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Some Comments on the Case for the House Un-American Activities Committee

The House Un-American Activities Committee has long been a source of vocal and heated dispute between "liberals" and "conservatives." This Article reviews a collection of essays assembled by William F. Buckley, Jr., in defense of HUAC. Professor Auerbach utilizes his discussion of the book to present his own views on the utility of the Committee and control of its operations.

Carl A. Auerbach*

In 1953, Mr. Justice Felix Frankfurter wrote of the "wide concern, both in and out of Congress, over some aspects of the exercise of the congressional power of investigation."¹ This concern has not abated over the years; it has been evoked primarily by the congressional investigations of subversive activities in the United States and still centers on the House Un-American Activities Committee (HUAC). Judging by the 385 to 20 vote that once again extended its life in 1963² and armed it with ample funds,³ HUAC does not lack popular support. William F. Buckley, Jr.'s recent book, *The Committee and Its Critics: A Calm Review of the House Committee on Un-American Activities*,⁴ is an effort to persuade the liberals and intellectuals who oppose HUAC of the error of their ways by correcting alleged misapprehensions about the Committee's work. Eight of the eleven contributors to the volume are associated with *National Review*,⁵ of which, of course, Mr. Buckley is editor.

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

2. 109 CONG. REC. 2916 (daily ed. Feb. 27, 1963).

3. The appropriation for 1963 was \$360,000. 109 CONG. REC. 2903 (daily ed. Feb. 27, 1963).

4. New York: G. P. Putnam's Sons, 1962. 352 pp. \$4.95. [Hereinafter cited as *A CALM REVIEW*.]

5. The contributors from the *National Review* are William F. Buckley, Jr., editor of *National Review*; James Burnham, former professor of philosophy at New York University; Willmoore Kendall, former associate professor of political science at Yale; William F. Rickenbacker, an editor of

To be successful, a calm effort to persuade on an issue that arouses emotion should at least be tolerant of the motives of those held to be mistaken. But Mr. Buckley is nettled by the "intellectuals" and cannot tolerate their opposition. To destroy it, he charges that the operating premise of the "intellectuals"⁶ seems to be: "How shall we make it painless for an American citizen to contribute to the subversion of his country?"⁷ He insists, of course, that the Communist Party is responsible for the manufacture and distribution of the "erroneous information which seriously affects the indictment by many liberals of the Committee"⁸ and for the "national synchronized expressions of resistance"⁹ to HUAC. More specifically, M. Stanton Evans, describing the now famous "San Francisco Riots" of 1960, repeats the accusation that the Communist Party led the California students "in transforming a pacific demonstration into an overt challenge to constituted authority."¹⁰

This attempt to brand the liberal opponents of HUAC as Communist dupes could be forgiven as a ritual act of the Buckley cult of conservatism if the book also dealt, conscientiously, with the basic grounds of liberal opposition voiced during the last 15 years. But again we are disappointed; the writers never get to the heart of the matter.

Mr. Buckley thinks that liberals are hostile to HUAC because they separate the internal from the external threat of Communism and then minimize the danger of "domestic" Communism. There are liberals who make this false separation. But even if the Communist Party of the United States is correctly seen as an arm of a militarily powerful Soviet State, the nature and extent of the danger it poses at any particular time must be determined as a matter of fact and not of logic. It is not important, for present purposes, to make this determination because acceptance of Buckley's estimate of the peril does not force the conclusion that HUAC is

the *National Review*; Karl Hess, press editor of *Newsweek*; Ralph de Toledano, editor of the *Washington World*; M. Stanton Evans, editor of the *Indianapolis News*; and Ross D. Mackenzie, undergraduate at Yale. The remaining chapters were written by C. Dickerman Williams, former general counsel to the Department of Commerce; Irving Ferman, former chief counsel for the American Civil Liberties Union; and George N. Crocker, an attorney and author of *ROOSEVELT'S ROAD TO RUSSIA* (1959).

6. Mr. Buckley names Henry Steele Commager, Robert Carr, James Wechsler, Alan Barth, Zechariah Chafee, Telford Taylor, "*et al.*" Buckley, *The Committee and Its Critics*, in *A CALM REVIEW* 31.

7. *Ibid.*

8. Buckley, *The Campaign Against HUAC*, in *A CALM REVIEW* 218.

9. *Ibid.*

10. Evans, *The San Francisco Riots*, in *A CALM REVIEW* 188.

needed any more than the rejection of his estimate impels a call for its abolition. It all depends on the objectives of the Committee and the methods it uses to achieve them.

