment might be claimed by a witness before a grand jury and that a statutory attempt to withdraw the right by offering a witness immunity only against the use of his own testimony in a subsequent criminal proceeding against him could not meet the test of constitutionality.[25]

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23. As amended 62 Stat. 683 (1948). Derived from 11 Stat. 156 (1857), 12 Stat. 333 (1862).

24. As amended 52 Stat. 942 (1938). Derived from 12 Stat. 333 (1862).

25. 142 U.S. 547 (1892). See the discussion in Eberling, op. cit. supra note 2, at 401 et seq. The statutory provision involved in the *Counselman* case was Rev. Stat. § 860 (1875), which reads as follows:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any other foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided,* That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

Section 860 is comparable to the present Section 3486 of Title 18 of the United States Code. Indeed, the latter provision of law is derived from

By analogy the legislation pertaining to witnesses before congressional committees has seemed to have the same deficiency,[26] and accordingly, congressional committees have been reluctant to insist that a witness must testify when he offers self-incrimination as an excuse for remaining silent. Of course, it should be recognized that a witness who offers this excuse usually discredits himself in the eyes of the public, for in effect he admits he has been guilty of wrong-doing.

The way in which the courts have gained the opportunity to review the record of investigating committees, both with respect to substance and procedure, should be noted. With rare exceptions cases presenting such an opportunity have come to the courts as a result of the exercise of the contempt power by Congress. Where witnesses have refused to cooperate with investigating committees, conviction for contempt of Congress has traditionally been the price such witnesses have paid. Such a conviction, in turn, has often afforded a witness the opportunity to challenge in the courts the propriety of the subject matter of an investigation or of the procedures the committee making the investigation has employed. Where such challenges have been made the courts have, since 1880 at least, been ready to subject the investigation to the full measure of judicial review, although having insisted upon the right to scrutinize this activity of a

Section 859 of the Revised Statutes where it was definitely a companion to Section 860. But whereas Section 3486 is today coupled with a statutory provision flatly withdrawing the privilege against self-incrimination from witnesses before congressional committees (12 U.S.C. § 193 [1946]), Section 860 of the Revised Statutes was *not* accompanied by a similar provision purporting to withdraw the privilege from witnesses before grand juries or other judicial agencies. Actually it would seem as though it is Section 193 that is of doubtful constitutionality, and not Section 3486. The defect in Section 3486 is that it does not grant a broad enough immunity to cancel the Fifth Amendment privilege. But it does not in its own language claim to do that. Thus it might properly be regarded as a harmless, ineffectual, but not unconstitutional statute. As a matter of fact a careful reading of the *Counselman* opinion leaves one in some doubt as to whether the Court did not find Section 860 harmless and ineffectual rather than unconstitutional. In a long opinion the only passage that bears on the possible unconstitutionality of Section 860 is the following: "We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution, for the offence to which the question relates." 142 U.S. 547, 585-586.

26. Chief Justice Vinson's opinion in United States v. Bryan, 339 U.S. 323 (1950) implies the unconstitutionality of this legislation.

collateral branch of the government, the courts, as has been seen, have then consistently ruled against the witness and for the Congress.

The right of Congress to punish a private person for conduct deemed contemptuous of it was recognized by the Supreme Court as early as 1821 in *Anderson v. Dunn.* In that case the Court upheld the power of the House of Representatives to arrest and punish a private person who had attempted to bribe one of its members. The Court declared this was an implied common law power essential to the effective exercise of Congress's express powers.[27] Until 1857 the procedure in such cases was to bring the accused individual before the bar of the Senate or the House where he was, in effect, tried. If a finding of guilt resulted, punishment might be imposed, ranging from a mere reprimand as in Anderson's case, to imprisonment at the hands of the House or Senate Sergeant at Arms for the remainder of the session. In the 1857 legislation, already referred to, Congress took the step of defining contempt of Congress as a statutory offense against the United States, thus making it possible to turn a contumacious person over to law-enforcement officials for prosecution in the courts. Seemingly this step was taken not so much to provide a statutory definition of contempt of Congress which all could see, as to establish a greater and more effective penalty, since the Supreme Court had inferred in the *Anderson* case that Congress itself could not order a person, declared by it to be guilty of contempt, imprisoned beyond the duration of the current session.[28] Under the Act of 1857, contempt of Congress was declared to be a misdemeanor punishable by a fine of not more than $1,000 nor less than $100, *and* imprisonment for not more than one year nor less than one month. The text of this portion of the Act which has now become Section 192 of Title 2 of the United States Code is:

> "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 joint committee established by a joint or concurrent resolution of the two Houses of Congress, or

27. 19 U.S. 204 (1821).

28. See Eberling, op. cit. supra note 2, at 302 et seq. The Supreme Court had observed in Anderson v. Dunn, 19 U.S. 204, 231 (1821): "'a period is imposed by the nature of things; since the existence of the power that imprisons is indispensable to its continuance and although the legislative power continues perpetual, the legislative body ceases to exist at the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment.'"

> any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any 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." [29]

After the *Dunn* case in the 1820's most of the cases in which private persons were held to be in contempt of Congress concerned uncooperative witnesses before investigating committees. Although the Act of 1857 made it possible to turn such persons over to the courts for trial, the two houses of Congress continued in many instances to use their own direct power to declare such persons guilty and to order them punished. One reason for this continued adherence to the original procedure was that as long as Congress retained an uncooperative witness in its custody there was always the chance he would change his mind and agree to testify, whereas once he was handed over to the courts this chance came to an end. In other words, imprisonment for contempt by Congress itself may be used more readily for its coercive effect, whereas imprisonment following a court trial is largely punitive in its effect.[30]

The constitutionality of the Act of 1857 was upheld by the Supreme Court in 1897 in *In Re Chapman*.[31] Chapman appeared in response to a subpoena as a witness before a Senate committee which was investigating charges that certain senators had yielded to corrupt influences in the consideration of tariff legislation. He then refused to answer specific questions as to whether a brokerage firm of which he was a member had bought or sold sugar stocks for any senator. As the result of this refusal to testify he was successfully prosecuted under the Act of 1857. Indeed, it appears Chapman was the first person ever to be indicted for contempt of Congress under the Act of 1857, passed some forty years earlier.[32] In reviewing the case the Supreme Court held that Congress might properly define refusal of private persons to testify before its committees as a misdemeanor. It also held that this statutory offense did not take the place of the common

29. As amended 52 Stat. 942 (1938). Derived from 11 Stat. 155 (1857).
30. See Eberling, op cit. supra note 2, at 316 et seq.
31. 166 U.S. 661 (1897).
32. 2 Hinds, Precedents of the House of Representatives, 1076, § 1613 (1907).

law offense recognized in the *Anderson* case, but was merely a supplement to the latter. Indeed, the Court implied that were Congress to attempt by statute to vest in the courts exclusive power to try witnesses before its committees for contempt the result would be an unconstitutional delegation of legislative power to the judiciary. The Court also stated that were Congress first to punish a contumacious witness itself, and then turn him over to the courts for prosecution and possible punishment such procedure would not violate the double jeopardy clause of the Fifth Amendment.[33] It may be noted that the *Chapman* decision did not establish the authority of Congress to seek factual information in aid of legislation by means of investigations. Rather it approved the use of the investigation as a means of obtaining information concerning the conduct of its own members looking toward the possibility of their expulsion.

In recent years the House and Senate have depended heavily upon proceedings under the Act of 1857 as a sanction to compel private persons to cooperate with their investigating committees, and have seldom invoked their own power to punish contumacious witnesses directly.[34] It should be noted that while the relevant legislation states that when the facts concerning a contumacious witness are reported to either House, the President of the Senate or the Speaker *shall* certify the case to the district attorney for the District of Columbia for presentation to the grand jury, the custom has been for the presiding officers to wait until the Senate or House by majority vote direct them to take this step.

Because a review of proceedings in contempt cases has been

33. On this point the Court said, "It is improbable that in any case cumulative penalties would be imposed, whether by way of punishment merely, or of eliciting the answers desired, but it is quite clear that the contumacious witness is not subjected to jeopardy twice for the same offense, since the same act may be an offense against one jurisdiction and also an offense against another; and indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the acts as contempts, the two being *diverso intuito* and capable of standing together." 166 U.S. 661, 672 (1897).

