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COMPULSORY DISCLOSURE AND THE FIRST AMENDMENT—THE SCOPE OF JUDICIAL REVIEW

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Involvement of the Supreme Court of the United States with highly charged public issues understandably occasions fresh debate concerning the proper role of the Court in determining questions of ultimate governmental power, in short, debate over the doctrine of judicial review.

As it is sometimes difficult for the judge to distinguish between what is unconstitutional and what is merely unwise, so it is difficult for the critic to disassociate his reaction to the results reached in a given case from his evaluation of the competence of the particular judicial performance. For some the failure to draw such a line robs criticism of much of its usefulness and reduces it to the level of determining ownership of the proverbial gored ox.[1] For others the effort to make such distinctions is simply unrealistic; nice questions regarding the nature of the process are of interest only in the context of larger purposes served or thwarted by the particular decision.[2]

This essay is predicated upon the propositions that means are important, that the reasons advanced by courts in support of their judgments are not simply window dressing, and that questions relating to what courts ought and ought not to consider are of real and not merely apparent significance.

INTRODUCTION

If the history of the first amendment in the Supreme Court has been brief, it has certainly been intense.[3] In broad perspective the clash between expression of unorthodox views and competing societal interests

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1 See Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 10-20, (1959); Hart, Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term, 73 Harv. L. Rev. 84, 125 (1959); Kadish, A Note on Judicial Activism, 6 Utah L. Rev. 467, 471 (1959); McKay, The Supreme Court and Its Lawyer Critics, 28 Fordham L. Rev. 615, 626-636 (1960).

2 See Miller & Howell, The Myth of Neutrality in Constitutional Adjudication, 27 U. Chi. L. Rev. 661, 683-695 (1960); Mueller & Schwartz, The Principle of Neutral Principles, 7 U.C.L.A. L. Rev. 571 (1960).

3 "No important case involving free speech was decided by this Court prior to Schenck v. United States, 249 U.S. 47 (1919)." Dennis v. United States, 341 U.S. 494, 503 (1951).

is as old as civilization itself. Important Court decisions, however, date only from 1919.[4] In 1951 Justice Frankfurter, concurring in *Dennis v. United States*,[5] catalogued the prior adjudications into six types of cases in which the Court has had occasion to resolve conflicts between speech and other interests. These involved statutory prohibition of certain speech because of its tendency to produce crime; regulations restricting expression in the interest of public peace and the normal uses of streets and parks; restrictions on picketing; exclusion and deportation of aliens and denaturalization of citizens because of advocacy or belief; discriminatory taxes and restraints upon the press. In a category by itself was placed the case of *American Communications Association v. Douds*.[6] The Court there "recognized that the exercise of political rights protected by the First Amendment was necessarily discouraged by the requirement of the Taft-Hartley Act that officers of unions employing the services of the National Labor Relations Board sign affidavits that they are not Communists."[7] Despite this discouragement, the statute was held to be valid.

An additional category is needed for a group of cases decided since *Dennis*, cases like *Douds* in that they present no direct regulation of speech, either as to content or as to mode of expression, but which involve governmental demands of disclosure of past expression and affiliation in the realm of political activity, using that term in its broadest sense. These cases have arisen in several contexts. Foremost are cases in which legislative interests in investigating with a view toward the possible enactment of legislation for the protection of nation and state against the threat of violent overthrow are pitted against the claims of free expression and those associational relationships which are within the ambit of the first amendment and the due process clause of the fourteenth amendment.[8] Closely allied are decisions on the validity of registration statutes under which persons and organizations engaged in

[4] Schenck v. United States, 249 U.S. 47 (1919).
[5] 341 U.S. 494, 529-539 (1951).
[6] 339 U.S. 382 (1950).
[7] 341 U.S. 494, 532 (1951).
[8] No distinction will be drawn in this paper between the scope of the first amendment and the scope of the fourteenth amendment in relation to freedom of speech, press, and assembly. It is believed that the proposition that the due process clause of the fourteenth amendment makes applicable to the states the specific prohibitions of the first amendment has validity in this setting. See Gitlow v. New York, 268 U.S. 652, 666 (1925); Grosjean v. American Press Co., 297 U.S. 233 (1936); Palko v. Connecticut, 302 U.S. 319, 324 (1937); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Jones v. Opelika, 319 U.S. 103 (1943); Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943); Staub v. Baxley, 355 U.S. 313, 321 (1958); NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449, 460-62 (1958); Bates v. Little Rock, 361 U.S. 516, 523 (1960). But cf. Beauharnais v. Illinois, 343 U.S. 250, 288-299 (1952) (dissenting opinion); Alberts v. California, 354 U.S. 476, 501 (1957) (concurring opinion). Thus the term "first amendment principles" is used herein in connection with state as well as federal action.

particular activities are required to disclose their identity and their membership. Control of corporate activities and the community's stake in determining the fitness of public employees and persons seeking admission to regulated professions have also been advanced as societal interests justifying such deterrence of free expression and association as may be present in compulsory disclosure of political relationships or other matters pertaining to one's views, thoughts, and beliefs.

That compulsory testimony is an integral part of our judicial system is a proposition that need not be labored.[9] It is likewise clear that legislatures as well as courts may compel the attendance of witnesses and their testimony on matters of concern to the legislature in the carrying out of its constitutional functions.[10] The employment of committees to gather information for legislative purposes is established as is the practice of conferring upon such committees the power to subpoena witnesses.[11] The use of contempt process to compel attendance and testimony has been upheld,[12] as has been legislation imposing criminal sanctions for refusal to respond to interrogation "pertinent to the question under inquiry."[13]

Vigorous use of the legislative inquiry has met the resistance of witnesses challenging the validity of interrogation. Recognition has been accorded the proposition that the fifth amendment privilege against self-incrimination applies to interrogation by an organ of the legislature.[14] The assertion was inevitably made that the first amendment, too, limits the power of Congress to compel testimony and that the fourteenth amendment similarly limits the powers of the states. The role of the Supreme Court in the determination and application of these limits is the subject of this paper.

Not until 1959, in the case of *Barenblatt v. United States*,[15] did the Court squarely face the issue of accommodating the legislative interest in compulsory disclosure to the competing claims of freedom of expression. However, in a number of prior decisions the Court skirted the issue; these cases form an important part of the setting in which the ultimate problem is confronted.

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[9] See Wigmore, Evidence § 2190 (3d ed. 1940).

[10] See McGeary, Congressional Investigations: Historical Development, 18 U. Chi. L. Rev. 425 (1951).

[11] McGrain v. Daugherty, 273 U.S. 135 (1927).

[12] Ibid.

[13] 11 Stat. 155 (1857) as amended, 2 U.S.C. § 192 (1958). The constitutionality of the statute has been upheld. In re Chapman, 166 U.S. 661 (1897).

[14] Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955). See generally Griswold, The Fifth Amendment Today (1955).

[15] 360 U.S. 109 (1959).

A. *The Background to Barenblatt*

On several occasions prior to 1953 witnesses charged with refusing to answer pertinent questions of the House Committee on Un-American Activities unsuccessfully sought Supreme Court review of their convictions, basing their petitions on first amendment grounds.[16] In 1953, in *United States v. Rumely*[17] the Court reviewed a judgment of the Court of Appeals for the District of Columbia reversing the conviction of Rumely for refusing to produce a list of purchasers of certain books of a political nature in response to a subpoena *duces tecum* issued by the House Select Committee on Lobbying Activities. The Court avoided the necessity of constitutional decision by frankly reaching for a construction of the authorizing congressional resolution which excluded from the committee's sphere the subject matter of the subpoena. That the Court viewed the first amendment problems as substantial is unmistakable. The government had argued that, "At least where disclosure serves a legitimate purpose, it cannot invade first amendment rights." For the majority Mr. Justice Frankfurter wrote:

> Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment. . . . [I]t would not be seemly to maintain that those doubts are fanciful or factitious.[18]

Justices Douglas and Black disagreed only as to the scope of the committee's delegated authority; they would have held the interrogation authorized by the resolution and that the conviction violated the first amendment.[19]

In 1957 *Watkins v. United States*[20] presented the Court with another opportunity to adjudicate a conflict between first amendment interests and compulsory disclosure in aid of Congress' power to inquire. Again the Court declined. Watkins had been convicted for failure to respond to allegedly pertinent questions asked by a subcommittee of the House

[16] Barsky v. United States, 167 F.2d 241 (D.C. Cir. 1948) cert. denied, 334 U.S. 843 (1948); United States v. Josephson, 165 F.2d 82 (2d Cir. 1947) cert. denied, 333 U.S. 838 (1948); Lawson v. United States, 176 F.2d 49 (D.C. Cir. 1949) cert. denied, 339 U.S. 934 (1949); Marshall v. United States, 176 F.2d 473 (D.C. Cir. 1949) cert. denied, 339 U.S. 933 (1949). In another instance the petition was granted, Eisler v. United States, 335 U.S. 857 (1948); the petitioner fled the country after argument but before decision. The case was removed from the docket, 338 U.S. 189 (1949) and eventually dismissed. 338 U.S. 883 (1949).

[17] 345 U.S. 41 (1953).

[18] Id. at 46.

[19] Id. at 48 (concurring opinion).

[20] 354 U.S. 178 (1957).

Committee on Un-American Activities. The Supreme Court based reversal upon due process grounds; the subcommittee had not furnished the witness sufficient information to afford him a fair opportunity to judge the pertinency of the questions asked and thus to determine the legality of his refusal to answer. Although spurning the first amendment as the ground of decision, Mr. Chief Justice Warren flatly asserted the applicability of the first amendment to legislative investigations:

> Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. . . . The First Amendment may be invoked against infringement of the protected freedoms by law or by law-making.[21]

The Chief Justice wrote for five members of the Court. Mr. Justice Frankfurter concurred in the opinion but emphasized the narrow ground on which the case was decided. Justices Burton and Whittaker took no part; only Mr. Justice Clark dissented.

Two members of the Court reached the first amendment issue[22] in *Sweezy v. New Hampshire*,[23] handed down on the day of the *Watkins* decision. The New Hampshire legislature had designated the Attorney General of the state a one man committee[24] to investigate violations of the Subversive Activities Act of 1951[25] and to determine the presence of "subversive persons" within the borders of the state. The Attorney General interrogated Sweezy, who answered questions concerning many of his activities. He refused to disclose the contents of a lecture he delivered at the University of New Hampshire, beyond stating that he had not there or elsewhere advocated violent overthrow of constitutional government. He likewise refused to respond to queries regarding his activities in connection with the Progressive Party. He was ordered to answer questions concerning both these matters by the Superior Court of New Hampshire. His refusal occasioned judgment of contempt of court, and the Supreme Court of New Hampshire affirmed.[26] The Supreme Court reversed, but no ground of decision mustered the support of a majority. Mr. Chief Justice Warren, for himself and Justices Black, Douglas, and Brennan reached the very threshold of the first amendment issue. Finding the authorizing resolution unclear as to the scope of the Attorney General's authority, the Chief Justice was unable to determine that the legislature wanted the information. Since only a demonstrated relevance to the legislature's interest could justify the intrusion upon constitutionally protected interests, imprison-

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21 Id. at 197
22 See note 8, supra.
23 354 U.S. 234 (1957).
24 N.H. Laws 1953, c. 307.
25 N.H. Rev. Stat. Ann. ch. 588, §§ 1-16 (1955).
26 Wyman v. Sweezy, 100 N.H. 103 (1956).

ment of the witness for refusing to answer constituted a deprivation of liberty without due process of law. Inasmuch as the New Hampshire court had held the inquiry to be within the scope of the legislative mandate, four members of the Supreme Court regarded the Warren opinion as an unwarranted intrusion into the area of separation of powers at the state level. Yet of those four, Justices Frankfurter and Harlan joined in reversal after balancing "the right of a citizen to political privacy, as protected by the fourteenth amendment, and the right of the State to self-protection."[27] It seems clear that the fourteenth amendment interests relied upon by Justice Frankfurter are closely related to those protected by the first amendment if indeed not identical therewith.[28]

NAACP v. Alabama ex rel. Patterson[29] stemmed from a proceeding brought by the Attorney General of Alabama to oust NAACP from the state for failure to qualify to do business as a foreign corporation. The state court ordered the defendant to produce certain records including membership lists. The membership lists were not produced; NAACP was adjudged in contempt and fined. A unanimous Supreme Court reversed, sustaining the claim of NAACP that its members' rights of associational privacy are secured by the fourteenth amendment and were violated in the circumstances of the case. Recognizing that "it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech,"[30] Mr. Justice Harlan stated the issue as follows:

> We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. . . .
>
> We turn to the final question whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from the petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association.[31]

The sole asserted interest of the state was in aid of determining whether NAACP was conducting intrastate business in violation of Alabama law. The Court could not perceive that disclosure of the membership

[27] Sweezy v. New Hampshire, 354 U.S. 234, 266-67 (1957) (concurring opinion).
[28] See note 8 supra.
[29] 357 U.S. 449 (1958).
[30] Id. at 460.
[31] Id. at 462-63.

lists had a "substantial bearing" upon any issue relevant to that determination.