Though the Supreme Court of the United States holds that a congressional committee may compel testimony or the production of documents in aid of any investigation it has power to conduct, clear thinking about HUAC's means and ends requires exploration of the possibilities of investigation that will not seek to coerce disclosure. Legal controversy, of course, is provoked only by a committee's use of its power of compulsion. For example, it is obvious from William F. Rickenbacker's short history of HUAC,¹¹ Ross Mackenzie's more detailed summary of its record,¹² and Karl Hess' account of a typical year's work,¹³ that all of HUAC's information about the strategy, tactics, and propaganda activities of the world Communist movement and its American affiliate comes from readily available documentary sources and willing witnesses. Communists, and many ex-Communists, refuse to cooperate with the Committee even when they are subpoenaed. The point is that HUAC could do much to enlighten the public about the anti-democratic movements operating in the country without using its subpoena power. Though it is difficult reasonably to object to such activity on the part of any congressional committee, HUAC has managed to arouse misgivings even in this area.

HUAC's current mandate goes back to 1946 when it was authorized to investigate "the extent, character, and objects of un-American propaganda activities in the United States."¹⁴ Mr. Buckley agrees that HUAC's authorization is "too broad" and would change its name to the "House Committee on Communist Activities."¹⁵ In effect, the Supreme Court has already done so. Speaking for the majority that upheld the constitutionality of HUAC's charter in *Barenblatt v. United States*,¹⁶ Mr. Justice Harlan explained that the "abstract terms" of the authorization were furnished with a "definite content" by HUAC's actions and by the unflinching support given to it by the House of Representatives. The "course of congressional actions," the Justice concluded, indicates a clear congressional intent to give HUAC "pervasive au-

11. Rickenbacker, *A Short History of the Committee; and a Chronology, 1946-1960*, in A CALM REVIEW 90.

12. Mackenzie, *A Record of the Committee's Work*, in A CALM REVIEW 276.

13. Hess, *A Year's Work (1958)*, in A CALM REVIEW 118.

14. Legislative Reorganization Act of 1946, ch. 753, § 121(q)(2)(i), 60 Stat. 828.

15. Buckley, *The Committee and Its Critics*, in A CALM REVIEW 25.

16. 360 U.S. 109 (1959).

thority to investigate Communist activities in this country."¹⁷ Mr. Buckley is convinced that HUAC has effectuated this intent and that the record shows that it has gone after pro-Communists or suspected pro-Communists or apparent victims of Communist influence only (and here and there a pro-fascist, or "hate" group).¹⁸

While it is difficult to generalize about the position of "the liberal" on HUAC—there is no single position—some liberals are disturbed by the Committee's concentration on Communist activities to the neglect of nascent neo-fascist and racist movements. Even those liberals who oppose congressional investigations of fascist and racist groups as well as of Communist groups are disturbed by this one-sidedness. It reflects, it is feared, an anti-Communism influenced by the ideology of the radical right and, therefore, incapable of educating the American people to discriminate between Communists and non-Communists at home and abroad. To limit HUAC to the investigation of Communist activities, as Buckley proposes, would accentuate this fear.

Liberals should console themselves, however, with the thought that they may be over-estimating HUAC's influence upon the public—as attested to by Mr. Buckley himself. "I was myself," he writes, "stupendously ignorant of the scope of the Committee's work even at the moment when I undertook to put this volume together."¹⁹ Buckley acknowledges that he never looked at HUAC's publications (of which millions of copies have been distributed) and that he is "even now" unfamiliar with most of them.²⁰

The strongest argument for HUAC's abolition—even if it were not to exercise the power to compel testimony—is based on a Committee practice that is not mentioned by any of the writers. HUAC boasts that it has accumulated files on more than 1,000,000 individuals that contain unevaluated reports allegedly linking this multitude to Communism. Based on these dossiers, it answers thousands of inquiries each year from Congressmen, government officials and private persons about the Communist connections, if any, of thousands of individuals and organizations. There is no justification for this irresponsible activity.

Because it is "an instrument of politics,"²¹ Herbert L. Packer doubts that any congressional committee is capable of providing

17. *Id.* at 118.

18. Buckley, *The Committee and Its Critics*, in *A CALM REVIEW* 24.

19. *Id.* at 17.