34. An exception is seen in the case of Jurney v. MacCracken, 294 U.S. 125 (1935). MacCracken was cited by a Senate resolution in 1934 to appear before the bar of the Senate to show cause why he should not be punished for contempt of the Senate because he had destroyed certain papers which he had been subpoenaed to produce before a Senate committee investigating air mail contracts. MacCracken sought protection in the courts against arrest by Jurney, the Senate Sergeant-at-Arms, arguing that the power of the Senate to punish a contumacious witness could be used only for its coercive effect and did not extend to punishment for a past and completed act. The Supreme Court rejected this argument and upheld the authority of the Senate to bring MacCracken before its bar to be punished for contempt.

almost the only method by which the courts have gained the opportunity to pass generally upon the propriety of congressional investigations, the means has always been available to Congress to avoid judicial supervision of this activity merely by refraining from contempt proceedings against recalcitrant witnesses. On the other hand, unless Congress takes steps to punish at least an occasional uncooperative witness, its investigating committees might ultimately be faced by a wholesale refusal of witnesses to testify.

The Constitutional Case Against the Un-American Activities Committee

In carrying their case against the Un-American Activities Committee to the courts, the Committee's opponents have raised virtually every constitutional point that has ever been made against any earlier congressional committee, and have also devised several new arguments. As has been true of previous attacks upon the investigatory power, the arguments have fallen into two categories, one including attacks upon the Committee's general authority to investigate subversive activity, and the other attacks upon the Committee's specific policies and procedures. Unfortunately, consideration of these arguments by the courts has not been very orderly or systematic, nor has it resulted in a series of clear-cut legal rulings. There has been a good deal of disagreement between different courts hearing the same case, and even between the justices of a single court. Moreover, the opinions, majority and dissenting alike, have been more than ordinarily discursive and it is not easy to set forth their substance in orderly fashion.

At this point a summary may be provided of the different legal and constitutional attacks that have been made upon the Un-American Activities Committee, although it should be added that some of these arguments have not yet been recognized or passed upon by the appellate courts. The Committee has been challenged in the following respects:

1. The general grant of investigating power made to it by the House of Representatives as lying outside the legislative authority (or any other kind of authority) of Congress.
2. The specific matter under inquiry in particular hearings as not encompassed by the investigating power granted to it.

3. Specific questions asked a witness as not pertinent to the matter under inquiry.
4. Invasion of private affairs.
5. Its general grant of power, or its use of this power to undertake a specific inquiry or to ask specific questions, as encroaching upon rights safeguarded by the First Amendment.
6. Its efforts to obtain evidence as contrary to the search and seizure clause of the Fourth Amendment.
7. Its efforts to obtain testimony as contrary to the self-incrimination clause of the Fifth Amendment.
8. Its general grant of power as contrary to the due process clause of the Fifth Amendment on the ground of vagueness.
9. Its use of authority in allegedly discriminatory fashion as violative of the due process clause of the Fifth Amendment.
10. Its treatment of a witness as amounting to a criminal prosecution without trial by jury in violation of the Sixth Amendment. (A correlative challenge has been that its treatment of a witness amounts to a bill of attainder, in violation of section nine of Article One of the Constitution.)
11. The legality of the proceedings at a particular session of the Committee on the ground that a quorum of its members was not present.
12. The legality of the proceedings on the ground that members of the Committee have been improperly elected to Congress.

Before attempting to set forth in any orderly fashion the findings of the courts in cases in which the Committee has been challenged with respect to any of the points listed above a brief description may be made of the cases themselves and of the manner in which they arose. In a two and a half year period between December, 1947, and April, 1950, five cases growing out of the work of the Un-American Activities Committee were decided finally at the court of appeals level and four more reached the Supreme Court for decision.[35] The cases that did not go

35. The cases in the first group were: United States v. Josephson, 165 F. 2d 82 (2d Cir. 1947), cert. denied 333 U.S. 838, 858 (1948), 335 U.S. 899 (1948); Barsky et al. v. United States, 167 F. 2d 241 (D.C. Cir. 1948), cert. denied 334 U.S. 843 (1948); Eisler v. United States, 170 F. 2d 273 (D.C. Cir. 1948), cert. granted 335 U.S. 857 (1948), dismissed as moot 338 U.S. 189 (1949); Lawson v.

beyond the courts of appeals raised the most basic issues concerning the law of congressional investigations. The Supreme Court was seemingly content to let the lower courts settle these issues since it refused to review any of these cases.

Three of the cases grew out of the Committee's investigation of the Joint Anti-Fascist Refugee Committee in 1946, two were the results of investigations of the National Council of American-Soviet Friendship and the National Federation for Constitutional Liberties in the same year, three were the result of the Committee's somewhat disorganized investigations in 1947 into the Communist Party and the comings and goings of certain international Communists—chiefly Gerhart Eisler, and one was the product of the Hollywood hearings later in 1947. As yet, the spectacular Communist espionage hearings of 1948 have resulted in no litigation in which the authority of the House Committee has been at issue, although a decision by the House of Representatives in 1950 to order the prosecution of certain witnesses who refused in 1948 to testify on the ground of self-incrimination may well ultimately produce such a result.

The three most important cases of this period were perhaps *United States v. Josephson*, which was decided by the Court of Appeals for the Second Circuit in 1947, *Barsky v. United States*, which was decided by the Court of Appeals for the District of Columbia in 1948, and *Lawson v. United States*, decided by the latter court in 1949.

Leon Josephson appeared before the Committee in New York in March, 1947, pursuant to a subpoena presumably to supply the Committee with information concerning the methods by which Eisler and other international Communists had been able to enter and leave the United States with great ease. However, upon his appearance he refused either to be sworn or to give testimony. At the request of the Committee the House of Representatives cited Josephson for contempt. He was then indicted and convicted in the federal district court in New York for violation of Section 192 of Title 2 of the United States Code. This verdict was affirmed by the Court of Appeals by a two-to-one

United States, 176 F. 2d 49 (D.C. Cir. 1949), cert. denied 339 U.S. 934, 972 (1950); Marshall v. United States, 176 F. 2d 473 (D.C. Cir. 1949), cert. denied 339 U.S. 933, 959 (1950).

The cases in the second group were: United States v. Bryan, 339 U.S. 323 (1950), affirming 174 F. 2d 525 (D.C. Cir. 1949); United States v. Fleischman, 339 U.S. 349 (1950), affirming 174 F. 2d 519 (D.C. Cir. 1949); Dennis v. United States, 339 U.S. 162 (1950), affirming 171 F. 2d 986 (D.C. Cir. 1948); Morford v. United States, 339 U.S. 258 (1950), affirming 176 F. 2d 54 (D.C. Cir. 1949).

vote. The majority consisted of Judges Swan and Chase, Judge Charles E. Clark being the dissenter.

Dr. Edward K. Barsky, Chairman of the Joint Anti-Fascist Refugee Committee, was subpoenaed together with Helen Bryan, executive secretary of the organization, and fifteen members of its executive board to appear before the House Committee in February and April, 1946, and to bring with them the organization's books and records relating to the receipts and disbursements of money, and correspondence with persons in foreign countries. All of the subpoenaed persons appeared, but none produced the requested documents. Thereupon, at the request of the Committee all of the witnesses were cited for contempt by the House and all were ultimately tried and convicted in the courts under Section 192. Barsky and others appealed these verdicts to the Court of Appeals for the District of Columbia which affirmed the verdicts by a two-to-one vote. The majority consisted of Judges Prettyman and Bennett Champ Clark, Judge Edgerton being the dissenter.

John Howard Lawson and Dalton Trumbo were two of the ten Hollywood witnesses who refused in October, 1947, to answer questions put to them by the House Committee including the now classic one, "Are you now or have you ever been a member of the Communist Party?" All ten were cited for contempt by the House but only Lawson and Trumbo were tried immediately under Section 192 in a District of Columbia court, the trials of the other eight being postponed by agreement until the validity of the prosecution of Lawson and Trumbo could be tested in the appellate courts. The two men were tried and convicted separately, but their appeals were heard jointly by the Court of Appeals for the District of Columbia. The latter court affirmed the verdicts unanimously.