In the light of this conclusion, judgment may well rest upon general considerations of due process rather than upon those aspects related to the first amendment. Compulsion to appear before an officer of government and to testify about anything involves coercion of the individual which needs a reasonable basis for its justification. Although use of the adjective "substantial" to modify the relation required may indicate a greater degree of scrutiny than that accorded the usual claim of substantive due process, it will be seen that such limited review does not account for other factors of great importance. In the absence of any significant relationship between the names of NAACP's members and the nature of its operations, the decision did not require analysis of the relative value of the competing interests asserted, and without such an analysis the interests of freedom of expression are not truly tested.

B. *Barenblatt v. United States*

Freedom of expression inevitably encounters its heaviest seas when pitted against the demands of national security. This is one of the most difficult of all accommodations required of the institution of judicial review, that between self preservation, termed by Mr. Chief Justice Vinson "the ultimate value of any society"[32] and Mr. Justice Cardozo's "freedom [of which] one may say that it is matrix, the indispensable condition, of nearly every other form of freedom."[33] This, in relation to compulsory disclosure, was the issue avoided in *Watkins* but faced two years later in *Barenblatt v. United States*.[34] Like Watkins, Barenblatt was subpoenaed by a subcommittee of the House Committee on Un-American Activities. He refused to answer questions as to his Communist Party membership and on that account was convicted of contempt of Congress. To the Supreme Court he brought challenges to the subcommittee's authority, to the pertinency of the questions and his apprisal thereof, and to the validity of the interrogation in the face of the first amendment. The conviction was affirmed by a vote of five to four. Mr. Justice Harlan, for the Court, described the judicial function as follows:

> Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.[35]

[32] Dennis v. United States, 341 U.S. 494, 509 (1951).
[33] Palko v. Connecticut, 302 U.S. 319, 327 (1937).
[34] 360 U.S. 109 (1959).
[35] Id. at 126.

In this as in prior cases, dissenters vigorously challenged this concept of judicial review based upon a "balancing of the competing interests." Mr. Justice Black, joined by Chief Justice Warren and Mr. Justice Douglas, urged a literal approach to the interpretation of the first amendment.[36] However, a majority of the Court has never viewed application of the amendment in terms of an absolute command. The Court has agreed with what Justice Holmes stated in a different setting:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.[37]

There exists here a cleavage within the Court in addition to that just noted. Even accepting, *arguendo*, Justice Harlan's above quoted statement of the Court's function, a strong minority of the Court has challenged sharply the application of that standard in *Barenblatt* and in a series of more recent cases. This dispute is not simply over the striking of the balance resulting from a differing assessment of commonly agreed upon factors. There is indeed conflict as to the very ingredients for decision, as to what should be placed in the scales in the first place.

It is the objective of this paper to examine the implementation of this judicial concept of "balancing the competing interests" with a particular view to the relevance of ulterior legislative purposes or motives.[38]

After disposing of Barenblatt's challenges to the subcommittee's authority to compel testimony and to the pertinency of the questions asked, Mr. Justice Harlan turned to constitutional contentions. After stating the function of the Court he proceeded:

> The first question is whether this investigation was related to a valid legislative purpose, for Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to such a purpose.[39]

This would certainly appear to be *sine qua non* to conviction of a wit-

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[36] Id. at 140-144 (dissenting opinion).

[37] Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

[38] The terms "ulterior purpose" and "motive" are here used as synonyms to indicate a desired objective other than that upon the basis of which the governmental action is justified. For example, if Congress passes a statute prohibiting the shipment in interstate commerce of goods produced by child labor, the purpose of the statute may be said to be the exclusion of such goods from interstate shipment. It may be inferable or even demonstrable that beyond that the purpose is to discourage the use of child labor in manufacturing and beyond that to promote health in children. The promotion of health may be the ultimate purpose and at the same time the motive for the exclusion of the goods from interstate commerce.

[39] 360 U.S. 109, 127 (1959).

ness for defying the subcommittee, but is the source of the limitation the first amendment? Should not this minimum standard be attributed rather to the due process clause of the fifth amendment on the ground that such relevance to a valid legislative purpose is an essential condition of *any* governmental coercion of the individual, let alone compulsion in those areas of activity encompassed by the first amendment?

The Court found that the inquiry did relate to a valid legislative purpose, "the power to legislate in the field of Communist activity in this country. . . . In the last analysis this power rests on the right of self-preservation, 'the ultimate value of any society'."[40]

A subsidiary question was raised by Barenblatt's claim that the "true objective" of the committee and of the Congress was the impermissible one of exposure. This argument was rejected, first as irrelevant because entailing an examination of "motives," and second because the Court having scrutinized the record agreed with the court below that " 'the primary purposes of the inquiry were in aid of legislative processes'."[41]

Finally, the Court found neither a committee bent on attempting to pillory witnesses nor a lack of probable cause for belief that Barenblatt possessed information of interest to the subcommittee. The conclusion follows "that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended."[42]

The opinion is open to serious criticism on several counts.

First, as already noted, it confounds the question of relevance to a valid legislative purpose, a matter of basic due process, with the additional claims of the first amendment.

Second, as stated by Mr. Justice Black in dissent:

> [I]t completely leaves out the real interest in Barenblatt's silence, the interest of the people . . . . It is these interests of society, rather than Barenblatt's own right to silence, which I think the Court should put on the balance against the demands of the Government, if any balancing process is to be tolerated.[43]

Arguably this is a quibble with the Court for failure to utter a truism to the effect that societal and not simply individual interests are involved in freedom of expression. Yet when the Court is resolving grave issues on the announced basis of judging the weight to be accorded competing interests of constitutional dimension, it seems not unreasonable to expect precision in the statement of the interests involved. To announce the contest as the right to silence on Communist Party mem-

[40] Id. at 127-128.
[41] Id. at 133.
[42] Id. at 134.
[43] 360 U.S. 109, 144 (1959) (dissenting opinion).

bership of one Lloyd Barenblatt versus the self-preservation of the United States of America is to decide the case by stating it.

Third, even as the Court describes the critical element as "the existence of and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness,"[44] the Court totally ignores factors previously given controlling significance in both first amendment and commerce clause cases. The governmental interest in compulsory disclosure is quickly translated into the safety of the republic itself on the strength of the slender reed of rational connection between the two. The *extent* to which the disclosure serves the national interest is not considered, nor is the availability of alternatives which may serve the cause of security at less expense to freedom.

Fourth, attachment of significance to the absence of any indication "that the Subcommittee was *attempting* to pillory witnesses"[45] (emphasis added) is at odds with the declaration of lack of judicial "authority to intervene on the basis of the motives which spurred the exercise of the power."[46] Assuming that "pillory" is used in its figurative sense, i.e., any means for exposing to public scorn or ridicule, it is possible for an inquiry to serve the informational needs of Congress and *eo instante* to represent a highly successful attempt to expose individuals to public scorn in a fashion having a substantial effect as a deterrent to the exercise of freedom of speech. Before such an "attempt" can be useful as a factor on the side of the first amendment interests, evidence that the attempt was made must be relevant. Yet the Court here appears to dismiss such inquiry as beyond the pale, as constituting a matter of motives.

If validity there be in these criticisms their importance should not be underestimated. Mr. Justice Frankfurter's plea in *Dennis*[47] for recognition of the true nature of judicial review as inevitably involving an assessment of competing interests goes unheeded by a majority of which he is a part if "balancing," too, is reduced to a substitute for analysis, to a new slogan replacing those so effectively criticized both on and off the Court.[48] Justice Frankfurter's opinion in *Dennis* is ample testimony to the proposition that the value of free expression need not be drained of its public interest content as a prelude to judgment that Congress reasonably struck the balance in favor of a competing claim.

[44] 360 U.S. 109, 126-27 (1959).
[45] Id. at 134.
[46] Id. at 132.
[47] Dennis v. United States, 341 U.S. 494, 524-25 (1951) (concurring opinion).
[48] See Bridges v. California, 314 U.S. 252, 295-296 (1941) (dissenting opinion); Dennis v. United States, 341 U.S. 494, 527 (1951) (concurring opinion); see Freund, On Understanding the Supreme Court 24-28 (1949); Hand, The Bill of Rights 58-61 (1958); McKay, The Preference For Freedom, 34 N.Y.U. L. Rev. 1182, 1203-1212 (1959).

Nor does the process gain respect through inflating the governmental interest to the status of self-protection, untempered by an evaluation of the contribution thereto of the compulsory disclosure involved in the particular case. In the words of *Barenblatt* itself, the balancing is "of the competing private and public interests at stake *in the particular circumstances shown.*" (Emphasis added.)[49]

The claim is not made here that a full and painstaking delineation of the issues involved would have led inevitably to a contrary result. It is the thesis of this paper that failure so to delineate the issues led to a highly questionable result in *Uphaus v. Wyman*,[50] and that express reliance on *Barenblatt* in subsequent cases has further reduced the significance of judicial review without adequate explanation.

II. Compulsory Disclosure Cases—The Issues for Decision

An application for review of a criminal conviction, judgment of contempt, or other judicial action consequent to a refusal of governmental demand for disclosure of information will usually include some if not all of the following contentions:

A. The disclosure demanded is not pertinent to the matter into which the interrogator is authorized to inquire.
B. The pertinency of the question has not been made sufficiently clear to the witness to afford him a fair opportunity to determine his obligation to respond.
C. The particular interrogation is not reasonably related to a valid legislative purpose which the inquiry is designed to serve.
D. Compulsory disclosure in the particular circumstances violates the first amendment (or interests of freedom of expression and association protected by the fourteenth amendment against abridgement by state action).

There may well be an overlap of these contentions in specific cases. Nevertheless, it is believed that separate treatment of the issues posed is useful to an analysis of the significance of the first amendment and of the role of the Supreme Court.