20. *Ibid.*

21. PACKER, *EX-COMMUNIST WITNESSES: FOUR STUDIES IN FACT FINDING* 228 (1962).

any kind of basis for conclusions about general Communist aims and objectives or about the philosophical underpinning of American Communism. For this purpose, Professor Packer would create an investigatory body patterned after the British Royal Commission, the members of which are almost always drawn from private life, which relies exclusively upon willing witnesses who are informed about the subject matter under inquiry, and which, he thinks, is free from political pressures.²²

HUAC's use of its power to compel testimony has raised the gravest constitutional questions. In his dissenting opinion in the *Barenblatt* case, Mr. Justice Black contended that HUAC's compulsory examination of witnesses violates the first amendment guarantees of free speech and free association because HUAC seeks to inquire into, expose, and subject to scorn and obloquy "beliefs, not action—ideas and associations, not conduct."²³ The Justice fears that HUAC's investigations will result in preventing "all but the most courageous from hazarding any views which might at some later time become disfavored."²⁴

Mr. Justice Black, it would seem, regards the Communist Party as just another political party advocating more radical measures than the others. But this is not the position of the majority of the Supreme Court, which Justice Harlan stated in the *Barenblatt* case as follows:

To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II . . . and to the vast burdens which these conditions have entailed for the entire Nation.²⁵

Nor, it might be added, is it accurate to say, as Mr. Justice Black does, that inquiry into membership in the Communist Party seeks to expose ideas and associations, not conduct.²⁶ By joining an organization of activists seeking political power to crush democracy, a member of the Communist Party—if he is not an innocent—has moved from the realm of opinion into the world of action.

Other constitutional difficulties remain. All of the Justices in *Barenblatt* agreed that the Constitution authorizes Congress to use compulsory process only to "investigate into those areas in which

22. *Id.* at 238–39.

23. 360 U.S. at 142.

24. *Id.* at 144.

25. *Id.* at 128–29.

26. *Id.* at 142.

it may potentially legislate or appropriate. . . ."²⁷ But only a bare majority concluded that "the primary purposes of [HUAC's] inquiry were in aid of legislative processes."²⁸ Granted these purposes, the Supreme Court has consistently held that a congressional committee may use the subpoena power to determine whether a particular witness is or has been a member of the Communist Party.²⁹ The chapter in the book written by George N. Crocker (an attorney not connected with *National Review*) supports the majority view by indicating briefly the nature of the 35 legislative recommendations made by HUAC that have become law and 61 other recommendations that have not.³⁰ The four dissenting Justices in *Barenblatt* did not deny these facts. Voicing a basic liberal criticism of HUAC, they charged that the public statements of HUAC's members demonstrate that they are not really interested in legislation but only in exposing individuals they think are or were connected with Communism and purely for the sake of subjecting these individuals to public condemnation and privately-administered social and economic sanctions. In this way, it is charged, HUAC is usurping the function of the courts.³¹

Though we may agree with the majority of the Supreme Court that it is not the Court's business to try the motives of the members of a congressional committee, the question remains whether it makes any sense for a committee to try to subpoena and expose every person who is or was, or is suspected of being or having been, a Communist Party member or, as Mr. Buckley would add, an apparent victim of Communist influence. Certainly little or no information that might be important for legislative purposes is elicited in this fashion. James Burnham argues that exposure is typical of all congressional investigations and must be tolerated as a part of our political system.³² C. Dickerman Williams (a distinguished lawyer not connected with *National Review*) adds that exposure is necessary to win public support for HUAC's legislative recommendations.³³ Both these points are valid, but do not seem to outweigh the objections to the Committee's procedure.

27. *Id.* at 111.

28. *Id.* at 133.

29. *Braden v. United States*, 365 U.S. 431 (1961); *Wilkinson v. United States*, 365 U.S. 399 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959).