Is the general authority of the Un-American Activities Committee valid? In virtually every case reaching the appellate courts some effort has been made to challenge the general authority of the Un-American Activities Committee. For example, it has repeatedly been argued that the Committee's enabling resolution and/or the actual record made by the Committee demonstrate that the Committee is not concerned with discovering factual information that may serve as a basis for legislation, but that instead its purpose is to influence public opinion or to expose

allegedly subversive people to public condemnation.[36] The implication of this argument is that the Committee's general authority has been granted or used for a purpose or purposes not hitherto recognized as valid by the courts. The argument was specifically rejected by the majority in the *Josephson* case. Judge Chase stated, ". . . we have no occasion now to decide whether a Congressional investigation may have exposure as its principal goal . . . . It is sufficient to say that the authorizing statute contains the declaration of Congress that the information sought is for a legislative purpose and that fact is thus established for us. . . ." The Court called attention to the express congressional powers to "provide for the common defense," "to raise and support Armies," "to provide and maintain a Navy," "to make Rules for the Government and Regulation of the land and naval Forces," "to make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers," to guarantee to every state a republican form of government and to protect the states against invasion and domestic violence, and suggested that their exercise might be facilitated by the findings of an un-American Activities investigation. It also took notice of the many types of legislation that might properly be enacted by Congress as a result of such an investigation, quoting with approval the following passage from a ruling of a federal district judge:

> "That the subject of un-American and subversive activities is within the investigating power of the Congress is obvious. Conceivably, information in this field may aid the Congress in legislating concerning any one of many matters, such as correspondence with foreign governments (U.S.C.A. Title 18, § 5); seditions conspiracy (Id. § 6); prohibition of undermining the morale of the armed forces (Id. § 9); suppression of advocacy of overthrow of the Government (Id. § 10); the registration of organizations carrying on certain types of propaganda (Id. §§ 14 and 15); qualifications for entering and remaining in Government service; the authorization of Governmental radio broadcasts to foreign countries; and other innumerable topics. Similarly such information may be helpful in appropriating funds." [37]

36. See infra p. 309 for the text of the Committee's enabling resolution.

37. United States v. Josephson, 165 F. 2d 82, 89 (2d Cir. 1947). The quoted passage is from a ruling by Judge Holtzoff in United States v. Bryan, 72 F. Supp. 58, 62 (D.D.C. 1947).

In the *Morford* case the Court of Appeals for the District of Columbia took notice of the argument that "when the subpoena was issued against the

In spite of the fact that legislative recommendations have not been a conspicuous feature of the reports of the Committee to the House and also that very little actual legislation can be traced to the work of the Committee, it is most unlikely that the courts can be persuaded to show any sympathy for the broad claim that the Committee's grant of authority or its exercise of that authority is unconcerned with the search for information in aid of legislation.[38] There is little doubt that Congress's

defendant the House Committee on Un-American Activities had already passed judgment on the National Council of American-Soviet Friendship and was seeking to obtain names of persons participating in its activities and supporting it financially and otherwise, for the sole purpose of adding such names to its black-list and to facilitate the committee's efforts to destroy the effectiveness of the National Council of American-Soviet Friendship in its advocacy of American-Soviet Friendship by placing undue burdens upon such continued advocacy," and that this meant "the committee was not acting in furtherance of a legislative purpose. . . ." The court rejected this argument, holding "that a legitimate legislative purpose is presumed when the general subject of investigation is one concerning which Congress can legislate, and when the information sought would materially aid its consideration." It added, "That presumption arises here, and it cannot be rebutted by impugning the motives of individual members of the Committee." 176 F. 2d 54, 58 (D.C. Cir. 1949).

38. There is, of course, always the possibility that a particular line of inquiry might be held deficient in the sense that no legislation could result from it. But varied and unpredictable though the Committee's interests have proved to be, it is doubtful whether the courts would hold that any of them lay completely outside the scope of legislative possibilities. For example, in undertaking to investigate the methods by which the Joint Anti-Fascist Refugee Committee raised funds and the nature of its contacts with persons in foreign lands it might seem as though the Committee had both exceeded the limits of the authority granted to it and moved beyond the limits of permissible congressional interest. But the court of appeals took notice of the existence of such official bodies as UNRRA and the President's War Relief Control Board, and held that they "clearly justified Congressional inquiry into the disbursement abroad of private funds collected in this country avowedly for relief but reasonably represented as being spent for political purposes in Europe." Barsky v. United States, 167 F. 2d 241, 244 (1948). Again in the *Morford* case it was argued that the Committee's investigation of the National Council of American-Soviet Friendship was not "pertinent to any matter of inquiry committed to the Committee by Congress." The Court of Appeals for the District of Columbia rejected the argument and stated, "The National Council's unstinted praise of the communistic regime in Russia, and its comparison of Soviet official behavior with that of the United States to the disparagement of the latter, led logically to the Committee's conclusion that here was such strong indication of an attack on the *principle* of our form of government as to justify inquiry" under the Committee's enabling resolution. 176 F. 2d 54, 56-57 (D.C. Cir. 1949).

In the *Eisler* case the Court of Appeals for the District of Columbia affirmed Eisler's conviction under § 192 by a two-to-one vote. The dissenting judge, Prettyman, stated that a judgment of acquittal should have been directed on the ground the government had failed at Eisler's trial to show that he had been summoned by the House Committee to testify on a matter falling within its authority under its enabling resolution. Prettyman added, "This record does not show, and we do not yet know, what it was that the Committee wanted appellant to testify about." 170 F. 2d 273, 284 (D.C. Cir. 1948). The majority does not appear to have given any consideration to this point.

legislative authority under the Constitution is such that it may properly authorize an investigation into the general field of subversive activity as a means of securing factual information in aid of legislation.[39]

Has the Committee's substantive authority brought it into conflict with the First Amendment? A more promising attack upon the House Committee has been that the specific authority granted to it brings it into conflict with the First Amendment. But this attack, too, has thus far failed in the courts.

The argument that the Committee has encroached upon the freedom of speech, press, and assembly guaranties of the First Amendment has been formulated in various ways. It has been argued that Congress's authority to undertake an investigation of subversive activity is limited by the clear and present danger doctrine. According to this doctrine Congress may not curb freedom of expression or related rights except where there is evidence that the exercise of such rights is creating a clear and present danger of a substantive evil that Congress has authority to prevent.[40] More specifically, it is argued that the investigating

39. In the *Barsky* case the majority states, "We think that inquiry into threats to the existing form of government by extra-constitutional processes of change is a power of Congress under its prime obligation to protect for the people that machinery of which it is a part. . . ." 167 F. 2d 241, 246 (D.C. Cir. 1948).

40. The first formulation of the clear and present danger doctrine was by Justice Holmes in the Court opinion in Schenck v. United States, 249 U.S. 47, 52 (1919): "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 439. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

In Whitney v. California, 274 U.S. 357, 376-78 (1927), Justice Brandeis in a concurring opinion said, "To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . . . no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. . . . Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. . . . The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State."

In Bridges v. California, 314 U.S. 252, 263 (1941), Justice Black in the Court opinion observes, "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil [that the legislature seeks to prevent by statute] must be extremely serious and the degree of imminence extremely high before utterances can be punished."

power is subject to the same limitations as the legislating power, and that in the absence of evidence that the nation is endangered by subversive activity the House Committee may not undertake a program of thought control by such means as exposure and publicity where legislation attempting the same thing would most certainly be held to violate the First Amendment. A totally different line of argument under the First Amendment has been that the Amendment establishes a right of privacy, or a right to remain silent, particularly as to an individual's political beliefs or affiliations, which rights have been violated by the Committee's oft-repeated demand that its witnesses state whether or not they are members of the Communist Party. One observer has pointed out, "Paradoxically enough, the 'right' to be silent has been vociferously asserted by some of our most loquacious citizens." [41]

However formulated, arguments based upon the First Amendment have consistently been rejected by the courts. In both the *Josephson* and *Barsky* cases the majorities held that a congressional committee may properly investigate the propaganda activities of political groups to determine whether there does exist a clear and present danger to American democracy that Congress may wish to meet through legislation. The majority judges in both cases refused to concede that the Un-American Activities Committee was itself attempting to meet the threat through exposure and publicity, or to decide whether this threat was sufficiently serious to constitute a clear and present danger. Instead, they implied that any such direct action by the Committee was incidental to its main purpose—securing information that would enable Congress to decide whether remedial legislation was needed. And the judicial position in these two cases was that the search for information must necessarily be allowed to reach wider limits than can be encompassed by legislation itself. The reasoning in the majority opinions runs somewhat as follows: A statute restrictive of speech or political activity is valid only when aimed at a clear and present danger. But the questioning of witnesses before a congressional committee concerning their political or propagandist activities must necessarily be broad where the purpose is to discover whether such activity does in fact create a clear and present danger. It will be time enough to consider whether a statute growing out of the investigation perchance violates the First Amendment, when such a statute is passed. In the meantime the courts must presume that Congress will not be

41. Nutting, op. cit., p. 181.

encouraged by the investigation at hand to pass unconstitutional legislation.[42]

Similarly, the courts have rejected the notion that there is any absolute right under the First Amendment to remain silent as to one's political affiliations or activities. Insofar as such affiliations or activities may affect the public welfare, Congress may properly seek information as to their nature and extent, and private persons must cooperate with such a search. In the *Lawson* case the Court of Appeals for the District of Columbia observed that it is "beyond dispute that the motion picture industry plays a critically prominent role in the molding of public opinion," took notice of "the current ideological struggle between communistic-thinking and democratic-thinking peoples of the world," and concluded "it is absurd to argue . . . that questions asked men, who, by their authorship of the scripts, vitally influence the ultimate production of motion pictures seen by millions, which questions require disclosure of whether or not they are or ever have been Communists, are not pertinent questions." And for good measure, the Court added, "Indeed, it is hard to envisage how there could be any more pertinent question" where a committee of Congress is investigating un-American propaganda activities.[43]

42. In the *Josephson* case the majority states, "The power of Congress to gather facts of the most intense public concern, such as these, is not diminished by the unchallenged right of individuals to speak their minds within lawful limits. When speech, or propaganda, or whatever it may at the moment be called, clearly presents an immediate danger to national security, the protection of the First Amendment ceases. Congress can then legislate. In deciding what to do, however, it may necessarily be confronted with the difficult and complex task of determining how far it can go before it transgresses the boundaries established by the Constitution." 165 F. 2d 82, 91 (2d Cir. 1947).