A. *Pertinency*

The issue of pertinency is basic to judicial review of contempt adjudications in this area. In the sense the term is used here, however, is not of constitutional dimension. The matter is one of construction of the authorizing statute or resolution and determination as to whether a particular question or demand falls within its scope. An

[49] 360 U.S. 109, 126 (1959).
[50] 360 U.S. 72 (1959).

essential element of the statutory offense is the defendant's refusal to answer "any question pertinent to the question under inquiry."[51] Thus in *United States v. Rumely*[52] the Court never reached the first amendment. The construction of the authorizing resolution was sufficiently narrow that the information demanded of Rumely was held to be beyond its scope. His refusal to respond was thus justified. He had not rejected a demand pertinent to an authorized inquiry. So in *Deutch v. United States*[53] the Court found the specific question asked not pertinent to the scope of the subcommittee hearing. Supreme Court disposition of cases on this ground is possible when federal authority to compel disclosure is in issue. It is of course otherwise in regard to matters originating in state proceedings. The scope of the delegates' authority is there matter of state law to be finally determined by state courts.[54] That the determination may involve closely related constitutional issues is the subject of later discussion herein.

B. *Pertinency: Notice to the Witness*

The claim that the pertinency of the question has not been communicated to the witness with sufficient clarity to enable him to appraise his obligation to answer is grounded in considerations of due process. It is based upon the principle that conduct denominated as criminal must be defined with sufficient particularity to guide the individual in regulating his activity.[55] This was ultimately the narrow ground of decision in *Watkins v. United States*:

> It is obvious that a person compelled to make this choice is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense. The 'vice of vagueness' must be avoided here as in all other crimes.[56]

Such knowledge had not been made available to Watkins. The authoriz-

[51] 2 U.S.C. § 192 (1958).
[52] 345 U.S. 41 (1953).
[53] 367 U.S. 456 (1961). Justice Stewart wrote for a majority of five. Justices Frankfurter, Clark, Harlan and Whittaker dissented. The evidence indicated that the subject under inquiry before a subcommittee of the House Committee on Un-American Activities was Communist infiltration in the Albany, or "capital," area, particularly in the field of labor. The questioning of Deutch concerned Communist activity at Cornell University, one hundred and sixty-five miles from Albany, and did not relate to labor.
[54] But cf. Sweezy v. New Hampshire, 354 U.S. 234, 253-54 (1957). A totally capricious finding of pertinency may well constitute a denial of due process. Cf. Thompson v. Louisville, 362 U.S. 199 (1960).
[55] Scull v. Virginia, 359 U.S. 344 (1959); Raley v. Ohio, 360 U.S. 423 (1959); United States v. Harriss, 347 U.S. 612 (1954); United States v. Cardiff, 344 U.S. 174 (1952); Winters v. New York, 333 U.S. 507 (1948).
[56] 354 U.S. 178, 208-09 (1957).

ing resolution itself possessed "confusing breadth,"[57] and neither the committee resolution authorizing creation of the subcommittee nor the opening statement of the committee chairman sufficed to define the question under inquiry. The government contention that the record amply disclosed the topic of inquiry to be Communist infiltration in labor was confounded by the fact that several persons about whose Communist Party connections Watkins was interrogated had no connection with organized labor. And even when Watkins objected to the lack of pertinency the chairman of the subcommittee failed to clarify the matter. This same defense was unsuccessfully interposed by Barenblatt, the Court finding that the matter under inquiry had been clearly indicated by the chairman of the subcommittee.[58] There are strong intimations in *Barenblatt*, repeated in *Deutch*, that inadequacy of notice to the witness is available as a defense only where, as in *Watkins*, the witness has raised the issue of pertinency before the interrogating body.[59] Recent decisions evidence great care on the part of the House Committee on Un-American Activities to explain fully to witnesses the nature of the inquiry to which they have been summoned.[60]

C. *Relationship to a Valid Governmental Purpose*

A claim that a particular demand for disclosure is not related to a valid governmental purpose involves three considerations: What is the purpose of the investigation or other inquiry? Is this purpose valid? Does the particular demand upon the individual reasonably relate to that purpose?

If no valid legislative purpose can be found the particular interrogation is unconstitutional as a matter of due process of law.[61] In regard to the problem of relationship, let us assume that an authorizing resolution clearly indicates a valid legislative purpose, but that the particular demand upon the citizen does not reasonably relate to that purpose. If the agency involved is federal the matter may be disposed of on statutory grounds. A question not related to the purpose for which the inquiry was authorized is not within the scope of that authority. So far this is basically a restatement of pertinency. However, it is conceivable that interrogation pertinent to an authorizing resolution might still fall for want of relevance to a legislative purpose; this would occur only if the resolution announced a legislative purpose and then proceeded to authorize an inquiry into areas unrelated to that purpose.

[57] Id. at 209.
[58] 360 U.S. 109, 124-25 (1959).
[59] See also United States v. Bryan, 339 U.S. 323 (1950). It should be carefully noted that reversal in Deutch was based upon lack of pertinency, not upon inadequacy of notice thereof. That these are separate elements is made clear by Justice Stewart's opinion for the Court. 367 U.S. 456, 467-8 (1961).
[60] See Wilkinson v. United States, 365 U.S. 399, 404 & n.5 (1961).
[61] Kilbourn v. Thompson, 103 U.S. 168 (1881).

A state court decision that a particular interrogation falls within the scope of a state statute or resolution is conclusive in terms of authorization.[62] However, that does not foreclose Supreme Court inquiry into the reasonableness of the state determination of relevance.[63] If the question asked has no rational connection with the avowed purpose of the inquiry, coercion of the individual to respond must constitute a denial of due process *without regard to first amendment principles.* No balancing is in order at this point. It is only *after* relevance to a valid legislative purpose is established that the first amendment inquiry need begin. That the particular interrogation serves a valid governmental objective does not foreclose the possibility that it does so with such a deterrent effect on freedom of expression as to lead to the judicial conclusion that it is barred by the Constitution of the United States.[64] Such a conclusion, of course, will be reached only after consideration of many factors which are the subject of discussion below. The point to be stressed at this time is that the first amendment, if it has any significance here at all, operates as a limitation upon governmental action which would be valid were it not for that amendment and the principles it embodies. If the particular governmental action is not related to some legitimate purpose, its invalidity need not and should not be laid at the door of the first amendment.

Several decisions are in point. In *NAACP v. Alabama ex rel. Patterson,*[65] the major portion of the opinion deals with first amendment contentions. Justice Harlan's opinion is significant in this respect, for as noted above it recognizes that compulsory disclosure can have a deterrent effect on free speech and association, thus requiring that the " 'subordinating interest of the state must be compelling'[66] . . . . Whether there was 'justification' in this instance turns solely on the *substantiality* of Alabama's interest in obtaining the membership lists." (Emphasis added.)[67] Ultimate decision, however, was based on the Court's inability to find "that the disclosure of petitioner's rank-and-file members has a *substantial* bearing" (Emphasis added) on the avowed interests of the state, *i.e.,* ascertaining whether NAACP was carrying on intrastate business in violation of Alabama law.[68] It is submitted that the terms "substantiality" and "substantial" used by the Court are used in very different contexts with different connotations. Certainly a

[62] But cf. Sweezy v. New Hampshire, 354 U.S. 234, 253-54 (1957).
[63] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); Bates v. Little Rock, 361 U.S. 516 (1960).
[64] Shelton v. Tucker, 364 U.S. 479 (1960).
[65] 357 U.S. 449 (1958).
[66] Id. at 463, quoting Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (concurring opinion).
[67] Id. at 464.
[68] Ibid.

substantial connection between the information demanded and the asserted state interest does not establish the substantiality of the latter. To require the former is apparently to require a clear demonstration of the contact essential to due process where intrusion into the lives of the citizenry is sought to be justified. If such contact is found to exist only then is it time to inquire whether the state interest served is sufficiently substantial to justify the effect its promotion in the circumstances of the case will have upon rights protected by the first amendment. To treat substantial relevance to any valid purpose, irrespective of other factors, as satisfying the demands of free expression and association is to accord the first amendment little more content than the virtually abandoned concept of substantive due process.[69]

This minimal review sufficed to protect interests of free expression in *NAACP*, but the technique casts a cloud on the decision in *Barenblatt*. In taking up the constitutional issues there the Court stated that "the first question is whether this investigation was related to a valid legislative purpose."[70] The affirmative answer seems unexceptionable. But in the face of the first amendment claims the failure of the Court to look significantly further into the effect on the competing interests in these particular circumstances is to reduce to the vanishing point the vigor of the first amendment as a meaningful limitation on congressional action in this area.

Uphaus v. Wyman[71] was decided on the same day. Uphaus had been subpoenaed by the Attorney General of New Hampshire, acting in the same capacity as in *Sweezy*. Uphaus testified fully concerning his own activities but refused to comply with a subpoena *duces tecum* which called for production of a list of guests at a camp operated by World Fellowship, Inc. of which Uphaus was executive director. When ordered to produce the list by the Superior Court he refused and was adjudged in contempt of court. The judgment was affirmed by the Supreme Court of New Hampshire and by the Supreme Court of the United States. Mr. Justice Clark, dissenter in *Sweezy* two years earlier, wrote for the five member majority. The investigation into the presence of subversive persons in New Hampshire was undertaken in the interest of self-preservation, as in *Barenblatt* "the ultimate value of any society."[72] The Court found that the record demonstrated sufficient relationship between the guest list and the legislative purpose of the inquiry. Here it must be emphasized that the nexus between the questions asked Sweezy concerning the Progressive Party and the self-

[69] Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955).
[70] 360 U.S. 109, 127 (1959).
[71] 360 U.S. 72 (1959).
[72] Id. at 80, quoting Dennis v. United States, 341 U.S. 494, 509 (1951).

preservation of New Hampshire was the same as that found sufficient in *Uphaus*, for the Attorney General in *Sweezy* relied upon sworn testimony he allegedly had received to the effect that "the Progressive Party of New Hampshire has been heavily infiltrated by members of the Communist Party and that the policies and purposes of the Progressive Party have been directly influenced by the Communist Party."[73] In *Uphaus* it was alleged that the witness had participated in "Communist front activities" and that speakers at World Fellowship "'had either been members of the Communist Party or had connections or affiliations with it or with one or more of the organizations cited as subversive or Communist controlled in the United States Attorney General's list.' "[74] Justice Clark distinguished *Sweezy* on the ground that "the academic and political freedoms . . . are not present here in the same degree, since World Fellowship is neither a university nor a political party."[75] Why these differences in degree are of constitutional dimension remains unexplained. The interests of the state in the two cases are the same.[76] The relationship between the interrogation and the self-preservation of the State found sufficient in *Uphaus* was likewise present in *Sweezy*. The competing demands of free expression explored so thoroughly in the *Sweezy* opinions of Chief Justice Warren and Mr. Justice Frankfurter are brushed aside in *Uphaus*. The determination that valid legislative purposes are served by the particular interrogation appears as a practical matter to represent the limit of meaningful judicial review, rather than simply a prelude to full elaboration of first amendment issues.

Nothing in the later case of *Bates v. Little Rock*[77] dispels this impression. A municipal taxing ordinance required organizations operating within the municipality to furnish the City Clerk upon request various items of information including lists of dues-paying members and contributors. The information furnished became a matter of public record. The custodian of the records of the local branch of NAACP was convicted for refusal to furnish the lists. The Supreme Court unanimously reversed. Mr. Justice Stewart's opinion contains extended discussion concerning compulsory disclosure as a deterrent to freedom

[73] Wyman v. Sweezy, 100 N.H. 103, 111 (1956), quoted in Sweezy v. New Hampshire, 354 U.S. 234, 252, n.13 and at 265 (concurring opinion) (1957).