30. Crocker, *HUAC and Legislation*, in *A CALM REVIEW* 254, 258-75.

31. See the dissenting opinion of Mr. Justice Black in *Barenblatt v. United States*, 360 U.S. 109, 159-62 (1959).

32. Burnham, *The Investigating Power of Congress*, in *A CALM REVIEW* 34-65.

33. Williams, *The Committee's Procedures*, in *A CALM REVIEW* 235-36.

Even if exposure does not have a legislative objective, it may be proper under the Constitution if its purpose is to assist Congress in supervising the operation of the Government. Woodrow Wilson had in mind Congress' power and duty to expose improprieties in the administration of the federal government when he expressed the opinion that the "informing function" of investigation was even more important than its legislative function.³⁴ HUAC, of course, takes pride in its achievements as an overseer and the book stresses them. Ralph de Toledano reviews the Hiss case³⁵ and Willmoore Kendall tries to show that only HUAC can be relied upon to ferret out government officials who have "played into the Communists' hands," because the "Executive . . . cannot be counted on to police itself."³⁶ Yet de Toledano's account makes clear that HUAC stumbled upon the Hiss case by chance. A congressional committee can hardly be expected to be an effective counter-espionage unit. A committee like HUAC, however, provides a forum to which persons inside Government may appeal, and thereby misdeeds by the security agencies of the executive branch may occasionally come to light. More often, these agencies furnish the Committee with the information it brings to public attention. At least three of the witnesses studied by Professor Packer—Elizabeth Bentley, Louis Budenz, and John Lautner—went to the FBI first and only later appeared before a congressional committee.³⁷

Professor Packer contends that a congressional committee is at its weakest when it tries to examine charges against particular individuals. A committee is not limited by any formal requirements of proof—it freely accepts hearsay testimony and is not checked by any controlling criteria of relevance; it does not permit the accused to cross-examine his accusers; it severely limits the right to counsel; and political considerations distort any possibility of a full and fair exposition of the facts. To perform the overseer function of a congressional committee, Professor Packer would create still another agency, this time patterned after the British Tribunal of Inquiry.³⁸ Convened when serious charges of impropriety are made against government officials, the Tribunal is usually composed of a Justice of the High Court and two senior members of the bar. Free of political pressures, it exercises the subpoena power and affords the accused the right to counsel and the opportunity

34. WILSON, CONGRESSIONAL GOVERNMENT 198 (Meridian ed. 1956).

35. de Toledano, *The Hiss Case*, in A CALM REVIEW 143-75.

36. Kendall, *Subversion in the Twentieth Century*, in A CALM REVIEW 88.

37. PACKER, *op. cit. supra* note 21, *passim*.

38. *Id.* at 237-38.

to cross-examine his accusers. To such a tribunal on the American scene, Packer would also give access to the files of the FBI, the right to exchange immunity from prosecution for disclosure, and, if necessary, the right to publicize only its results and not its proceedings.³⁹

HUAC, of course, has not confined itself to exposing Communists in Government. If it had, it would have run out of business by now. For years, it has been investigating Communist influence in various sectors of private life. Both Mr. Burnham and Mr. Williams, therefore, contend that the "informing function" of congressional investigations should be given a wider scope than Wilson envisaged.⁴⁰ They would have the Supreme Court sanction investigations designed to inform and educate the citizens about the nation's problems even when legislation is not contemplated. So would I. But even if the Supreme Court accepted public education in this broader sense as a constitutional objective of the exercise of the power to compel testimony, which it has not yet done, there would still be the question whether it is necessary, in order to educate the American people about Communism, to expose every person who is or was, or is suspected of being or having been, a Communist or an apparent victim of Communist influence.

Apart from constitutional questions, is HUAC doing more good than harm to the cause of democracy it should be serving? Essentially, I think it is fair to say, the partisans of HUAC answer this question in the affirmative on the basis of the guerrilla warfare it has waged against the Communist Party during the last 15 years. They have a point. Compelling Communists to answer subpoenas, attend hearings, plead constitutional rights, undergo trials for contempt, confer with lawyers, raise bail, and serve occasional jail sentences, gives them time for little else. But it is also likely that the open activities of the Communist Party in this country are sustained by precisely the type of public agitation these legal battles make possible.

But why should we not resolve this doubt in favor of the Committee? Who is being hurt, HUAC's partisans ask, but Communists? Is this true? In 1954, Will Maslow of the American Jewish Congress reported a number of instances in which HUAC branded individuals and organizations as Communist before giving them a chance to be heard.⁴¹ No purpose would be served by detailing

39. *Id.* at 245-46.

40. Burnham, *The Investigating Power of Congress*, in A CALM REVIEW 48; Williams, *The Committee's Procedures*, in A CALM REVIEW 232.