In the *Barsky* case the majority states, "In our view, it would be sheer folly as a matter of governmental policy for an existing government to refrain from inquiry into potential threats to its existence or security until danger was clear and present. And for the judicial branch of government to hold the legislative branch to be without power to make such inquiry until the danger is clear and present, would be absurd. How, except upon inquiry, would the Congress know whether the danger is clear and present? There is a vast difference between the necessities for inquiry and the necessities for action. The latter may be only when danger is clear and present, but the former is when danger is reasonably represented as potential.

"There was justification here, within the bounds of the foregoing restriction, for the exercise of the power of inquiry. The President . . . has announced to the Congress the conclusion that aggressive tendencies of totalitarian regimes imposed on free peoples threaten the security of the United States, and he mentioned the activities of Communists in that connection. . . . These culminations of responsible governmental consideration sufficiently demonstrate the necessity for Congressional knowledge of the subject and so justify its course in inquiring into it." 167 F. 2d 241, 246-247 (D.C. Cir. 1948).

43. 176 F. 2d 49, 53 (D.C. Cir. 1949). In the *Josephson* case the majority says, "Surely matters which potentially affect the very survival of our Gov-

It has also been argued that the Committee's enabling resolution violates the First Amendment under the rule that a statute which impinges on rights protected by the Amendment is void on its face if it is worded so broadly as to permit within the scope of its language the punishment of conduct clearly protected by the Amendment.[44] But the courts have been unwilling to apply this stringent rule to the resolution or statute by which a congressional investigation is authorized. There is no case concerning the Un-American Activities Committee in which the majority has given this argument careful consideration. But in the *Barsky* case, having noted the argument, Judge Prettyman asserted, "There is a difference between the particularity required in the specification of a criminal act and that required in the authorization of an investigation. . . ." [45]

Have the Committee's activities encroached upon rights safeguarded by the Fifth Amendment? At least three arguments against the activity of the House Committee have been based upon the Fifth Amendment. The first, and perhaps most serious, has been that since the resolution establishing the Committee defines the area of its investigative powers in exceedingly vague and nebulous terms any attempt to use criminal statutes to punish persons who fail to cooperate with the Committee is unconstitutional on the traditional ground that proscribed criminal conduct

ernment are by no means the purely personal 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. The doctrine of Kilbourn v. Thompson . . . is, then, not here involved." 165 F. 2d 82, 89 (2d Cir. 1947).

44. This rule finds expression in Winters v. New York in the Court opinion by Justice Reed: "It is settled that a statute so vague and indefinite . . . as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face. . . . 333 U.S. 507, 509 (1948).

See also Stromberg v. California, 283 U.S. 359, 369 (1931); Herndon v. Lowry, 301 U.S. 242, 258-259 (1937); and Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).

On the other hand, the Supreme Court has sometimes upheld statutes, whose broad wording raised doubts about their constitutionality, as long as they had been narrowly applied in the cases bringing them to the Court's attention. For example, in the *Chapman* case the Court noted the argument that because the statute defining contemptuous conduct by a witness before a congressional committee as a misdemeanor referred to "any" matter under inquiry it was "fatally defective because too broad and unlimited in its extent," but rejected this argument preferring instead to follow the rule "that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion. . . ." 166 U.S. 661, 667 (1897).

45. 167 F. 2d 241, 248 (D.C. Cir. 1948). Judge Edgerton in his dissenting opinion gave this argument more careful, and sympathetic, consideration. See infra p. 321.

must be "set forth with clarity, so that the person to whom it applies may determine what conduct is legal and what is not." [46] Persons subpoenaed to appear as witnesses before congressional committees are clearly entitled on the basis of Supreme Court decisions in the *Kilbourn*, *Daugherty*, and *Sinclair* cases to refuse to give testimony if the subject matter of the investigation lies outside the scope of Congress's legitimate interests, and they are entitled to refuse to answer specific questions which are not in fact pertinent to the legitimate subject matter of an inquiry. It has been argued that the subject matter of the un-American activities investigation is so vaguely defined that a witness has no basis for estimating his responsibility to cooperate by appearing or answering questions if he is to avoid prosecution for crime.

The Committee's enabling resolution authorizes it to investigate:

> "(i) the extent, character, and objects of un-American propaganda activities in the United States,
> "(ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and
> "(iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

In trying to determine whether he might or might not refuse to answer a question as not pertinent a witness before the House Committee might well find it difficult to know:

a. what "un-American propaganda" or "subversive and un-American propaganda" is;
b. whether the Committee is authorized to investigate all "subversive and un-American propaganda . . . instigated from foreign countries," or only that subversive and un-American propaganda, foreign or domestic in origin, that "attacks the principle of the form of government as guaranteed by our Constitution";
c. what "the principle [note the emphasis upon *one* principle] of the form of government as guaranteed by our Constitution" is;
d. what ground is covered by "all other questions in relation thereto."

46. United States v. Josephson, 165 F. 2d 82, 97 (2d Cir. 1947).

The courts have conceded that this first argument under the Fifth Amendment is a serious and substantial one, but in the end they have rejected it in those specific situations in which it has been raised. For example, in the *Josephson* case the majority held that since the witness had refused to be sworn or to answer any questions at all he was precluded from raising this defense.[47]

More specifically in the *Barsky* and *Lawson* cases the Court of Appeals for the District of Columbia held that under that portion of the Committee's enabling act which authorizes it to investigate "the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution," the pertinency of a specific query as to a witness's membership in the Communist Party is made clear. In the *Lawson* case Judge Bennett Clark stated that it would be hard to imagine a more pertinent question to an inquiry into un-American activity as defined in the resolution creating the Committee in view of the holding (of the *Barsky* case) that Communism "is antithetical to the principles which underlie the form of government incorporated in the Federal Constitution and guaranteed by it to the States." [48]

47. In the decision in the *Josephson* case the court added, "At the very least the language of the authorizing statute permits investigating the advocacy of the idea that the Government or the Constitutional system of the United States should be overthrown by force, rather than modified by the peaceful process of amendment . . . . The vice of vagueness in that language, if any, lies in the possibility that it may authorize, though we do not decide that it does so, investigations relating to the advocacy of peaceful changes." 165 F. 2d 82, 88.

In the decision in the *Barsky* case the court inferred that, standing by itself, Subclause (i) of the resolution might be regarded as so vague as to be unconstitutional. But it concluded that Subclause (ii) "is definite enough." And it added, "It conveys a clear meaning and that is all that is required. The principles which underlie the form of the existing government in this country are well-enough defined . . . ." In his dissenting opinion Judge Edgerton chided the majority for putting "a plural where Congress put a singular," and added, "To me it is not obvious how much Congress meant by 'the principle,' or how much the court means by 'the principles.'" 167 F. 2d 241, 247-248, 262 (D.C. Cir. 1948).

In the *Morford* case the Court of Appeals for the District of Columbia made a rather petulant reply to the argument that the enabling resolution was defective because of vagueness. It stated, "The Resolution authorized investigation into propaganda which attacks the principle of our constitutionally-guaranteed form of government. It is difficult to imagine how the standard could be further particularized, or how the test could be misunderstood. The National Council's literature either did or did not attack the principle of our form of government. It was not necessary to justify inquiry that there be an attack on our government, or an advocacy of its violent overthrow; enough if the *principle* of our form of government were attacked." 176 F. 2d 54, 57 (D.C. Cir. 1949).