[74] 360 U.S. 72, 79 (1959), quoting Wyman v. Uphaus, 100 N.H. 436, 442 (1957).

[75] 360 U.S. 72, 77 (1959).

[76] In neither case was the fact that the Attorney General had received such testimony introduced in evidence before the Superior Court which ordered the witnesses to respond and adjudged them in contempt for refusal to do so. This omission in the record was noted in Sweezy, 354 U.S. 234, 252 n.13. In Uphaus it was ignored. See Petition for Rehearing, pp. 2-4. Rehearing was denied, 361 U.S. 856 (1959).

[77] 361 U.S. 516 (1960).

of expression and association, and yet the crux of the decision is found in the following:

> In this record we can find no relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the membership lists of the local branches of the National Association for the Advancement of Colored People.[78]

This alone is enough to invalidate the conviction without regard to the deterrent effect on expression.[79] That this ground of decision might be emphasized subsequently to narrow the precedent value of the case appears to be the provocation for Mr. Justice Black's concurrence, in which Mr. Justice Douglas joined. For them judgment rested squarely upon the principles of the first amendment.

In two recent decisions freedom of expression and the associational rights appurtenant to it prevailed against competing state interests, even though in both instances the disclosure sought to be compelled related to a valid governmental purpose. The rights of expression were held paramount to the state interest as served in the particular circumstances. *Shelton v. Tucker*[80] is particularly significant. By a vote of five to four the Court struck down an Arkansas statute requiring all teachers and prospective teachers in public institutions to submit to the hiring authority an affidavit disclosing all organizations to which the applicant belongs or has belonged during the previous five years and all organizations to which he has made regular payments in the form of dues or contributions during the same period. The requirement in practical operation was an annual one. For the majority Mr. Justice Stewart did not find the statute unrelated to the state's interest in the competency and fitness of its teachers. He did find that "the statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry. . . ."[81] Justice Stewart alone of the *Barenblatt* and *Uphaus* majorities voted to invalidate the act. Justice Harlan's dissent, joined by Justices Frankfurter, Clark, and Whittaker is particularly noteworthy. He would have upheld the Arkansas law on the authority of *Barenblatt* and *Uphaus*, distinguishing *NAACP v. Alabama* and *Bates v. Little Rock*. He stated:

> The rights of free speech and association embodied in the

[78] Id. at 525.
[79] The Court does add, "We conclude that the municipalities have failed to demonstrate a controlling justification for the deterrence of free association which the compulsory disclosure of membership lists would cause." Supra, n.77 at 527. However, this seems to follow as a matter of course from the statement quoted in the text. Supra, n.78.
[80] 364 U.S. 479 (1960).
[81] Id. at 490.

> 'liberty' assured against state action by the Fourteenth Amendment (citations omitted) are not absolute. Where official action is claimed to invade these rights, the controlling inquiry is whether such action is justifiable on the basis of a superior governmental interest to which such individual rights must yield. When the action complained of pertains to the realm of investigation, our inquiry has a double aspect: first, whether the investigation relates to a legitimate governmental purpose; second, whether judged in the light of that purpose, the questioned action has substantial relevance thereto. See *Barenblatt v. United States*, 360 U.S. 109; *Uphaus v. Wyman*, 360 U.S. 72.[82]

To assume the superiority of the governmental interest from its legitimacy alone is hardly to balance the competing interests. If the inquiry has only the "double aspect" indicated then of course the dissenters are right. The affidavits required do have relevance to teaching fitness in that they are part of the total background of the individual. Certainly the employment of able teachers is a legitimate governmental purpose. But to limit the scope of review to legitimacy of purpose and relevance of the disclosure compelled is, again, to narrow review toward the minimal standard employed in the realm of substantive due process. Justice Harlan's dissent tends to confirm the belief that this was the limited scope of review accorded Barenblatt and Uphaus. That this review can be meaningful is demonstrated by *NAACP v. Alabama* and *Bates v. Little Rock*. It is regarded as inadequate by several members of the Court. It was inadequate for Justice Stewart in *Shelton v. Tucker* and even for Justice Harlan in *Talley v. State of California*.[83] There a Los Angeles ordinance forbidding the distribution of any handbills not containing the name and address of the author and distributor was held "void on its face" in an opinion by Mr. Justice Black for five members of the Court. Justice Harlan concurred on the ground that the ordinance allegedly aimed at fraud, deceit, obscenity, and libel was "not so limited, and I think it will not do for the State simply to say that the handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character."[84] Los Angeles' showing fell short of an "acceptable justification for the deterrent effect on freedom of expression which this all-embracing ordinance is likely to have."[85] The enunciated purpose was the legitimate one of preventing the use of handbills for fraud, deceit, obscenity, etc., and the dissenters, Justices Clark, Frankfurter, and Whittaker not only found compulsory disclosure of authorship reasonably related to that purpose, but they also

[82] Id. at 497-98 (dissenting opinion).
[83] 362 U.S. 60 (1960).
[84] Id. at 66 (concurring opinion).
[85] Id. at 67 (concurring opinion).

found the deterrent to free expression negligible in comparison to the substantiality of the city's interest.

There is then a serious question how far judicial review will go beyond the relationship between the disclosure compelled and a legitimate governmental purpose.[86] It seems clear that it goes at least that far. Therefore the remaining two questions posed at the outset of this section are of consequence. What is the purpose of the investigation or other inquiry? Is that purpose valid?[87] A full discussion of what constitute the valid purposes of legislative inquiries is beyond the scope of this paper. That the power to inquire is as broad as the power to legislate is a proposition which has been advanced.[88] It has likewise been asserted that legislative inquiries may not roam into spheres in which legislation itself cannot be enacted constitutionally.[89] The Supreme Court in *Watkins* uttered the oft quoted dictum, "We have no doubt that there is no congressional power to expose for the sake of exposure."[90] Assuming that this be so, or that other limitations do exist, the review of compulsory disclosure cases involves an identification of the governmental purpose of the inquiry.[91]

It is in regard to this determination that a serious difference has developed within the Court concerning its function. If the information demanded of the individual substantially relates to an avowed governmental purpose which is valid, should the Court be receptive to the contention that such avowed purpose was not the true purpose and that the latter is beyond the ambit of legitimate governmental inquiry? This question involves consideration of the relevance of ulterior purposes or motives[92] of two separate bodies, the parent legislature or branch thereof authorizing the inquiry and the committee or other delegate upon which the power to compel disclosure is bestowed. As a general proposition the Court will not inquire into the motives which impelled legislators to vote for particular measures.[93] Justice Brandeis wrote for the Court when he said, "Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this

[86] Justice Harlan's willingness to accord broader review in Talley v. California is probably attributable to the fact the case does not involve "the realm of investigation." See note 78 supra, and accompanying text.

[87] These questions were treated as germane in Barenblatt v. United States, 360 U.S. 109, 127 (1959).

[88] McGrain v. Daugherty, 273 U.S. 135, 174-75 (1927); see Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926); Morgan, Congressional Investigations and Judicial Review: Kilbourn v. Thompson Revisited, 37 Calif. L. Rev. 556 (1949).

[89] United States v. Rumely, 345 U.S. 41, 58 (1953) (concurring opinion); Watkins v. United States, 354 U.S. 178, 187, 198 (1957).

[90] 354 U.S. 178, 200 (1957).

[91] Such purpose has been said to be presumed; Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir. 1938). See Jaffe & Nathanson, Administrative Law 491 (2d ed. 1961).

[92] See note 38, supra.

[93] Fletcher v. Peck, 6 Cranch 87, 130 (1810).

Court may not enquire."[94] In sustaining a South Carolina statute prohibiting the mixing of funeral directing and insurance, a unanimous Court spoke through Mr. Justice Murphy, "A judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality."[95] To the extent that *Hammer v. Dagenhart*[96] represents a departure from that principle, it has of course been overruled.[97] It is sometimes asserted that in the area of federal taxation motive, or ulterior purpose, has a unique role in judicial review. In the main, the cases do not bear this out. While the Court has had occasion to conclude that a measure labeled "tax" was in reality something else, that which it has determined to be a tax it has not invalidated because of the ulterior purposes of the legislature in enacting it.[98] An exaction conditioned upon the illegality of an act has been denied the constitutional status of a tax despite legislative affixation of that label,[99] but the Court has consistently rejected the contention that a revenue measure is unconstitutional because of its oppressive rate or its reporting requirements, or because it was designed for the purpose of discouraging or even destroying the activity taxed.[100]

In the *Child Labor Tax Case*[101] the Court refused to classify the challenged measure as a tax. It is significant that the Court declared that "We must construe the law and interpret the intent and meaning of Congress from the language of the act."[102] Decision that the measure exacted a penalty was based upon a number of factors: The exaction was triggered by a departure from a prescribed course of conduct set forth in detail; the heavy assessment depended only on a single act of employment of a person below the prescribed ages; *scienter* was a condition of liability; inspections were directed not only by the Treasury Department but also by the Department of Labor; the Court could find no revenue raising purpose at all.[103]

United States v. Kahriger[104] represents a recent approach to this

[94] Arizona v. California, 283 U.S. 423, 455 (1931). And see cases there cited.
[95] Daniel v. Family Security Life Insurance Company, 336 U.S. 220, 224 (1948).
[96] 247 U.S. 251 (1918).
[97] United States v. Darby, 312 U.S. 100 (1941).
[98] McCray v. United States, 195 U.S. 27 (1904).
[99] United States v. Constantine, 296 U.S. 287 (1935).
[100] United States v. Sanchez, 340 U.S. 42 (1950).
[101] 259 U.S. 20 (1922).
[102] Id. at 36.
[103] See also Hill v. Wallace, 259 U.S. 44 (1922). United States v. Butler, 297 U.S. 1 (1936), does depart from this pattern. The processing tax there held invalid was clearly productive of revenue. Its unconstitutionality stemmed from its use as part of a scheme to regulate agricultural production. Motive was here decisive. However, this case though never overruled has been stripped of vitality by subsequent decisions. See Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).
[104] 345 U.S. 22 (1953).

problem. A tax upon persons engaged in the business of receiving wagers and the related requirement that such persons register with the Collector of Internal Revenue were upheld as productive of revenue, regardless of regulatory effect. The Court, over Justice Frankfurter's dissent, declined an invitation to invalidate the measure by virtue of legislative history indicating a congressional motive to suppress wagering.

Grosjean v. American Press Company, Inc.,[105] treated more extensively below, should be noted here for what it did not decide, that the measure in question was not a tax. To relate this to the thesis of this paper we must recall that the question now under consideration is the relationship of the governmental action to a valid legislative purpose. That such a relationship must exist is essential to constitutionality but is not conclusive of it. An exaction, be it of money or of information, may be reasonably related to a valid legislative purpose and still run afoul of some specific constitutional prohibition. But the specific prohibition is not relevant until the basic question of power has been decided.

