Louisiana Law Review

Volume 20 | Number 3
April 1960

Constitutional Law - First and Fifth Amendments Clarified with Regard to Congressional Investigations

Robert S. Cooper Jr.

seems to believe that the *state* courts should be required to furnish the protection guaranteed the witness by the Fifth Amendment.

Whichever interpretation of the *Mills* case is correct, it seems clear that the satisfactory disposition of the problems required more than a per curiam opinion. The result of the case, in the light of the dissenting opinions and the silence of the majority, has been to increase the uncertainty in this area. Some explanation by the Court would have resulted in the assurance that witnesses relying on their privilege against self-incrimination would be able to make decisions based on settled law rather than questionable assumptions.

Jack Pierce Brook

CONSTITUTIONAL LAW — FIRST AND FIFTH AMENDMENTS CLARIFIED WITH REGARD TO CONGRESSIONAL INVESTIGATIONS

Petitioner was convicted of contempt of Congress[1] for refusing to answer questions of the House Un-American Activities Committee relating to Communist methods of infiltration into the field of education.[2] Petitioner was present when the subject under inquiry was read by committee counsel.[3] He also heard testimony of an earlier witness to the effect that petitioner had been a member of a Communist club while a graduate student in college. After answering several introductory questions relating to his background, petitioner refused to answer five questions[4] concerning his political associations, acquaintances, and member-

1. 2 U.S.C. § 192 (1938): "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 any committee of either House of Congress, wilfully 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."

2. The printed report of this committee appears as: House Comm. on Un-American Activities, "Communist Methods of Infiltration (Education—Part 9) H.R. Doc. 30172, 83rd Cong. 2d Sess. 5754 (1954). (Hereinafter cited as 1954 *Hearings*).

3. "The field covered will be in the main communism in education and the experiences and background in the party by Francis X. T. Crowley.

"It will deal with activities in Michigan, Boston, and in some small degree, New York." 1954 *Hearings* 5754. See note 2, *supra*.

4. "Are you now a member of the Communist Party?

"Have you ever been a member of the Communist Party?

ships in various organizations. Petitioner's brief was admitted in evidence and asserted that the committee lacked authority to inquire into his associations and beliefs as they were protected by the First Amendment and that the activities of the committee constituted a bill of attainder which is prohibited by the Constitution.[5] In the subsequent contempt proceedings he also urged that the authorizing resolution[6] of the committee was so vague as to deny him due process of law as guaranteed by the Fifth Amendment and that he was not sufficiently apprised of the pertinency of the questions to the matter under inquiry.[7] After his conviction was affirmed by the court of appeals,[8] petitioner applied to the United States Supreme Court, which vacated the judgment and remanded the case to the court of appeals for reconsideration in the light of its recent decision in *Watkins v. United States.*[9] On remand, the court of appeals reaffirmed its previous decision.[10] On certiorari to the United States Supreme Court, *held,* affirmed, four Justices dissenting.[11] The First Amendment does

"Now you have stated that you knew Francis Crowley. Did you know Francis Crowley as a member of the Communist Party?

"Were you ever a member of the Haldane Club of the Communist Party while at the University of Michigan?

"Were you a member while a student of the University of Michigan Council of Arts, Sciences, and Professions?" *Id.* at 5804-5812.

5. Petitioner was refused permission to read the lengthy statement into the record; however, the brief itself was admitted. 1954 *Hearings* 5807, note 2 *supra,* contains the full contents of the brief.

6. "(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (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." H. Res. 5, 83rd Cong., 1st Sess., 99 CONG. REC. 18 (1953).

7. This requirement is specifically set forth in the statute authorizing contempt proceedings which is quoted in note 1, *supra.*

8. Barrenblatt v. United States, 240 F.2d 875 (D.C. Cir. 1957).

9. 354 U.S. 178 (1957).

10. Barrenblatt v. United States, 252 F.2d 129 (D.C. Cir. 1958).

11. The dissenting Justices, Black, Warren, and Douglas, would have upheld all of petitioner's claims. They felt that the wording of the authorizing resolution, with especial reference to the phrases "un-American activities" and "un-American propaganda" is so vague as to deny any witness appearing before the committee due proces of law under the Fifth Amendment. Justice Black's position in regard to petitioner's First Amendment claims has been clear for years. He believes that the freedoms guaranteed by the First Amendment are absolute and there can be no governmental interference.