48. Lawson v. United States, 176 F. 2d 49, 52, 53 (D.C. Cir. 1949); Barsky v. United States, 167 F. 2d 241, 244, 248-249, 250 (D.C. Cir. 1948).

A second argument under the Fifth Amendment which has been raised against the Committee is that the implied right to the equal protection of the laws under the Amendment has been violated by the Committee because of the highly discriminatory fashion in which it had investigated some types of propaganda activity while ignoring others. In rejecting this argument in the *Josephson* case the court was content to refer to "the well-established principle that the legislature need not strike at the whole of an evil, but only at a part" and to add that in this respect "the Congressional power to investigate is as flexible as its power to legislate." [49]

The third argument under the Fifth Amendment has concerned the privilege against self-incrimination. There has as yet been no court case that has clearly raised the classic problem outlined earlier, largely because the House Committee until recently allowed witnesses to refuse to answer questions where they were willing to pay the price of pleading self-incrimination to purchase the privilege of remaining silent.[50] Prior to 1950 all of the Committee's witnesses prosecuted for contempt had justified their refusal to answer questions on some other ground. For example, in the Hollywood hearings refusal to answer the question concerning membership in the Communist Party was based upon an alleged right under the First Amendment to remain silent as to one's political affiliations. In 1950, the Committee did reverse its policy concerning the self-incrimination issue, and, at its request, the House of Representatives voted to order the prosecution of a number of witnesses who had refused to testify on the ground of self-incrimination, but at the end of the year the courts had not yet passed upon the legal issues involved in these proceedings.

This sudden reversal of policy by the Committee may result in its first setback by the appellate courts, for the soundness of its legal case against these uncooperative witnesses is far from clear.[51] There are many uncertainties about the law of self-incrimination but the following relevant points may be noted:

49. 165 F. 2d 82, 92 (2d Cir. 1947). See also the decision in the *Barsky* case, 167 F. 2d 241, 251 (D.C. Cir. 1948).

50. Refusal of witnesses before the Un-American Activities Committee to testify on grounds of self-incrimination occurred at the very beginning of the Dies Committee hearings when Earl Browder and William Z. Foster used this excuse to refuse to answer the Committee's questions. Moreover, the Committee vacillated from the very beginning between accepting and rejecting the ground as valid. See Ogden, The Dies Committee, 134, 143, 148, 196, 202 (1943).

51. The case of United States v. Rosen, 174 F. 2d 187, 192 (2d Cir. 1949),

1. The Fifth Amendment expressly establishes the privilege not to be a witness against one's self, as a *federal* right. Nonetheless, the Supreme Court has consistently refused to recognize this right as a basic or fundamental one—as one "implicit in the concept of ordered liberty," as an "immutable principle of justice," as necessary to "a fair and enlightened system of justice," or as "of the very essence of a scheme of ordered liberty." [52] Since this attitude has been expressed in cases where the right has seemingly been denied to *defendants* in *criminal* cases, it is unlikely that the Court will show much enthusiasm for a holding that witnesses before congressional committees are entitled to a *broad* exercise of the right.

2. Nonetheless, it seems likely that the Court will hold that the Fifth Amendment right does extend generally to witnesses before such committees.

3. It seems likely that the Court will hold that the immunity statutes are inadequate and do not withdraw the constitutional right from witnesses before congressional committees.[53]

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bears out this statement. Rosen appeared before a federal grand jury in New York City in March, 1949, and refused on the ground of self-incrimination to answer many of the same questions that he had earlier refused to answer before the Un-American Activities Committee concerning the disposition of the Ford roadster Alger Hiss claimed to have given Whittaker Chambers. He was adjudged in contempt but the Court of Appeals for the Second Circuit reversed the judgment on the ground that Rosen "was justified in believing that he was in a precarious situation" and that "he had the right to refuse to answer questions which might connect him with the Ford car. . . ."

52. This attitude of the Court toward the right is expressed in cases in which the Court has refused to hold that the Fourteenth Amendment carries freedom from self-incrimination over into the area of state criminal procedure. Twining v. State of New Jersey, 211 U.S. 78 (1908); Adamson v. California, 332 U.S. 46 (1947). See also Palko v. Connecticut, 302 U.S. 319, 325 (1937).

53. Congress could presumably meet this difficulty by amending the present immunity statute (18 U.S.C. § 3486 [1946]) so as to restore the absolute immunity that was granted by the act of 1857. As the Washington Post put it in an editorial in its issue of September 14, 1948, the problem is to devise an immunity statute adequate to withdraw from witnesses before congressional committees the privilege against self-incrimination, but not so sweeping as to prevent the prosecution of a Fall or Meyers following his appearance before such a committee. The Post suggests that committees of inquiry be given discretionary power to grant complete immunity to witnesses on a selective basis for "in the case of many witnesses subpoenaed before congressional committees the value of having their stories told in public far exceeds the public interest in their possible prosecution for some crime that might be uncovered."

The problem has been elsewhere posed in the following language: "An adequate immunity statute would give to legislative committees the power to require testimony of witnesses, but the question arises as to the wisdom of enacting such a statute. Clearly, immunity as broad as that required by the Supreme Court should not be granted unless the benefit to be derived

4. The recent decision of the Supreme Court in the *Blau* case, although specifically concerned with the rights of a witness before a federal grand jury, indicates that a witness before a congressional committee may rightfully refuse on the ground of self-incrimination to answer the specific question, "Are you now or have you ever been a member of the Communist Party?" [54]

5. Many witnesses before the House Un-American Activities Committee have used the self-incrimination ground in seemingly improper and even irresponsible fashion to refuse to answer questions, answers to which could not possibly incriminate them, either because such answers would not relate to criminal conduct or because the statute of limitations had run with respect to any criminal conduct that might be revealed. Perhaps the most ridiculous assertion of the right occurred during the 1948 Communist Espionage hearings when Henry Collins used this ground to refuse to answer the question, "Do you belong to the American Legion?" and Lee Pressman refused to answer the Committee's question, "Have you ever been in the Pennsylvania Railroad station in New York City?" [55]

6. A careful reading of the printed hearings suggests that the Committee has not always established a satisfactory basis for a prosecution under Section 192 of those witnesses who have refused to testify on grounds of self-incrimination because of its failure to have informed such witnesses that they were using the ground improperly or to have directed them to answer such questions. In a judicial proceeding it is customary for a judge to follow such a policy before holding an uncooperative witness in contempt of court. As a matter of fact, the printed hearings reveal statements by Committee members to the effect that the Committee recognizes and accepts the use by witnesses of the self-incrimination ground to refuse to answer questions.[56]

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from the possible increased efficacy of legislative investigations is sufficient to outweigh the social loss implicit in legislative largesse to admitted criminals. In England, the benefit derived from legislative investigations has been deemed to justify such immunity for over one hundred and fifty years. Whether the possibility of increasing the effectiveness of congressional committees similarly justifies the granting of such a broad immunity is a question for serious congressional deliberation." Note, 49 Col. L. Rev. 87 (1949).

54. Blau v. United States, 19 U.S. Law Week 4062, 4094 (1950, 1951). But cf. Rogers v. United States, 19 U.S. Law Week 4094 (1951).

55. Hearings Regarding Communist Espionage in the United States Government, 80th Cong., 2d Sess. 807, 1026 (1948). Pressman finally relented and "in a spirit of cooperation" informed the Committee that he had taken a train in said station the same morning.

56. Id. at 591 (Mundt), 695, 1026 (Nixon). In the second instance Repre-

One of the cases growing out of the Joint Anti-Fascist Refugee Committee hearings which reached the Supreme Court did raise a secondary issue of self-incrimination. The case was *United States v. Bryan.* Helen Bryan, executive secretary of the JAFRC, was found guilty of contempt for refusing to produce the organization's records before the Committee and to answer the question whether the organization's executive board supported her action in this respect. At her trial in the district court the transcript of the proceedings before the Committee, including the defendant's testimony, was accepted as evidence. On appeal, Bryan argued that this had, in effect, forced her to be a witness against herself. In the majority opinion of the Supreme Court, Chief Justice Vinson admitted that the literal language of Title 18, Section 3486, United States Code, which grants immunity to witnesses before congressional committees against the use of their testimony in any subsequent criminal proceeding against them, except in a prosecution for perjury committed in giving such testimony, seemingly had been violated in this case. But the majority held that thus to apply the statute in this case "would subvert the congressional purpose in its passage" and lead "to absurd conclusions." In effect, the majority asked how a recalcitrant witness could be prosecuted for contempt without the introduction as evidence of a transcript of the Committee proceedings to demonstrate the contemptuous conduct of the witness.