To judicial consideration of the reasons the members of the legislature chose to *exercise* power, the underlying objectives are both practical and philosophical. To contemplate importation into constitutional adjudication of a factual inquiry into the subjective intent of every Senator and Representative, to say nothing of the executive who signs the measure in question, is to contemplate utter chaos and is at the same time to inject the Court into the legislative domain. Even in that rare case in which the internal legislative history alone is enough to "give one the libretto to the song,"[106] the Court since Marshall has abjured deciding questions of power on the basis of motive.[107] Nowhere is the Court's attitude stated more succinctly than by Mr. Justice Stone in *United States v. Darby*: "Whatever their motive and purpose, regulations of commerce *which do not infringe some constitutional prohibition* are within the plenary power conferred on Congress by the Commerce Clause." (Emphasis added.)[108]

So it may be said that if a House of Congress or the legislature of a state authorizes an investigation for the expressed purpose of informing itself regarding any of that vast number of matters concerning which that body may constitutionally legislate, then the investigation relates to a valid legislative purpose irrespective of why any or all individual members voted for it. One may go a step further. If the

105 297 U.S. 233 (1936).
106 Frankfurter, J. dissenting in United States v. Kahriger, 345 U.S. 22, 39 (1953).
107 Fletcher v. Peck, 6 Cranch 87, 130 (1810).
108 312 U.S. 100, 115 (1941).

committee directed to conduct the investigation propounds to a witness a question related to the purpose of the investigation, the question does not lose its validity through the underlying motives of the committee members, however clearly these may appear. For the judicial determination of whether the particular interrogation is related to a valid legislative purpose, those motives simply have no relevance. The dictum in *Watkins* relied upon in *Barenblatt* states that committee members' "motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served."[109]

The issue is clearly posed in the recent case of *Wilkinson v. United States*.[110] Wilkinson was convicted of contempt of Congress for refusal to answer a question as to Communist Party membership propounded by a subcommittee of the House Committee on Un-American Activities. The Supreme Court affirmed his conviction, Mr. Justice Stewart speaking for a majority of five. His opinion separated the argument that the committee was not pursuing a valid legislative purpose from the contention that the interrogation violated first amendment rights. Although the latter is given rather short shrift, the fact of separation is a genuine aid to understanding the Court's attitude toward motive in relation to the issue of relevance to a valid legislative purpose. Wilkinson sought to justify his refusal on the ground, *inter alia*, that although the *hearings* may have been pursuant to a valid legislative purpose, the committee interrogated *him* for the purpose of exposing him to public censure for his activities in opposition to the committee generally and to the instant hearings in particular. After rejecting the substance of this contention, Mr. Justice Stewart added:

> Moreover it is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the petitioner.[111]

Mr. Justice Black characterizes this as a "sweeping abdication of judicial power" which permits the committee to "continue to harass its opponents with absolute impunity so long as the 'protections' of *Barenblatt* are observed."[112] With Justice Black's view that the first amendment claims are inadequately treated both here and in *Barenblatt* the present writer agrees, but Justice Stewart's position regarding motive, taken in its context, is hardly judicial abdication. It is stated not in connection with first amendment issues, but on the previous question as to whether the interrogation substantially relates to a valid legisla-

[109] 354 U.S. 178, 200 (1957).
[110] 365 U.S. 399 (1961).
[111] Id. at 412.
[112] Id. at 417 (dissenting opinion).

tive purpose which the committee was directed to serve. The inquiry of Wilkinson as to membership in the Communist Party either does or does not relate to the legislative purpose which the Court has found contained in the House Resolution establishing the Committee on Un-American Activities. That relationship is neither added to nor subtracted from by the motives which may have spurred the interrogation.

The dissenting justices are not alone in fearing that refusal to examine the motives of the committee members means virtually a free hand for the committee in using the subpoena power to harass its critics.[113] However, meaningful judicial review need not come in the form of an unprecedented practice of going behind the articulated legislative purposes to determine why the investigation was authorized. Nor need the Court try the motives of the committee members in the course of deciding whether the questions asked relate to the purposes disclosed in the authorizing resolution, for no matter how valid the purpose, no matter how substantial the relationship between that purpose and disclosure demanded of the individual, the governmental action is subject to the specific limitations imposed by the Constitution. "The First Amendment may be invoked against infringement of the protected freedoms by law or by law-making."[114]

If the above analysis is correct not only is Justice Black's *Wilkinson* claim of "judicial abdication" misplaced, but also misdirected at least in part is the penetrating and pursuasive dissent of Mr. Justice Brennan in *Uphaus v. Wyman.*[115] At the outset is the following:

> This record, I think, not only fails to reveal any interest of the State sufficient to subordinate appellant's constitutionally protected rights, but affirmatively shows that the investigatory objective was the impermissible one of exposure for exposure's sake."[116]

The first of these conclusions of course relates to the constitutional issue of freedom of expression, but the second involves an inquiry behind the enunciated legislative purpose into the motives of the legislature and its one man investigating committee, the Attorney General. It is hard to quarrel with this approach because Justice Brennan so fully and effectively documents his proposition. As will appear below much of what he says in relation to purpose is relevant to the issue of free expression. It is here urged, however, that on the issue of relation to a valid legislative purpose, the purpose must be accepted as declared by the legislature, its validity determined, and the information demanded from the witness analyzed for relationship to that purpose.

[113] See editorial, The Court and Congress, N.Y. Times, March 1, 1961, p. 32, cols. 3-4 (city ed.).
[114] Watkins v. United States, 354 U.S. 178, 197 (1957).
[115] 360 U.S. 72, 82 (1959).
[116] Ibid.

If the demand for disclosure passes muster on these counts, then only those first amendment principles made applicable to the states by the fourteenth amendment stand in the way of affirmance of the judgment below.

The *Uphaus* majority's handling of the problem of legislative purpose reduced it to utter simplicity. The resolution authorized and directed the Attorney General to investigate with respect to violation of the state's Subversive Activities Act and to determine the presence within the State of subversive persons as defined in the act. He was directed to report to the legislature. Inasmuch as subversive persons were defined with a view towards violent overthrow of the government of the state, the legislative purpose served was determined to be self-preservation. The Attorney General was directed to ascertain whether there were subversive persons within the state. "The obvious starting point of such an inquiry was to learn what persons were within the State."[117] Guests being persons, the relevance of World Fellowship's guest list was thus established. One may question the substantiality of the relationship between persons and subversive persons. The relationship is buttressed, however, by the assertion that the "record reveals that appellant had participated in 'Communist front' activities and that 'not less than nineteen speakers invited by Uphaus to talk at World Fellowship had either been members of the Communist Party or had connections or affiliations with one or more of the organizations cited as subversive or Communist controlled in the United States Attorney General's list.' "[118] To be sure a close scrutiny of this record may confirm rather than allay doubts about this,[119] but a Supreme Court finding of such relationship should end judicial inquiry as to the legislative purpose as a factor of independent significance.

D. *The First Amendment*

Decision in favor of the recalcitrant witness on any of the grounds heretofore discussed does not reach the hypersensitive area of ultimate governmental power. Decision that a congressional committee has overstepped its authority can be followed by legislative expansion of that authority. Reversals for failure to make clear to witnesses the pertinency of questions can be limited in their effect through easy alterations in committee practices. Even in those instances in which state court judgments are reversed for lack of sufficient nexus between the demand upon the individual and the asserted purpose of the inquiry, the state is not foreclosed from demanding disclosure of relevant in-

[117] Id. at 78.
[118] Id. at 79.
[119] See note 76 supra.

formation nor from articulating the purpose of the inquiry in such a way as to demonstrate the relevance of the information previously refused. But when judicial decision sustains first amendment objections, the implications may be more grave. No matter how clearly the request for information is within the scope of the interrogator's authority, no matter how explicitly pertinency is made known, no matter how directly related is the question to a valid legislative function, the government cannot compel disclosure if the Court concludes that to do so would violate the first amendment or its principles contained in the fourteenth. This then is judicial review in its starkest form, for the Court to deny validity to what Congress or the state legislature has found not only constitutional but in the interest of the people it represents. The role of the Court in enforcing constitutional prohibitions has hardly been neglected of late.[120] To catalogue like all Gaul attitudes toward that role is oversimplification, but it is believed not inaccurate. The commandments of the first amendment (and the rest of the Bill of Rights) can be left largely to the legislature, to serve as "counsels of moderation"[121] on the theory that by its very nature the judiciary is incapable of their nurture.[122] Conversely the Court has been urged to enforce these particular provisions in accordance with their literal phraseology; *no law means no law.*[123] It is not surprising that the Court has followed the road between. After years of attempting to articulate a formula for decision in cases involving freedom of expression, the Court majority has stated forthrightly what has probably always been so, that resolution of the issues involves a "balancing of the competing interests in the particular circumstances shown."[124] Mr. Justice Frankfurter has variously termed the process "careful weighing of conflicting interests"[125] and "[a]ccommodation of these contending principles—the one underlying the power of Congress to investigate, the other at the basis of the limitation imposed by the First Amendment."[126] If there is danger in formulae which "tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentan-

120 See notes 1 and 2 supra; see also Jackson, The Supreme Court in the American System of Government (1955); Hand, The Bill of Rights (1958).

121 Hand, The Contribution of an Independent Judiciary to Civilization (1944), reprinted in Hand, The Spirit of Liberty 172, 181 (1952). See also Richardson, Freedom of Expression and The Function of Courts, 65 Harv. L. Rev. 1, 44-54 (1951).

122 See generally Curtis, Law as Large as Life (1959).

123 See Mr. Justice Black concurring in Smith v. California, 361 U.S. 147, 157 (1959). See also Douglas, The Right of the People (1958); Black, The Bill of Rights, 35 N.Y.U. L. Rev. 865 (1960).

124 Barenblatt v. United States, 360 U.S. 109, 126 (1960).

125 Dennis v. United States, 341 U.S. 494, 542 (1951) (concurring opinion).

126 United States v. Rumely, 345 U.S. 41, 44 (1953).

gle,"[127] so there is difficulty in the use of metaphorical scales. A tendency to strive for measurable preponderance can becloud the ultimate judicial act, the exercise of judgment. The need is for identification and elaboration of those elements upon which judgment is finally based.

Wilkinson v. United States,[128] discussed above in connection with legislative purpose, and a companion case, *Braden v. United States*,[129] involved challenges to the validity of compulsory disclosure, challenges based upon the first amendment. Justice Stewart's salutary separation of the issue of relationship to a valid legislative purpose from that of freedom of expression and association has already been discussed.[130] Having treated the former in painstaking fashion the *Wilkinson* opinion disposed of the first amendment problem:

> We come finally to the claim that the subcommittee's interrogation of the petitioner violated his rights under the First Amendment. The basic issues which this contention raised were thoroughly canvassed by us in Barenblatt. Substantially all that was said there is equally applicable here, and it would serve no purpose to enlarge this opinion with a paraphrased repetition of what was in that opinion thoughtfully considered and carefully expressed.[131]

Braden's assertions too are disposed of "upon the reasoning and authority of Barenblatt."[132]

These cases are disturbing for three reasons. In the first place this observer cannot share Justice Stewart's enthusiasm for the thoroughness of *Barenblatt*.[133] Second, if the criticism of that decision is warranted, its inadequacies are compounded by the sweeping effect given it here. Third, the Court fails to deal with asserted differences between these cases and *Barenblatt* in the context of the first amendment claims.

The starting point of inquiries of this sort must be the effect of the challenged governmental action upon interests protected by the first amendment. Without a showing of harm to those interests there is no accommodation required. In *Schneider v. State*,[134] the Court held unconstitutional four ordinances restricting the distribution of handbills. Justice Roberts wrote:

> In every case, therefore, in which legislative abridgement of the rights is asserted, the courts should be astute to examine the

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127 Freund, On Understanding the Supreme Court 27-28 (1949).
128 365 U.S. 399 (1961).
129 365 U.S. 431 (1961).
130 See p. 464, supra.
131 365 U.S. 399, 413-14 (1961).
132 365 U.S. 431, 435 (1961).
133 See pp. 451-52, supra.
134 308 U.S. 147 (1939).

> *effect* of the challenged legislation. Mere legislative preference or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.[135] (Emphasis added.)