The dissent would further hold that the activities of the committee constitute a bill of attainder within the meaning of the Constitution, their position being that *any* public or private opprobrium which results from forced disclosure of unpopular beliefs is a form of punishment, and if Congress indulges in such exposures, the courts ought to prevent it. To support their feeling that the committee is indulging in such activities, they attached a lengthy appendix to their opinion which contained statements of various members of the committee to the

not protect a person who refuses to reveal his political associations before a congressional committee investigating an area in which the Congress is competent to legislate. The authorizing resolution of the House Un-American Activities Committee is sufficiently clear to afford the witness an opportunity to make an informed decision as to the pertinency of questions asked by the committee. The exposure that attends the activities of the committee does not constitute a bill of attainder prohibited by the Constitution.[12] *Barrenblatt v. United States*, 360 U.S. 109 (1959).

In order to appreciate the significance of the instant case an understanding of the due process problems created by congressional investigative committees is necessary. The power of Congress to investigate is subject to several limitations.[13] Congress has no general investigative power enabling it to require disclosure of private affairs.[14] However, in an area in which Congress has a valid legislative interest, there can be investigations which will require the disclosure of private affairs, associations,

effect that exposure was part of their job. However, it is to be noted that the majority of the Court is not willing to examine the individual motives of the committeemen, but rather presume that if the committee is performing a valid legislative function, the motives of the members of the committee are not subject to judicial scrutinizing. They feel that if this power is being abused it is up to the electorate to correct the situation at the polls.

Justice Brennan would have reversed the conviction solely on the grounds that the questioning of petitioner was exposure for exposure's sake, and that petitioner's First Amendment rights cannot be subordinated for this purpose.

12. *Cf.* Lovett v. United States, 328 U.S. 303 (1946), where an act of Congress prohibiting the payment of salaries to certain named government employees on the basis of information that they were "security risks" was held to constitute a legislative punishment and to fall within the constitutional prohibition against bills of attainder.

13. The power of Congress to investigate is limited by the grant of power to it in the Constitution. It cannot investigate those matters upon which it is not authorized to legislate, nor can it investigate private affairs unrelated to a valid legislative purpose. Kilborne v. Thompson, 103 U.S. 168 (1880). Further, the bill of rights restricts the power of Congress to investigate. The Fifth Amendment's self-incrimination clause has been held as a legal limit on the power of Congress to compel testimony in investigations. Starkovich v. United States, 231 F.2d 411 (9th Cir. 1956); Aiuppa v. United States, 201 F.2d 287 (6th Cir. 1952); Marcello v. United States, 196 F.2d 437 (5th Cir. 1952); United States v. Costello, 198 F.2d 200 (2d Cir. 1952); United States v. DiCarlo, 102 F. Supp. 597 (N.D. Ohio 1952); United States v. Livacoli, 102 F. Supp. 607 (N.D. Ohio 1952); United States v. Cohen, 101 F. Supp. 906 (N.D. Calif. 1952); United States v. Jaffe, 98 F. Supp. 191 (Crim. Div. D.C. 1951); United States v. Fitzpatrick, 96 F. Supp. 491 (D.C.D.C. 1951); United States v. Raley, 96 F. Supp. 495 (D.C.D.C. 1951); United States v. Yukio Abe, 95 F. Supp. 991 (D. Hawaii 1950).

14. McGrain v. Daugherty, 273 U.S. 135, 173 (1927) ("Neither House is invested with 'general' power to inquire into the private affairs and to compel disclosures"); Kilborne v. Thompson, 103 U.S. 168, 190 (1880) ("Neither of these bodies [the Houses of Congress] possess the general power of making inquiry into the private affairs of the citizen"). See also Watkins v. United States, 354 U.S. 178 (1957).

and beliefs.[15] Once such an area is selected, a committee is authorized by resolution to conduct an investigation. This resolution sets forth the scope of inquiry and delineates the area in which witnesses can be compelled to answer questions. The witness is bound to interpret this resolution at his own risk.[16] It must be drawn so as to enable the witness to make a rational choice as to whether a particular question is "pertinent to the matter under inquiry,"[17] this being the test embodied in the contempt statute which provides criminal sanctions for those who refuse to answer. If the resolution is too vague, a witness before the committee would be without a standard by which to determine whether he is about to commit a criminal act. This would result in a denial of due process of law under the Fifth Amendment.[18]