In a vigorous dissenting opinion Justices Black and Frankfurter insisted that Congress had revealed a clear intention in the statute to make only one exception to the prohibition against the use of testimony in a congressional hearing in a later criminal

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sentative Nixon told the witness, Victor Perlo, "You have the right to plead self-incrimination on any particular matter, and you will note that the committee has never questioned that matter, and you will note that the committee has never questioned that right. . . ." On the other hand, there were instances where the Committee did seemingly reject the ground, order a witness to answer questions, and warn him that further refusal to testify might result in contempt proceedings against him. For example:

"Mr. Nixon. Now, Mr. Rosen and counsel, I want you to listen carefully. You may refuse to answer questions on the ground of self-incrimination. It is possible that the answer given might involve you in a crime, but this committee is unable to see how any answer concerning whether or not you purchased a 1929 automobile could involve you in a crime, particularly since any crime that could be involved in the purchase of such a car would now be outlawed by the statute of limitations.

"I will instruct you further that if you refuse to answer a question concerning a 1929 automobile on the grounds of self-incrimination and if the committee comes to the conclusion that no crime could be involved, that it will be the duty of this committee to cite you for contempt of Congress." Id. at 1209-1210.

proceeding against a witness—that of a prosecution for perjury—and they accused the majority of "judicial law-making." Moreover, they insisted that a strict interpretation of the statute would not lead to absurd conclusions because it would be perfectly possible in a contempt case for the prosecution to call witnesses who could testify as to the defendant's contemptuous conduct before a congressional committee, thus making it unnecessary to introduce as evidence a transcript of the accused's own testimony (or refusal to testify). This seems like hair-splitting on the part of the dissenters, for it is hard to understand the reasoning by which an official transcript of what transpired at a congressional hearing should be excluded while the word of persons present in the Committee room should be admitted. It is perhaps significant that the two dissenters were not prepared to say that the statute, as interpreted by the majority, violated the self-incrimination clause of the Fifth Amendment. Instead they were content to argue that the Court was misinterpreting the statute.

Has the Committee inflicted punishment upon its witnesses thus violating the constitutional prohibition against bills of attainder? It has been argued that the House Committee has tried certain individuals on the charge of subversive activity, has found them guilty, and has then subjected them to punishment by stirring up public opinion against them and in some instances causing them to lose their jobs. The result has been, the argument continues, to deprive such persons of their right to trial by jury under the Sixth Amendment. Much the same argument is seen in the claim that the punitive effect which certain Committee hearings have had upon witnesses amounts to a bill of attainder in violation of section nine, Article One of the Constitution. In terms of traditional constitutional law it is difficult to take this particular argument seriously. The bill of attainder and trial by jury clauses of the Constitution have generally been thought of as concerning only the individual who is accused of *criminal* conduct. Clearly, the Committee has not in any such formal sense been trying its witnesses for crimes. It is true that in 1946 in *United States v. Lovett* a divided Supreme Court did hold that action by Congress in an appropriation act ordering that no funds should be used to pay the salaries of three named federal officers amounted to a bill of attainder and was thus unconstitutional. The Court said:

"Section 304, thus, clearly accomplishes the punishment

> of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal. No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson 'guilty' of the crime of engaging in 'subversive activities,' defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.' The Constitution declares that that cannot be done. . . ." [57]

The decision in the *Lovett* case has undoubtedly encouraged witnesses who have been prosecuted for contempt of the House Committee to raise the bill of attainder argument in their defense, and the issue has actually received some consideration at the appellate court level. In the *Eisler* case the Court of Appeals for the District of Columbia ruled that the trial court had properly refused Eisler permission to introduce evidence showing that the Committee's real purpose in calling him as a witness had been to harass and punish him for his political beliefs. The court of appeals stated that Congress's power to compel private persons to appear and give testimony in aid of the legislative function is beyond question and that the courts have "no authority to scrutinize the motives of Congress or one of its committees." [58]

Actually it would be a considerable step from the *Lovett* decision to a Supreme Court holding that the Un-American Activities Committee has violated the bill of attainder clause of the Constitution by holding one of its witnesses up to public opprobrium or causing him to lose his job with a private employer. In the *Lovett* case there was no doubt whatsoever that the loss of job was the direct result of deliberate congressional action. There was no doubt that Congress imposed this penalty because it was convinced of the disloyalty of the three men dismissed. For the Court to call this action a bill of attainder represented a step beyond established constitutional law on the subject, but its decision was supported by a perfectly clear factual situation.

57. 328 U.S. 303, 316 (1946).
58. 170 F. 2d 273, 279 (D. C. Cir. 1948).

The facts supporting the often-made charge that the House Committee is more interested in seeing certain of its witnesses suffer loss of reputation or job than it is in obtaining factual information as a basis for the enactment of legislation by Congress are far less clear. This is not to say that the Committee has not been so motivated. But for any court to isolate the evidence suggesting that this has been so, while simultaneously ignoring the interest shown by the Committee, however slight, in facts as a basis for legislation and to conclude that the Constitution has been violated would be an act of judicial arrogance.[59]

In another sense, however, the bill of attainder argument raises an issue that cannot be easily dismissed. There can be little doubt that certain witnesses before the Un-American Activities Committee have suffered and been punished in just as realistic a sense as though they had been placed on trial in a criminal court and traditional criminal sanctions had been invoked against them. Professor John Frank has written: "Our own generation is finding more sophisticated ways of . . . putting economic instead

59. The Hollywood hearings, already mentioned, provide perhaps the strongest basis for such a judicial finding. Ten witnesses lost their jobs in the motion picture industry as the result of their refusal to answer the House Committee's questions. To say that this development pleased the Committee would be gross understatement. Moreover, the Committee showed so little interest in possible legislative action based upon the investigation that it did not even bother to file a formal report of its findings with the House of Representatives. At the same time, a court decision which accepted the conclusion that the Committee was interested in seeing its witnesses punished and disinterested in legislation would necessarily be based upon rumor, inference, and conjecture. For the courts to attempt to check the legislative process at the committee stage on any such uncertain basis would be deplorable.

A further argument against judicial supervision of congressional investigations is the difficulty the courts might have in enforcing decisions adverse to the congressional interest. One may doubt whether rulings in the *Barsky* or *Josephson* cases that the Un-American Activities Committee was an unconstitutional body would have brought an end to the Committee. All that was before the courts was the legality of the convictions of Barsky and Josephson under Section 192. The courts could have seen to it that the two men did not go to jail but it is a fair guess that the Committee would have gone right on with its program and that the House of Representatives would have supported it. Moreover, to provide a sanction to compel witnesses to cooperate with the Committee the House could have reverted to the early practice of bringing recalcitrant witnesses before its own bar to be tried for contempt, instead of turning them over to the courts for trial under Section 192. It is true that the courts have, from the time of *Anderson v. Dunn*, claimed the right to review such proceedings. But there has never been a showdown with the courts on the issue of which branch has the ultimate authority in this situation. If a witness were tried before the House, found guilty, and ordered imprisoned by the House Sergeant-at-Arms for the duration of the session, would not the House hold the upper hand if it simply refused to recognize the validity of any court ruling ordering the prisoner set free, and if it protected its Sergeant-at-Arms against any reprisal by the courts?

of criminal sanctions on persons whose speech is offensive. These sanctions ought to be recognized as mere variants of criminal sanctions, and ought to be subject to the same tests." [60] Here the degree to which the hearings of this congressional committee have been personalized establishes a real threat to the future of congressional inquiries as fact-finding, legislative-aiding agencies. If in fact these committees are to be used increasingly as the means of exposing and "punishing" individuals deemed dangerous to the public welfare by committee members then we shall have no choice, if we wish to preserve the most basic traditions of Anglo-American criminal procedure, but to subject such agencies to drastic controls—controls that may well hamper their effectiveness as fact-finding agencies. But that such control should now be achieved by encouraging the courts to see bills of attainder in committee treatment of witnesses would seem to be an exceedingly dubious way of dealing with this problem.

Miscellaneous constitutional arguments against the House Committee. A number of miscellaneous arguments have been raised against the Un-American Activities Committee, no one of which has received much support from the courts. One of the most ingenious of the arguments attacks the Committee through its personnel on the ground that the election of such southerners to the House of Representatives as John Rankin has taken place in violation of the Fourteenth and Fifteenth Amendments. Their illegal election by an electorate from which Negroes have been unlawfully excluded is said to taint the congressional actions in which they have participated, including their committee activities.[61] The argument obviously proves too much and no judge has given it serious consideration.