This element is most significant, for views have been expressed by individual members of the Court which, if accepted, would have ended at the threshold the application of the first amendment to some disclosure cases. Mr. Justice Clark's dissents in *Watkins*, *Sweezy*, and *Talley v. California*[136] are of this character. In each instance Justice Clark finds no significant adverse effect upon freedom of expression.

The most vulnerable aspect of the Court's *Barenblatt* opinion lies in its failure to articulate the effect upon freedom of expression of enforced disclosure of political beliefs and associations. The first amendment rights asserted are indeed public rights, public in two respects; first, the public interest in the freedom of the individual in terms of his own dignity, and second, in terms of the need of the public for the full and free discussion so eloquently described as "the indispensable condition, of nearly every other form of freedom."[137]

To recognize frankly this broad character of the first amendment is not a prelude to deciding all cases in favor of the individual involved. Of course the critical element to the contrary is the weight to be ascribed to the governmental interest in demanding disclosure from the unwilling witness.

This is to state the competing claims in broadest perspective. The difficulty with the opinions, majority and dissenting, in *Barenblatt* can be traced to their failure to narrow the focus to the particulars of the circumstances involved[138] and their silence concerning factors militating against the result reached.

The ingredients for decision would appear to include the following, although no such list can claim completeness in view of the possible variations in circumstances.

1. Identification of the Competing Interests

There is great need for precise identification of the competing interests involved. It would seem clear that exposure of an association,

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135 Id. at 161.
136 362 U.S. 60, 67 (1960).
137 Palko v. Connecticut, 302 U.S. 319, 327 (1937).
138 See Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 553-54 (1951).

however hurtful, is not the equivalent of prohibiting it. So also information which clearly would not justify prosecution for violation of the Smith Act might well suffice to warrant interrogation into the need for further legislation in aid of national security.[139]

Underlying the Court's opinions in *Barenblatt* and *Uphaus* is the assumption that the power to compel testimony is co-extensive with the power to investigate. It has been suggested that this assumption is not warranted.[140] To refuse to imprison the recalcitrant witness because his interrogation in the circumstances grievously invades constitutionally protected rights is not to enjoin a committee hearing nor otherwise to narrow the doctrine of legislative immunity.[141] With this may be coupled the added deterrent effect on expression of unpopular views attendant upon the *forced* public disclosure of one's associations, including the names of other people.[142]

A distinction may be drawn between the greater governmental interest in compulsory disclosure in the realm of governmental operation and the corresponding interest in examining into private affairs,[143] a distinction that has been accorded judicial recognition but significantly not in the recent cases upholding compulsory disclosure against first amendment claims where government operations were not involved.

In a somewhat separate class are cases involving statutes requiring registration of organizations and disclosure of their memberships.[144] Laws requiring such disclosure may be distinguished from the disclosures demanded of witnesses under authority conferred in general terms upon court or legislative committee. First, such laws are aimed at organizations engaged in particularly described activities.[145] Second, they are the product of the entire legislative process including the possibility of executive veto. That such statutes may themselves

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139 Barenblatt v. United States, 360 U.S. 109, 130 (1959).

140 See Kalven, Mr. Alexander Meiklejohn and the Barenblatt Opinion, 27 U. Chi. L. Rev. 315, 327-28 (1960).

141 See Tenney v. Brandhove, 341 U.S. 367 (1951).

142 That the witness has standing to assert the first amendment interests in associational privacy of those whom his testimony would expose appears settled by NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449, 458-59 (1958); cf. Uphaus v. Wyman, 360 U.S. 72, 77-78 (1959); Bates v. Little Rock, 361 U.S. 516, 524, n.9 (1960).

143 See Watkins v. United States, 354 U.S. 178, 200, n.33 (1957); Shelton v. Tucker, 364 U.S. 479, 490-91 (1960) (dissenting opinion); Newman, The Supreme Court, Congressional Investigations, and Influence Peddling, 33 N.Y.U. L. Rev. 796, 798-802 (1958).

144 Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928).

145 That such activities may involve advocacy does not prohibit registration requirements if a valid public interest in the identity of the registrants and their members can be demonstrated. See United States v. Harriss, 347 U.S. 612 (1954); Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961).

involve serious first amendment problems is attested to by *United States v. Harriss*[146] and *Communist Party of the United States v. Subversive Activities Control Board.*[147] However, in these situations the governmental interest is far more sharply defined than is true when disclosure is demanded by a subcommittee of a committee of a single house of Congress operating under a broad charter[148] or by an attorney general invoking judicial aid in carrying out general provisions of law relating to corporations.[149]

There is great variation in the character of the specific questions which witnesses have refused to answer, thereby subjecting themselves to contempt proceedings. Given the result in *Dennis*, the legislative interest in information regarding present Communist Party membership and activities must rate as substantial, and indeed this query alone may be said to involve a minimum interference with first amendment interests, provided an adequate foundation is shown for interrogating the particular witness.[150] Information regarding Communist Party activities in the recent past likewise appears significant in relation to potential legislation regarding national security, but the more remote in point of time, the more tenuous the connection with legislative needs and the greater the adverse effect upon first amendment interests. Greater importance then attaches to the foundation for the particular question.[151] As the interrogation moves from Communist Party membership into particular personal associations and utterances of the individual the governmental stake in disclosure requires greater evidence of justification, not only to indicate the government's interest which on the face of the query is less apparent, but also to counter the added extent to which compulsory disclosure impairs associational freedom. For Justices Harlan and Frankfurter this was the crux of *Sweezy*. The Attorney General of New Hampshire had allegedly

[146] 347 U.S. 612 (1954). The disclosure provisions of the Federal Lobbying Act, 2 U.S.C. §§ 261 et seg. were held valid in an opinion by Chief Justice Warren. Justices Douglas, Black and Jackson dissented. Justice Clark did not participate.

[147] 367 U.S. 1 (1961). It is noteworthy that only Justice Black would have held the registration provisions of the Subversive Activities Control Act, 50 U.S.C. § 786, violative of the first amendment. Chief Justice Warren and Justices Douglas and Brennan dissented on other grounds.

[148] See Watkins v. United States, 354 U.S. 178 (1957).

[149] See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

[150] In both Wilkinson and Braden, identification of the individual by another witness was held sufficient. It is now held that no such foundation is needed to justify questioning as to Communist Party membership addressed to an applicant for admission to the bar. An examination into the applicant's character being wholly permissible, refusal to answer questions reasonably related to prohibited advocacy may be treated as an obstruction of the inquiry into character and fitness. In re Anastaplo, 366 U.S. 82 (1961). In a companion case, Konigsberg v. State Bar of California, 366 U.S. 36 (1961), the Court described as "minimal" the effect upon free association of such questioning in connection with a determination of fitness to practice law.

[151] But see note 150 supra.

received considerable sworn testimony that the Progressive Party of New Hampshire had been infiltrated heavily by members of the Communist Party and that its policy had been influenced by those members, that Sweezy was associated with organizations listed by the House Un-American Activities Committee, and that he had co-authored an article asserting that violence was less to be deplored when used by the Soviet Union than by capitalist countries.[152] Such a foundation these judges found inadequate to support interrogation of Sweezy as to the contents of a lecture he had delivered at the University of New Hampshire and as to his Progressive Party activities. Two years later Justices Frankfurter and Harlan joined Mr. Justice Clark's opinion for the Court affirming the conviction of Willard Uphaus for refusing to produce the guest list of World Fellowship, Inc., though the subpoena *duces tecum* was justified on virtually the same basis as asserted in support of Sweezy's interrogation concerning the Progressive Party.[153] As noted earlier, the cases are distinguished on the basis that "the academic and political freedoms discussed in *Sweezy v. New Hampshire* are not present here in the same degree since World Fellowship is neither a university nor a political party."[154] As to why this difference is of constitutional significance, the opinion does not opine. In many ways the *Uphaus* record discloses a *more* drastic impact upon freedom of association than had been shown in *Sweezy*,[155] and the governmental justification is essentially the same as that described by Justice Frankfurter in *Sweezy* as:

> . . . so meagre a countervailing interest of the State as may be argumentatively found in the remote, shadowy threat to the security of New Hampshire allegedly presented in the origins and contributing elements of the Progressive Party and in petitioner's relations to these."[156]

In *Uphaus* the governmental showing is deemed a sufficient nexus to the very self preservation of the State itself.

2. Necessity and the Reasonably Available Alternative

In determining whether a particular measure falls within an enumerated power of Congress, the Supreme Court has from an early time

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[152] 354 U.S. 234, 261 (1957) (concurring opinion).

[153] See p. 25, supra.

[154] 360 U.S. 72, 77 (1959).

[155] When Uphaus was ordered to produce World Fellowship's guest list the first report of the Attorney General had been published. See Subversive Activities in New Hampshire, Report of the Attorney General to the New Hampshire General Court (1955). The use made therein of the list of speakers furnished by Uphaus (id. at 135-161) is detailed in Justice Brennan's dissenting opinion in Uphaus v. Wyman, 360 U.S. 72, 91-92 (1959), and is discussed in the text below.

[156] 354 U.S. 234, 265 (1957) (concurring opinion).

regarded the necessity for the act as a matter for Congress, provided only that it be adapted to an enumerated power.[157] Similarly state legislation challenged on grounds of denial of substantive due process has need only for reasonableness; the degree of necessity is not for the Court.[158] However, when governmental action is alleged to violate particular constitutional prohibitions, the process of accommodation of competing interests has involved judicial consideration of necessity for the particular measure. The question has frequently been put in terms of the availability of an alternative to serve the governmental purpose at less expense to the competing interests. The negative implications of the commerce clause were invoked in *Dean Milk Company v. City of Madison*[159] to invalidate a Madison, Wisconsin, ordinance requiring all milk sold in the city to be pasteurized within five miles thereof. Holding that the effect of the ordinance was to exclude wholesome milk produced and pasteurized in Illinois, the Court faced the issue "whether the discrimination inherent in the Madison ordinance can be justified in view of the character of the local interests and the available methods of protecting them."[160] When the Court, speaking through Mr. Justice Clark, found "that reasonable and adequate alternatives are available,"[161] it proceeded to adjudge the ordinance unconstitutional as imposing an undue burden on interstate commerce.

In *Schneider v. State*[162] the ordinances involved prohibited the unlicensed distribution of handbills on the public streets. The measures were defended as designed to prevent littering, but the Court found "obvious methods of preventing littering"[163] more compatible with freedom of expression.

This element has been considered recently in compulsory disclosure cases. Arkansas' claim to disclosure by teachers of all organizations to which they belong or contribute was justified by the state in the interest of evaluation of its teachers. But for the Supreme Court majority "the statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers."[164]

The Los Angeles ordinance forbidding distribution of *all* anonymous handbills was held invalid as not limited to the prevention of fraud, false advertising and libel.[165]

157 McCulloch v. Maryland, 4 Wheat. 316 (1819).
158 Nebbia v. New York, 291 U.S. 502 (1934).
159 340 U.S. 349 (1951).
160 Id. at 354.
161 Ibid.
162 308 U.S. 147 (1939).
163 Id. at 162.
164 Shelton v. Tucker, 364 U.S. 479, 490 (1960).
165 Talley v. California, 362 U.S. 60 (1960).

The factor of necessity has not been fully discussed in those cases dealing with legislative investigations into "subversive" activities. The informing of Congress for the purpose of legislation could arguably be achieved at a lower price to associational privacy than that exacted through the procedures of the House Committee on Un-American Activities.[166] The strong suggestion in *Watkins* that the resolution establishing the Committee on Un-American Activities suffered from overbroadness was not pressed by the Court when the issue was faced in *Barenblatt.* That the authority to compel disclosure in an area of such sensitivity to freedom of expression be not broader than necessary for the achievement of justifiable ends is a requirement befitting the role of the Court.[167] The difficulty with such an approach may be traced in part to the uncertain status of exposure as an aspect of the legislative process.