Prior to the instant case, the latest and controlling authority on the protection which the Fifth Amendment's due process clause afforded witnesses appearing before congressional investigative committees was *Watkins v. United States.*[19] In reversing a contempt conviction of a witness who refused to answer questions regarding ex-Communist acquaintances, the court in *Watkins* set forth the following standards to which it would look in appraising the pertinency of the question posed: (1) the authorizing resolution of the committee, (2) the opening remarks of the committee chairman, (3) the remarks of the members of the committee, (4) the response of the chairman to a direct challenge on pertinency grounds, and (5) the nature of the proceedings themselves. If any of these factors sufficiently inform the witness of the pertinency of the questions asked, the contempt conviction would be sustained. However, in looking to each of these factors in the *Watkins* case, the Court found that the questions asked were not pertinent. Moreover, since the Court severely criticized the authorizing resolution of the House Un-American

15. Lawson v. United States, 176 F.2d 49 (D.C. Cir. 1949); Barsky v. United States, 167 F.2d 241 (D.C. Cir. 1948); United States v. Josephson, 165 F.2d 82 (2d Cir. 1947); National Maritime Union of America v. Herzog, 78 F. Supp. 146 (D.C. D.C. 1948). See also American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

16. Sinclair v. United States, 279 U.S. 263 (1929).

17. See note 7 *supra.*

18. A typical statement of this proposition is found in Jordan v. DeGeorge, 341 U.S. 223, 230 (1951): "This Court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law." Scull v. Virginia, 359 U.S. 344 (1959); Flaxer v. United States, 358 U.S. 147 (1958); Winters v. New York, 333 U.S. 507 (1948); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

19. 354 U.S. 178 (1957).

Activities Committee, it was believed that the effect of the case would be to restrict that committee's activities.

It is believed that the most significant aspect of the instant case is the apparent change which it reflects in the attitude of the Court toward the authorizing resolution of the House Un-American Activities Committee.[20] This change is partially reflected by the fact that the Court, while acknowledging that the authorizing resolution is subject to differing interpretations, was willing to examine it in the light of the "legislative gloss"[21] placed on it by Congress, rather than restricting its examination to the language of the resolution itself. After specifically holding that the resolution was clear enough to meet the requirements of the due process clause, the Court then examined the other factors set forth in the *Watkins* case. It was found that in the instant case petitioner heard the charging of the committee and the remarks of the chairman and committee members. Also, the Court considered the fact that he had been present when a prior witness identified him as a member of a Communist club. It is interesting that the majority also noted his complete refusal to cooperate with the committee. On the basis of these facts, the Court found that he had been apprised of the pertinency of the questions asked him as to the matter under inquiry, thus satisfying the requirements of due process.

20. It is to be noted that in *Watkins* the majority Justices were Warren, Black, Brennan, Douglas, Harlan, and Justice Frankfurter rendered a concurring opinion. Justice Clark dissented. Justices Burton and Whittaker took no part in the decision. In the instant case the majority Justices were Frankfurter, Clark, Harlan, Whittaker, and Stewart. The minority were split, Justices Warren, Black, and Douglas joining in one opinion and Justice Brennan writing a third opinion. From an examination and comparison of the opinions in these two cases it becomes apparent that the new majority, formed out of the switching of Justice Frankfurter and the addition of Justice Stewart to the Bench, has a far different opinion of the House Un-American Activities Committee's work, its resolution, and the function of the Court in this area than do the minority, who retained their previous position, as expressed in *Watkins*. The new majority is obviously willing to read the resolution in the most favorable light possible, ignore as beyond the scope of judicial notice the exposure that goes along with the activities of the committee, and to preclude inquiry into the motives of the congressmen who are conducting these investigations.

The minority is unwilling to do any of these things, feeling that any of them in itself is sufficient grounds for reversal. While it is conceded that the two cases can be distinguished on factual grounds, it appears that in this case and several others concerning the right of investigation of so-called subversive activities, the Court has swung back over to the position of allowing the federal and state governments a high degree of latitude in their conduct. See Uphaus v. Wyman, 360 U.S. 72 (1959). *But see* Scull v. Virginia, 359 U.S. 344 (1959).

21. This term as used by the Court here seems to mean the entire legislative history of the statute, including debates before its enactment, in committee and on the floor of both Houses of Congress, the reports of the committee, its subsequent proceedings, extensions, and changes in status.