In the *Eisler* case the Court of Appeals for the District of Columbia considered the argument that, because the House Committee had denied Eisler's request that he be granted three minutes in which to state legal objections to the hearing before he was sworn, a conviction for *willful* default because of failure to obey a subpoena summoning him to appear and give testimony

60. Frank, The United States Supreme Court: 1949-50, 18 U. of Chi. L. Rev. 1, 32 (1950).

61. For example, one of the reasons given by Lee Pressman for his refusal to answer questions put to him by the Committee on August 20, 1948, was the following: ". . . the committee is unlawfully constituted by reason of the presence thereon of one John Rankin, who holds an alleged seat as a Member of Congress from Mississippi." Communist Espionage Hearings, supra note 55, at 1023.

could not stand. The trial judge had not allowed Eisler an opportunity to present evidence that he had merely wanted to state such legal objections. By a two-to-one vote the court rejected this argument. In the majority opinion Judge Bennett Clark says that in asking for a few minutes Eisler had not told the Committee that he wanted to state legal objections to the hearing. Clark accepts the Un-American Activities Committee's version of the episode—that Eisler had held in his hands a lengthy mimeographed statement he intended to read before being sworn and that the document would have taken much more than three minutes to read. In his dissenting opinion Judge Prettyman states that he thinks Eisler should have been allowed at his trial to show that his purpose in asking the Committee for time had been merely to state legal objections to the proceedings, for, in Prettyman's opinion, such evidence would have been significant in showing that Eisler had not willfully defaulted.[62]

The validity of certain of the contempt proceedings growing out of the Joint Anti-Fascist Refugee Committee hearings was challenged before the Supreme Court in 1950 on the ground that the presence of a quorum of the Committee members at the time the alleged contemptuous conduct occurred had not been proved. The Court rejected this argument holding that the statute that declares a witness who willfully defaults when subpoenaed to produce papers before a congressional committee guilty of a misdemeanor does not require that a quorum of the committee be present when the contempt occurs.[63]

United States v. Fleischman, a companion to the *Bryan* case,

62. Eisler v. United States, 170 F. 2d 273 (D.C. Cir. 1948). The Supreme Court agreed to review the case, but when Eisler fled the country in May, 1948, a majority of the justices, in a per curiam opinion, held that the case should be removed from the docket, pending the return of the fugitive. Chief Justice Vinson and Justice Frankfurter indicated in a dissenting opinion that they favored dismissing the case outright, for want of jurisdiction. On the other hand, in separate dissenting opinions, Justices Murphy and Jackson stated their belief that the Court should have proceeded to decide the case on its merits, Eisler's flight notwithstanding. Alone among the justices, Jackson indicated how he would have decided the case. He would have affirmed the conviction of Eisler. Eisler v. United States, 338 U.S. 189 (1949).

63. United States v. Bryan, 339 U.S. 323 (1950); United States v. Fleischman, 339 U.S. 349 (1950). In 1949, by a five-to-four vote, the Supreme Court had set aside a conviction for perjury committed before a congressional committee on the ground that a quorum of the committee had not been present at the time of the perjury. However, the decision rested on the ground that in the absence of a quorum such a committee was not a "competent tribunal" as required by the perjury statute under which the prosecution had taken place. Christoffel v. United States, 338 U.S. 84 (1949). The contempt statute in the *Bryan* and *Fleischman* cases did not contain this same phraseology.

raised an additional issue to those passed upon by the Supreme Court in the latter case. Fleischman, one of sixteen members of the board of directors of the Joint Anti-Fascist Refugee Committee, had been found guilty of contempt for her part in the collective failure of the board to produce the organization records before the House Committee. It was argued before the Supreme Court that at her trial the government should have been required to prove that as a single member of the board she had had it within her power to take some effective step toward collective action by the board to produce the records. The Supreme Court majority rejected this argument and held that the burden of the proof had properly been placed on the defendant to show that she had done all she could to get the board to produce the records. The evidence indicated that she had done nothing toward that end.[64]

Some of the Un-American Activities Committee cases that have reached the appellate courts have raised issues as to trial court procedures, which have had nothing to do directly with the authority or procedures of the Committee. For example, in *Dennis v. United States*, it was argued that when Dennis was tried under Section 192 for contempt of the House Committee the trial court had erred in failing to sustain Dennis's challenge for cause of all prospective jurors who were employed by the federal government on the ground that they could not help but show bias because of the existence of the federal loyalty program. By a five-to-two vote the Court rejected the argument.[65] On the other hand, during the same term the Supreme Court in a per curiam opinion in *Morford v. United States* held that the defendant's right to an impartial jury had been infringed where the trial court had refused to allow him to interrogate prospective government employee jurors concerning their ability to render a just verdict in the face of their own troubles under the loyalty program. Morford was granted a new trial and was then found guilty a second time.[66]

64. 339 U.S. 349 (1950). Justices Black and Frankfurter dissented, and Justices Douglas and Clark did not participate. Justice Black stated in the dissenting opinion: "Refusal [under Section 192] to comply with a subpoena to produce papers can be punished only if the witness has power to produce. It is a complete defense for him to show that the papers are not in his possession or under his control. . . . A command to produce is not a command to get others to produce or assist in producing."

65. 339 U.S. 162 (1950).

66. 339 U.S. 258 (1950). This reversal of the judgment in the first *Morford* trial is the only instance where an Un-American Activities Committee witness has obtained a favorable ruling from an appellate court. The judgment in

The Dissenting Opinions of Judges Clark and Edgerton—In both the *Josephson* and *Barsky* cases the verdicts of guilty were affirmed at the court of appeals level by two-to-one votes. In the *Josephson* case Judge Charles E. Clark dissented and in the *Barsky* case Judge Henry W. Edgerton dissented. Each of these judges wrote a long dissenting opinion in which the constitutional arguments against the House Committee are examined in systematic fashion and in which certain of these arguments receive vigorous, unqualified approval. Each is an eminent judge. Clark was once Dean of the Yale Law School and Edgerton was a professor at the Cornell Law School. Accordingly, the careful, detailed statements of these men that the Un-American Activities Committee does violence to the Constitution of the United States should receive respectful attention, even though the Supreme Court was seemingly so little impressed by their stands that it refused to grant certiorari.

Both judges would accept the argument that the House Committee's enabling act is unconstitutional because it encroaches upon rights safeguarded by the First Amendment, both would hold that the enabling act is so vague that when coupled with a criminal statute to punish witnesses for failure to cooperate with the Committee it comes into conflict with the Fifth Amendment, and Judge Edgerton would also hold the enabling act invalid as a bill of attainder.

In considering the argument under the First Amendment, Judge Clark draws heavily upon an unsigned note, entitled "Constitutional Limitations on the Un-American Activities Committee." [67] He picks up two points that are suggested somewhat tentatively in this article, namely, that Congress cannot undertake a completely unlimited inquiry in the area of the First Amendment, and that it cannot accomplish by publicity what it cannot do by legislation, and lends both his support. His own reasoning runs somewhat as follows:

The investigative power of Congress can be no broader than the extreme limits of its legislative power. In matters affecting speech and press the legislative and investigative powers are both limited by the clear and present danger test. If a statute sought to restrict speech and press in words as broad and vague

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the second *Morford* trial was sustained by the Court of Appeals for the District of Columbia and the Supreme Court refused to grant certiorari. 184 F. 2d 864 (D.C. Cir. 1950).

67. See note 5, supra.

as those used in the Committee's enabling resolution it would certainly be declared unconstitutional. This being the case, the resolution itself is unconstitutional, for Congress may not do by investigation what is forbidden as legislation. If the resolution were worded in the pattern of the Alien Registration Act of 1940 to the effect that the House Committee is directed to investigate propaganda advocating the overthrow of the government by force or violence it could be held constitutional, just as the 1940 act has been.[68]

To put it somewhat differently, Judge Clark agrees that Congress may properly conduct an investigation to discover whether there are facts suggesting the existence of a clear and present danger to the well-being of the state which it may then seek to curb by legislation. But such an investigation must be limited to a search for information concerning the kind of clear and present danger that can be met by legislation if it is found to exist. As it is, even if the Un-American Activities Committee does discover unmistakable evidence of the diffusion within the United States of propaganda of a domestic origin attacking "the principle" of the form of American government, Congress cannot constitutionally seek to suppress such propaganda by legislation. Thus the resolution is broader than it needs to be, and is at the same time unconstitutional.