3. Exposure

Unwelcome exposure of beliefs and associations is an attribute of compulsory disclosure impinging upon interests protected by the first amendment. Indeed Mr. Justice Harlan's dissent in *Shelton v. Tucker* contains the observation that "unwarranted publicizing" of the associational disclosures required of Arkansas teachers would present a very different case from that actually before the Court.[168] In his opinion for the Court in *Konigsberg v. State Bar of California*[169] he discounts the effect on first amendment interests of questioning an applicant for admission to the bar concerning Communist Party membership because the proceedings were held in private. However, exposure in the context of the legislative investigation is a matter apart and at least in some circumstances has affirmative claims of its own. There is danger in the simplicity of the *Watkins* dictum, "We have no doubt that there is no congressional power to expose for the sake of exposure." Indeed the statement is immediately qualified: "The public is, of course, entitled to be informed concerning the workings of its government."[170] A line has been drawn between the informing function of the legislative committee in connection with governmental operations and the exposure of the private activities of individuals.[171] However, even in the latter area the publicity aspect of legislative inquiry has been defended as itself

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[166] See the discussion by Mr. Justice Frankfurter of the rules of procedure of the Civil Rights Commission in Hanah v. Larche, 363 U.S. 420, 486 (1960) (concurring opinion), notably in regard to abstaining from public exposure (id. at 492).

[167] See Kalven, Mr. Alexander Meiklejohn and The Barenblatt Opinion, 27 U. Chi. L. Rev. 315, 327-28 (1960).

[168] 364 U.S. 479, 499 (1961) (dissenting opinion).

[169] 366 U.S. 36 (1961).

[170] 354 U.S. 178, 200 (1957).

[171] See note 139 supra and accompanying text.

a vital part of the process.[172] To declare that legislative interrogation is unlawful if conducted for no ostensible purpose save exposure of the conduct of private citizens is to contribute little to solution of real problems. The potential of legislative power is so broad that almost any inquiry a congressional committee might conduct can be rationally connected to *some* legislative purpose through careful drafting of the authorizing resolution.[173] This accomplished, exposure can at the very least be defended as an inevitable by-product of the inquiry; beyond that the publicity attendant upon investigation creates public awareness and opinion which in turn affects the process of enactment.

That exposure may be denominated a two-edged sword does not mean that the relative sharpness of those edges is a constant. To the extent that inquiry pertains to matters close to the political and intellectual autonomy of the individual, exposure lays a heavy hand on first amendment interests, and the competing needs of the government for information, and for exposure, become vital factors for a court. The argument that the public need be informed of the necessity for legislation suffers when the legislation in question concerns areas in which statutes are subject to specific constitutional prohibitions. It revives considerably when the asserted governmental interest also relates to the security of the government itself. At this point there is need for emphasis on the distinction between exposure in the form of publication by a committee and the use of compulsory process to exact the exposure from the unwilling witness. The traditional doctrine of legislative immunity accords great latitude to the legislative committee in publicizing its findings, its opinions, and the factual bases for them.[174] What is in issue is not the power to expose but rather the power to compel witnesses either to participate in exposing their associations and those of others or suffer consequences in the form of contempt proceedings or other adverse governmental action.

Exposure was a predominant element in *Uphaus v. Wyman*.[175] It formed the basis of Mr. Justice Brennan's dissent.[176] At the time Uphaus refused to obey the Superior Court order to produce the guest list of World Fellowship he had already furnished the investigating committee with a list of speakers and had seen that list published in the initial committee report to the legislature.[177] Twenty-one speakers

[172] "A representative democracy relies upon the creation of a favorable public opinion for the acceptance and thus the enforcement of new legislation." Brief for the United States in Watkins v. United States, p. 55, n.29. Compare statement of government counsel on oral argument, 354 U.S. 178, 187, n.8 (1957).

[173] See Mr. Justice Black, dissenting, in Wilkinson v. United States, 365 U.S. 399, 417 (1961).

[174] See Tenney v. Brandhove, 341 U.S. 367 (1951).

[175] 360 U.S. 72 (1959).

[176] Id. at 82.

[177] Subversive Activities in New Hampshire, supra note 145.

were discussed in some detail as having "records of affiliation with the Communist Party, Communist-infiltrated groups, or Communist-supported causes."[178] Thirty-six others were listed by names, the report stating that "the following individuals would appear at this time to be the usual contingent of 'dupes' and unsuspecting persons that surround almost every venture that is instigated or propelled by the 'perennials' and articulate apologists for Communists and Soviet chicanery, but of this fact we are not certain."[179] In this setting Uphaus persisted in his refusal to furnish the committee with the list of guests. The policy of the committee with respect to publication of names was clear. One need not agree with Justice Brennan's use of this material to show a *purpose* to expose for exposure's sake to conclude that the *effect* of such exposure upon associational interests protected by the fourteenth amendment far outweighs the state interest in such a sweeping disclosure. Though the decision in *Pennsylvania v. Nelson*[180] was here held not to preclude state investigation into the need for legislation to protect the state, the scope of that legislative interest should be discounted by the Smith Act,[181] as construed in the *Nelson* case. Again it may be observed that while the publication itself appears immune to judicial control, the inevitable involvement of the judicial process when compulsory disclosure is resorted to requires careful assessment of these competing interests. The concern of the Court with unwarranted publication in *Shelton v. Tucker*[182] seems equally appropriate to *Uphaus v. Wyman*.[183]

The factor of necessity is closely related. Does the legislative interest of New Hampshire fairly necessitate the kind of publication described above, or can the state's interest, including its interest in an informed public, be served by means less oppressive to rights of associational privacy? Close attention to circumstances such as these is essential if the Court is truly "to balance the competing interests." The status of exposure as a legislative function is a significant factor and to this point has been sadly neglected. Judicial recognition of such an interest may be fraught with serious implications for first amendment freedoms, but the legislative interest to be accommodated can be confined to that which the legislature is willing to articulate.[184] Thus while

178 Id. at 136.
179 Id. at 154.
180 350 U.S. 497 (1956).
181 18 U.S.C. § 2385 (1956).
182 364 U.S. 479, 486-87 (1960).
183 360 U.S. 72 (1959).
184 This is particularly true in regard to criminal prosecutions under 2 U.S.C. § 192 (1958) where the standard of pertinency is an element of the statutory offense. Confinement of the scope of inquiry where the House of Congress employs its inherent contempt power is more difficult. See generally, Morgan, Congressional Investigations and Judicial Review: Kilbourn v. Thompson Revisited, 37 Calif. L. Rev. 556 (1949).

much exposure of private expression could arguably be justified to inform the public of the possible need for a constitutional amendment altering the first amendment, such a forthright congressional declaration is not politically foreseeable. In its absence the Court retains, insofar as compulsory disclosure is concerned, the power to judge between the governmental interest in publicity in particular circumstances and the competing demands of the first amendment. To render such a judgment on the side of the interests of free expression, as might well have been the result in *Uphaus*, does not require a sweeping condemnation of any legislative function of informing the public outside the realm of government operation. There is gross oversimplification in the phrase "exposure for exposure's sake."

4. Motive and the First Amendment

In the section of this paper which dealt with determining the validity of the legislative purpose of an inquiry, it was asserted that courts ought not to probe behind the articulated purpose of the legislature for the reasons motivating a particular enactment. By the same token, motives or ulterior purposes of a legislative committee in demanding certain information were considered irrelevant to the question whether the demand reasonably related to the avowed legislative purpose. However, that discussion did not pertain to the solution of first amendment problems but rather to the preliminary issue of basic governmental authority. Once this issue is disposed of favorably to the asserted power, the judicial inquiry shifts to the complexities of free expression. In determining the effect of compulsory disclosure on first amendment interests, the motive of the delegate exercising power and conceivably of the legislature itself may have a relevance not present in regard to the previous question.[185] Reduced to its simplest terms the point is this: If an actor's conduct by its nature tends to produce a certain effect, the likelihood of that effect increases if it is the intent of the actor to produce it.[186] Translated into the present context, if the use of process to compel disclosure before a legislative committee in a given situation both serves a legislative purpose and adversely affects

[185] "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard." Mr. Justice Jackson in Board of Education v. Barnette, 319 U.S. 624, 639 (1943).

[186] See Holmes, The Common Law 68-69 (1887). For an interesting discussion of intent in relation to a determination of the probability of an apprehended evil flowing from legislatively prohibited speech, see Richardson, Freedom of Expression and The Function of Courts, 65 Harv. L. Rev. 1, 13-15 (1951). He concludes, "Intent, or its absence, should thus be relevant only in so far as it supplies evidence of the probable effect, or lack of it, of utterances otherwise colorless or ambiguous." Id. at 15.

first amendment interests, evidence that the committee's aim relates primarily to the latter is material to the Court's assessment of that deterrent effect and thus to judicial accommodation of the competing interests. This position receives some support from the *Barenblatt* opinion. Though the Court disclaims interest in the motives of committee members, the following excerpts indicate a concern:

> Nor can it fairly be concluded that this investigation was *directed at* controlling what is being taught at our universities rather than at overthrow. The statement of the Subcommittee Chairman at the opening of the investigation discloses no such *intention*, and so far as this record reveals nothing thereafter transpired which would justify our holding that the *thrust* of the investigation later changed. The record discloses considerable testimony concerning the foreign domination and revolutionary purposes and efforts of the Communist Party. That there was also testimony on the abstract philosophical level does not detract from the *dominant theme* of this investigation—Communist infiltration furthering the alleged ultimate purpose of overthrow. (Emphasis added.)[187]

And again,

> Having scrutinized this record we cannot say that the unanimous panel of the Court of Appeals which first considered this case was wrong in concluding that "the *primary purposes* of the inquiry were in aid of legislative processes." (Emphasis added.)[188]

The majority opinion in *Uphaus* contains no such language. Mr. Justice Brennan, dissenting, states:

> We have a detailed inquiry into an assemblage the general contours of which were already known on the one hand, and on the other the remote and speculative possibility of some sort of legislation—albeit legislation in a field where there are serious constitutional limitations. We have this in the context of an inquiry which was in practice being conducted *in its overwhelming thrust* as a vehicle of exposure, and where the practice had been followed of publishing names on the basis of a "not proven" verdict. (Emphasis added.)[189]

Justice Brennan's painstaking treatment of the record virtually precluded an assessment such as Justice Harlan's for the Court in *Barenblatt*.

This concern with motive and purpose in relation to effect is not novel; it has support in prior decisions of the Court. The commerce clause of the Constitution has long been construed as limiting but not

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187 360 U.S. 109, 131-32 (1959).
188 Id. at 133.
189 360 U.S. 72, 106-07 (1959) (dissenting opinion).

precluding state regulation of interstate commerce.[190] The clause invalidates state laws which discriminate against interstate commerce[191] or which produce an adverse effect thereon which outweighs the state interest promoted.[192] The emphasis is rightly upon the effect of the challenged measure, but the Court has recognized the intimate relationship between the effect of a statute and the underlying reasons for its enactment.[193]

Application of a statute valid upon its face may be challenged under the equal protection clause of the fourteenth amendment by virtue of alleged discrimination in its administration. In such cases the Court has avowed the materiality of the purpose of the administrator. *Snowden v. Hughes*[194] involved an action for damages under the Civil Rights Act against state election officials who allegedly discriminated against the plaintiff in failing to include his name on a ballot in violation of state law. Although defendant's failure to certify the plaintiff as a successful candidate in a primary was characterized as "malicious" and "wilful," the complaint was held insufficient to set out a denial of equal protection. Mr. Justice Stone wrote:

> The unlawful administration by state officers of a state statute fair upon its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, (citation omitted) or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, Yick Wo v. Hopkins, 118 U.S. 356, 373-4.[195]

Denial of equal protection to a Negro defendant through the exclusion of Negroes from a jury requires more than the absence of Negroes from the particular panel; deliberate exclusion is necessary.[196] This is normally shown by evidence of the customary absence of Negroes from juries in the locality, thus giving rise to the inference of a systematic practice.[197]

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190 Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 299 (1851).