In dealing with petitioner's First Amendment contention, the Court, while recognizing that this amendment protects the individual's right to freedom in his associations, again affirmed the doctrine that this protection is not absolute.[22] When Congress decides that the interest of the nation requires an individual to reveal his political associations, and the area under investigation does not fall outside the power of Congress to legislate, the only constitutional requirements are (1) a valid legislative nexus between the information desired and a possible legislative program of Congress,[23] and (2) a showing that the interests of the nation outweigh the interests of the particular individual in remaining silent.[24] The majority, in determining that the first requirement had been met, took notice of the prior legislation dealing with the Communist Party in the United States. It then concluded that the latter requirement had been shown, noting the current efforts of the Communist Party in the world. The right of the nation to preserve itself from this menace overbalanced the right of an individual to conceal his allegiance to the Communist Party.[25]

It was suggested earlier in this Note that the importance of the instant case rests on its clarifying and narrowing effect on the implications of the *Watkins* decision. Although the *Watkins* case cast doubt upon the adequacy of the resolution authorizing the Un-American Activities Committee, the Court in this case clearly established the validity of that resolution. Of further interest is the feeling, which can be seen in this decision, that the

22. American Communications Ass'n v. Douds, 339 U.S. 382 (1950) and West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) were cited by the court for the proposition set forth in the text. *Accord*, Roth v. United States, 354 U.S. 476 (1957); Kingsley Books, Inc. v. Brown Corporation Counsel, 354 U.S. 436 (1957); Breard v. Alexandria, 341 U.S. 622 (1951); Terminello v. Chicago, 337 U.S. 1 (1949); Near v. Minnesota, 283 U.S. 697 (1931); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Gilbert v. Minnesota, 254 U.S. 325 (1920); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

23. Watkins v. United States, 354 U.S. 178, 198 (1957): "The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness." See also American Communications Ass'n v. Douds, 339 U.S. 382 (1950). In regard to the right of the states to compel disclosures in this area, see Uphaus v. Wyman, 360 U.S. 72 (1959); National Association for Advancement of Colored People v. Alabama, 357 U.S. 449 (1958); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

24. National Maritime Union of America v. Herzog, 78 F. Supp. 146, 165 (D.C. D.C. 1948).

25. Dennis v. United States, 341 U.S. 494, 509 (1951). The power to control the activities of those who advocate the violent overthrow of the government, which includes the right to identify them, rests on the right of self-preservation, "the ultimate value of any society." See Barsky v. United States, 167 F.2d 241 (D.C. Cir. 1948).

right of anonymous political association is not protected from governmental invasion to the same degree as the rights of free speech and belief.

Robert S. Cooper, Jr.

CONSTITUTIONAL LAW — RIGHT OF STATES TO INVESTIGATE SUBVERSIVE ACTIVITIES

Appellant, an officer of a New Hampshire corporation which operated a summer camp, was summoned by the State Attorney General[1] to testify in regard to certain alleged subversive activities. Appellant answered all questions regarding his own activities, but refused to produce a list of names of persons who had attended the last two sessions of the camp. After refusing to comply with a state court order to produce the lists, which was issued pursuant to a motion by the Attorney General, appellant was held in civil contempt and confined to jail until he should see fit to comply with the order. The sentence was affirmed by the State Supreme Court.[2] Appellant's defenses were: (1) that the state statute authorizing the investigation had been rendered null by the United States Supreme Court's decision in *Pennsylvania v. Nelson*[3] which held that the field of subversion had been occupied by federal legislation to the exclusion of the states; and (2) that the state was precluded from compelling the disclosure by the due process clause of the Fourteenth Amendment. On the first appeal to the United States Supreme Court,[4] appellant was successful in obtaining a remand of the case for reconsideration in the light of the Court's recent decision in *Sweezy v. New Hampshire*.[5] The New Hampshire Supreme Court reaffirmed its previous decision.[6] On appeal to the United States Supreme Court, *held*, affirmed, four Justices dissenting.[7] The

1. An act of the New Hampshire legislature empowered the Attorney General of the state to act as a one-man investigating committee to ascertain if there were persons located within the state who were defined by statute as "subversive." N.H. Laws, ch. 197 (1955). See note 11 *infra*.
2. Wyman v. Uphaus, 100 N.H. 436, 130 A.2d 278 (1957).
3. 350 U.S. 497 (1956).
4. Uphaus v. Wyman, 355 U.S. 16 (1957).
5. 354 U.S. 234 (1957).
6. Wyman v. Uphaus, 101 N.H. 139, 136 A.2d 221 (1957).
7. Justice Brennan and Chief Justice Warren dissented on the ground that the rights of appellant of speech and those of assembly of the persons who attended the camp could not be subordinated to the rights of the state of New Hampshire because they could find no rational connection between the investigation and a valid legislative purpose. Although the dissent was joined by Justices Black and Douglas, they also concluded that the sentence of contempt, which grew out of