Judge Clark, and Judge Edgerton as well, reject the further argument on behalf of the House Committee that since in the cases at hand it was staying within proper bounds, in that it was actually seeking information pertaining to the program of international Communism, the enabling resolution should not be held to violate the First Amendment on the ground it contains language that would permit the Committee to go beyond proper bounds. Edgerton says on this point, "Even if the views the House Committee sought to elicit from these appellants had been of a sort that Congress might properly restrain, by investigative or other action aimed specifically at such views, the appealed convictions would have to be reversed. 'The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government. . . .' "[69]

68. The 1940 act has been declared constitutional by the Court of Appeals for the Eighth Circuit in Dunne v. United States, 138 F. 2d 137 (8th Cir. 1943), and by the Court of Appeals for the Second Circuit in United States v. Dennis, 183 F. 2d 201 (2d Cir. 1950).

69. 167 F. 2d 241, 258 (D.C. Cir. 1948). The quoted passage is from the opinion in Herndon v. Lowry, 301 U.S. 242, 263 (1937).

Judge Edgerton is also impressed by the fact that the Alien Registration Act has been law since 1940 and that it goes about as far in curbing un-American propaganda as any constitutional act can, that is, it outlaws propaganda advocating the overthrow of government by force and violence. This leads him to the conclusion that the House of Representative's purpose in setting up the Un-American Activities Committee was exposure of certain propaganda activities much less specific or dangerous than this, and not a search for factual information as a basis for further legislation. Thus, again the House appears to be seeking to accomplish by exposure what cannot be done by legislation.

Judge Edgerton also holds that the First Amendment establishes the right of a person to remain silent as to political beliefs and affiliations and that the resolution establishing the Committee has encroached upon that right.

Little need be added to what has already been said about the Fifth Amendment argument. Both judges are of the opinion that the key word in the resolution authorizing the Committee to investigate certain types of propaganda is "un-American," that this word is so vague that no witness before the Committee can possibly know when he is entitled to refuse to cooperate on the ground that a particular line of inquiry being pursued by the Committee exceeds its grant of authority or that certain questions being put by it are not pertinent to a permissible line of inquiry, and that thus any attempt to punish an uncooperative witness under such a criminal statute as Section 192 violates the due process clause of the Fifth Amendment.[70]

On the bill of attainder point, Judge Edgerton holds that the Committee's enabling act, as construed and applied by the Committee, creates an offense against the United States, "delegates to the Committee the ascertainment of individuals to be punished and the infliction of punishment; provides no standard of guilt; compels the individual, in the committee's discretion, to testify against himself; deprives him of the right to testify in his own defense; and deprives him also of the right to counsel, the right to call witnesses, and the right to cross-examine opposing wit-

70. Judge Clark concludes: "Since this is a penal statute we are called upon to enforce, standards so vague and doubtful should be adjudged insufficient under the settled requirements that prohibited conduct must for criminal purposes be set forth with clarity, so that the person to whom it applies may determine what conduct is legal and what is not." 165 F. 2d 82, 97 (2d Cir. 1947).

nesses." [71] He holds that the Committee has intentionally inflicted punishment on certain persons by bringing about their "dismissal from employment" and by subjecting them to "publicity and opprobrium." He then quotes with approval the holding of the Supreme Court in the *Lovett* case that no "congressional action, aimed at . . . named individuals, which stigmatize[s] their reputation and seriously impair[s] their chance to earn a living" can be sustained.[72]

Judges Clark and Edgerton have undoubtedly made the most of the constitutional case against the House Committee and at times their arguments are quite persuasive. But when everything is considered, it is difficult to avoid the conclusion that the measure of judicial review of the investigating power of Congress which their stand entails would give to the courts a dangerous degree of power to check the legislative branch of the government. In spite of the fact that he takes the highly dubious stand of the Supreme Court in the *Kilbourn* case as his point of departure, Judge Clark ends his opinion with an acknowledgement that the congressional investigation has been "so productive of good in so many instances in our history, that no one would wish to hamper it improperly." He agrees also that "the force of public opinion and the expression of the electorate at the polls must remain its main source of control." But he nonetheless asserts that in "the narrow, though important, field of constitutional liberties, more control is desirable" and he finds a rationalization for a judicial check upon the House Un-American Activities Committee in the thought that the Committee's exercise of the investigative power is endangering the standing of this all-important power in the minds of a liberty-loving people and that accordingly "the application of a proper restraint" will prove "a source of strength in the long run, rather than the reverse." [73]

It seems wise to abandon the hope that the Un-American Activities Committee may be curbed or destroyed through judicial intervention. It seems apparent that the courts, least of all the Supreme Court, have no intention of exercising the power of judicial review to the point where serious constitutional defects will be found in the Committee's authority or procedures. Only once in history has the Supreme Court challenged a congressional investigation as to its basic constitutionality and it seems likely

71. 167 F. 2d 241, 260 (D.C. Cir. 1948).
72. Ibid.
73. 165 F. 2d 82, 100 (2d Cir. 1947).

that, while the Court has never said so in so many words, it is now of the opinion that this decision was a mistake. It is, of course, perfectly possible for Congress to violate the Constitution by authorizing an investigation whose subject matter lies beyond the limits of congressional power. But since an investigation does not in itself amount to a statement of public policy to which all citizens must conform, but is rather a means by which the legislative process is carried on, there is considerable weight to the argument that the duty to see that no violence is done the Constitution by such an investigation rests with Congress itself and not with the judiciary.

It is true that where the issue of the constitutionality of a congressional investigation reaches the courts in a case involving personal liberty—where, perhaps, a person faces a jail term because of failure to cooperate with an investigating committee about whose constitutionality there may be doubts—a strong argument exists for judicial activism rather than judicial self-restraint. The issue of the constitutionality of a congressional investigation does not come before the courts in abstract fashion; it comes usually in cases in which there are very real opposing interests or rights and where refusal of the courts to accept jurisdiction will result in automatic victory for the congressional interest as against the interest of private individuals. One is strongly tempted to favor vigorous use of judicial power to protect those individuals who have been subjected by a congressional committee to harsh or arbitrary treatment. Where that can be done without the necessity of simultaneous judicial scrutiny of the propriety of an investigation or of procedures essential to its success, resort to the courts by wronged individuals may readily be encouraged. Unfortunately, the price that would have to be paid for court assistance to such individuals would often necessarily be substantial interference with the congressional inquisitorial power itself. Moreover, it is apparent from the record of congressional inquiries that the great majority of witnesses who have been prosecuted for contempt have invited the result. They have carefully calculated the risks, and for reasons that seemed sufficient to them have deliberately challenged the power of Congress and have willfully refused to cooperate. Almost never has a witness who was merely naive, bewildered, or foolishly assertive of an extreme view of individualism gone to jail for contempt. Certainly the witnesses who have tangled with the Un-American Activities Committee knew what they were doing;

often they were arrogant, dogmatic, and vituperative. It is hard to find in the record of the hearings much support for a view of them as innocent, grievously-wronged citizens who were defending the cause of liberty and democracy against a too-pervasive arm of the state. This is in no sense to defend the Un-American Activities Committee—its purposes, its methods, or its record. But it cannot be denied that its recalcitrant witnesses fall readily into the tradition of the Daughertys, the Sinclairs, and the Dr. Townsends—men who willfully defied the inquisitorial arm of the national legislature and invited the consequences that they experienced. We have to choose, and it does not appear that the harm done such persons who have been punished for contempt would justify the threat to legislative power which a vigorous judicial supervision of investigations would entail.

In his opinion in the *Eisler* case Justice Jackson said, ". . . I think it would be an unwarranted act of judicial usurpation to strip Congress of its investigatory power, or to assume for the courts the function of supervising congressional committees. I should . . . leave the responsibility for the behavior of its committees squarely on the shoulders of Congress." [74] In the end it seems a sound conclusion that the answer to the Un-American Activities Committee is not to be found in the courts; it must be found within Congress itself.

74. Eisler v. United States, 338 U.S. 189, 196 (1949). This was a dissenting opinion, but the majority justices would not necessarily have disagreed with Jackson's feeling as expressed in these words. Wyzanski, Standards for Congressional Investigations, 3 Record of the Association of the Bar of the City of New York 93, 104 (1948): "If it be conceded that it is desirable that there should be a continuance of the practice of compelling private persons to testify before Congressional committees on matters upon which legislation may be adopted, the question remains as to what reforms should be instituted.

"Should there be a wider ambit of judicial review? . . . This and indeed any other broadening of judicial review seem to me ill-advised remedies. . . . Moreover, the suggestion of a broadened judicial review of legislative investigations is founded upon a not universally shared view that the power of judges should be extended because they are ultimately the surest guardians of our liberty. After all it was a judge who told us 'it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' "