191 Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949).

192 Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

193 Nippert v. City of Richmond, 327 U.S. 416 (1945); Hood & Sons, Inc., v. DuMond, 336 U.S. 525 (1949); Dean Milk Co. v. Madison, 340 U.S. 349 (1951). See Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 550 (1951).

194 321 U.S. 1 (1944).

195 Id. at 8.

196 Virginia v. Rives, 100 U.S. 313, 323 (1879); Martin v. Texas, 200 U.S. 316, 320-21 (1906); Thomas v. Texas, 212 U.S. 278-82 (1909); Akins v. Texas, 325 U.S. 398, 403 (1945).

197 Neal v. Delaware, 103 U.S. 370, 379, (1881); Norris v. Alabama, 294 U.S.

Discrimination is likewise at the heart of the recent case of *Gomillion v. Lightfoot*[198] in which the Court upheld under the fifteenth amendment the sufficiency of a complaint alleging discriminatory deprivation of the right to vote. The challenge was to an Alabama statute redefining the boundaries of Tuskegee, Alabama, so as to produce an irregular twenty-eight sided figure, leaving outside the city limits all but four or five of its Negro voters without removal of a single white resident. Justice Frankfurter wrote for the Court:

> While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights.[199]

To the state's claim of unfettered power in drawing municipal boundaries the Court responded:

> When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used *as an instrument for circumventing a federally protected right.* This principle has had many applications. It has long been recognized in cases which have prohibited a state from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an "unconstitutional condition." What the Court has said in those cases is equally applicable here, *viz.*, that 'Acts generally lawful may become unlawful when done to accomplish an unlawful end, (citation omitted) *and a constitutional power cannot be used by way of condition to attain an unconstitutional result.*' (Emphasis added.)[200]

The concern with the *purpose* of exercising an admitted power is clear, but the parallel to the first amendment and compulsory disclosure must not be overdrawn. The Court notes that against the claim of discrimination the state advances no specific municipal concern which is served by the statute in question. But the Court does not suggest that any semblance of an interest would suffice. It is not the assertion here that the establishment of a purposeful policy of exposure would *per se* invalidate a governmental demand for information. It is believed that such a showing should be considered as evidencing a strong likelihood that exposure will result, thus necessitating consideration of exposure's legitimate contribution to the governmental

587, 589 (1935); Pierre v. Louisiana, 306 U.S. 354, 357 (1939); Hill v. Texas, 316 U.S. 400, 404 (1942); Patton v. Mississippi, 332 U.S. 463, 468-69 (1947); Eubanks v. Louisiana, 356 U.S. 584, 587 (1958); cf. Cassell v. Texas, 339 U.S. 282, 290 (1950).

198 364 U.S. 339 (1960).

199 Id. at 347.

200 Ibid.

interest and the extent to which it impairs associational rights protected by the Constitution.

The close relationship between effect and motive in a first amendment setting is found in *Grosjean v. American Press Company*.[201] A Louisiana statute imposed a license tax of two per cent of gross receipts upon all newspapers with circulation in excess of twenty thousand copies per week. Publishers of the thirteen newspapers affected sought an injunction against enforcement of the tax upon the ground, *inter alia*, that the act violated the first amendment prohibition against abridgement of freedom of the press made applicable to the states by the due process clause of the fourteenth amendment. In affirming a decree enjoining enforcement, the Supreme Court unanimously held the statute unconstitutional as an abridgement of the freedom of the press in violation of the due process clause of the fourteenth amendment. The Court relied almost entirely upon the historical use of such taxes to curtail the press and the English struggle against these exactions. This the Court found to be the background of the first amendment provision relating to the press. Of the particular tax the opinion by Mr. Justice Sutherland contains the following:

> It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties.[202]

The Court was silent as to details of the "present setting," but the record was not. The complaint contained allegations that the measure was intended as reprisal or punishment by the dominant political faction of the state directed at a hostile press. These allegations were supported by affidavits which apparently were persuasive to the Court.[203] Specific reference to them would have given express recognition to the relevance of motive or ulterior purpose, for on its face the measure disclosed a revenue producing function. Despite failure to elaborate on the situation, the quotation makes clear the Court's awareness of the particular use to which the tax was being put.

Consideration of motive in connection with compulsory disclosure should be sharply limited. Such a showing does not render for an invalid purpose interrogation which reasonably relates to a valid governmental objective. But even the latter interrogation is subject to first amendment prohibitions, and in connection therewith effect on freedom of expression is of paramount concern. Accommodation is par-

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201 297 U.S. 233 (1936).
202 Id. at 250.
203 See Transcript of Record in the Supreme Court of the United States, pp. 41-48. Grosjean v. American Press Co., note 201 supra.

ticularly difficult here because the Court is at best dealing with probable effects rather than actual effects of enacted legislation particularly applied. This in considerable part explains the Court's reluctance to downgrade the legislative interest in information sought where relevance to possible legislation is shown. Yet this very latitude subjects other constitutional interests to great pressure. The relation of desired objective to probable result is such as to render useful consideration of what effect a committee desires to produce. A committee which enunciates exposure as one of its policies will in all likelihood do more exposing than one whose practices indicate concern for the protection of associational privacy.[204] The attention of the Court thus may be drawn to a determination of the scope and effect of exposure; it may conclude in a given case that the exposure is justified by the governmental interest involved. This is far different from a refusal to consider the expressed policy of the committee on the ground that motive is irrelevant. It is one thing for a court to refuse to invalidate a statute on its face because of the possibility that it may be administered in a fashion detrimental to freedom of expression. It is quite another for a court to refuse consideration to a *demonstrated* intent so to administer on the part of the governmental agency.

These factors were present in *Wilkinson v. United States*[205] and *Braden v. United States*.[206] Petitioners' contentions that their interrogations were prompted by the committee's desire to censure criticism of itself were treated in relation to the existence of a valid legislative purpose rather than in connection with the first amendment, but their disposition is meaningful to the present discussion. Wilkinson was subpoenaed to appear before the subcommittee after he arrived in Atlanta to oppose publicly the holding of the hearings in question. Braden had likewise opposed the Committee in the South, and one of the subcommittee's announced purposes was investigation of Communism in that sector of the country. Wilkinson and Braden had each been once identified as a Communist Party member. The Court rightly pointed out that a witness cannot obtain immunity to process simply by criticizing the committee. But let us assume that the petitioners could show a general and deliberate committee practice of summoning as witnesses critics of the committee whom anybody had once accused of Communist Party involvement. The deterrent effect on

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204 See Random Selection of Statements by the House Un-American Activities Committee on Exposure and Punishment of Subversives, Appendix to Opinion of Mr. Justice Black, dissenting in Barenblatt v. United States, 360 U.S. 109, 163 (1959). See also Gellhorn, Report on a Report of the House Committee on Un-American Activities, 60 Harv. L. Rev. 1193 (1947).

205 365 U.S. 399 (1961).

206 365 U.S. 431 (1961).

public expression of criticism of the committee seems obvious; careless accusations of Communism are all too frequent. Add to this the Court's quotation in *Barenblatt* that "the remedy for abuse of legislative power lies in the people upon whom, after all, under our institutions, reliance must be placed for the correction . . . ,"[207] and the picture takes on the shape of a vicious circle. To be sure, the circumstances of the interrogation of Wilkinson and Braden do not establish conclusively such a committee purpose, but the Court should not close its eyes to evidence of such purpose which others can and will see, for the deterrent effect on the expression of those others can rob the process of the corrective mechanism upon which the Court itself has relied. This for me is the real weakness of the uncritical citation of *Barenblatt* as dispositive of the grave first amendment issues posed by *Wilkinson* and *Braden*.

CONCLUSION

"Perhaps the most delicate and shifting of all balances which the Court is expected to maintain is that between liberty and authority." These were the words of Mr. Justice Jackson after a thirteen-year career on the Supreme Court.[208] The Court does well to pause when its deliberations touch the inner workings of a coordinate branch of government. On the other hand, the case for judicial enforcement of a Bill of Rights is at its strongest when free speech is involved. That wise counselor of judicial self-restraint, Judge Learned Hand, has stated it thus:

> The most important issues here arise when a majority of the voters are hostile, often bitterly hostile, to the dissidents against whom the statute is directed; and legislatures are more likely than courts to repress what ought to be free. It is true that the periods of passion or panic are ordinarily not very long and that they are usually succeeded by a serener and more tolerant temper; but, as I have just said, serious damage may have been done that cannot be undone, and no restitution is ordinarily possible for the individuals who have suffered. This is a substantial and important advantage of wide judicial review.[209]

To the harm to the individual must be added the harm to the functioning of the very system on which respect for the legislative process depends, the system of free exchange of ideas. Although Judge Hand spoke of statutes, not of summonses, of legislation rather than investigation, these words have meaning for a society in which the legislative inquiry has become an established tool of government.

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[207] 360 U.S. 109, 133 (1959).
[208] Jackson, The Supreme Court in the American System of Government 75 (1955).
[209] Hand, The Bill of Rights 69 (1958).

With characteristic forthrightness Justice Jackson took his stand:

> I should not want to be understood as approving the use that the Committee on Un-American Activities has frequently made of its power. But 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 affirm the judgment below and leave the responsibility for the behavior of its committees squarely on the shoulders of Congress.[210]

The reply has been authored by Zechariah Chafee, Jr.:

> Free speech gets little attention and the dangers are everything. The legislative judgment is not reached "after due deliberation." So the indispensable balancing will have to be done by the courts or not at all. If judges cannot or will not review suppressions, then legislators and officials are left free to penalize speech and thoughts as much as they may desire, and they desire a great deal.[211]

This paper represents an attempt to focus upon the narrow point at which the traditional function of the judiciary touches the legislative power to investigate. With most aspects of a legislative inquiry the Court has no concern. The doctrine of legislative immunity preserves a barrier against judicial interference with the processes of law making. It is only when the legislature enlists the aid of the judicial process to enforce the cooperation of the individual or itself directly coerces the individual in a mannner entitling him to invoke the time honored jurisdiction of courts that the Supreme Court may have occasion to inquire into the validity of the legislative practice itself. This point is of course reached when government demands he disclose information and seeks his punishment upon refusal.

The factors set forth above as appropriate to the process of decision do not appear clearly and singly in actual litigation. They vary in importance with the circumstances of cases and with the attitudes of judges; and these variations may well be controlling in determination of outcome. The enunciation of competing general principles in this area is relatively easy, but their accommodation in context is not accomplished by a declaration of result accompanied by the simple announcement that the Court has balanced the competing interests. In the words of Herbert Wechsler, "The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees, or, it is vital that we add, to maintain the rejection of a claim that any given choice should be decreed."[212]

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210 Eisler v. United States, 338 U.S. 189, 196 (1949) (dissenting opinion).
211 Chafee, The Blessings of Liberty 85 (1956).
212 Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 19-20 (1959).