41. See Maslow, *Fair Procedure in Congressional Investigations: A Proposed Code*, 54 COLUM. L. REV. 839 (1954).

these instances here. It has never been claimed that the charge of Communism hurled at every one of these individuals and organizations was warranted. Mr. Williams informs us that in 1953, HUAC adopted a code of procedure that generally followed, but for the right of cross-examination, the recommendations of the New York City Bar Association's Committee on the Bill of Rights and that was intended to prevent a repetition of such instances.⁴² However, Mr. Williams does not undertake to tell us to what extent HUAC lives up to its own rules. For example, HUAC's Rule XVI provides: "No Member of the Committee or staff shall make public the name of any witness subpoenaed before the Committee or Subcommittee prior to the date of his appearance."⁴³ But it was precisely a violation of this rule that provoked the demonstrations against HUAC that culminated in the San Francisco riots of 1960. More than 100 teachers in California were subpoenaed for a HUAC hearing in San Francisco in 1959. The names of the teachers were published in the press. Subsequently, HUAC called off the inquiry without giving the individuals named a chance to be heard. In his account of the riots, Mr. Evans raises the question of whether the names were leaked to the press or "merely got out by accident," but fails to answer it.⁴⁴ Mr. Evans, however, quotes J. Edgar Hoover's report that "after the proposed 1959 hearings had been cancelled, HUAC turned over its files on these individuals to the California Attorney General's office and to the school boards of the teachers involved for any necessary action."⁴⁵ HUAC's rules afford no protection against this practice. When the Committee again scheduled hearings in San Francisco for April of 1960, the students protested, as they did again just a few months ago.

Irving Ferman (a former Civil Liberties Union counsel not connected with the *National Review*) calls attention to another class of possibly innocent victims of congressional investigations—those who refuse to answer questions that they honestly think the committee has no authority to ask.⁴⁶ As things now stand, if the courts ultimately uphold the committee's authority—no matter how divided the courts themselves may be on the question—these individuals will be subject to fine and imprisonment for contempt of Congress. Ferman urges conservatives and liberals alike to support the bill of Senator Kenneth Keating to relieve the witness of any

42. Williams, *The Committee's Procedures*, in A CALM REVIEW 222.

43. *Id.* at 226.

44. Evans, *The San Francisco Riots*, in A CALM REVIEW 210.

45. *Id.* at 183.

46. Ferman, *A Comment by a Civil Libertarian*, in A CALM REVIEW 248.

penalty for refusing to answer a committee question until the committee obtains a court order requiring him to do so.⁴⁷

The Keating proposal is more complicated than it sounds. It would enable prospective witnesses to delay and obstruct investigations by forcing a committee to resort to the courts even when no reasonable doubt exists about its authority to ask the questions. It might be wiser to give the judges discretion not to sentence an initially recalcitrant witness who is willing to cooperate with the committee after the courts have sustained the committee's authority if, in the opinion of the judge, the witness had some reasonable ground to doubt the committee's authority. Indeed, even now, judges may not be automatically sentencing recalcitrant witnesses who have lost their cases in the courts.

Is there an alternative to HUAC? Professor Packer recognizes that, as a practical matter, it is highly unlikely that his proposals for new instruments of inquiry will be accepted.⁴⁸ Unlike the British parliamentary system, our congressional government, as Woodrow Wilson emphasized, is government by committee, and it is the function of Congress to exercise power that will countervail that of the Executive. It is not likely that Congress will yield the potent power of investigation to judges and persons drawn from private life—think of the Billy Sol Estes case. Nor is it desirable in all cases to insulate matters from the pressure of partisan politics. While there is much to be said for the proposed "Tribunal of Inquiry," Royal Commissions have notoriously been the graveyard of desirable reforms. At least the congressional committee has a responsibility for and a commitment to action. The problem is not to avoid politics, but to instill a greater sense of responsibility in politicians.

Hopeless? Recently, Harvey B. Schechter of the Los Angeles Anti-Defamation League wrote that there is "nothing wrong with [HUAC] that a few vigorous liberal Representatives couldn't cure by serving on it."⁴⁹ In his book on HUAC, Robert Carr discounted this view by pointing out that "men who have enthusiasm for [the investigation of subversive activities] are apt to be the reactionaries and professional Red-baiters, if not the crackpots, of Congress" and that when "an attempt is made to press into service some of the more responsible members of the national legislature much of the spirit seems to go out of such an investigation."⁵⁰

47. *Id.* at 251-52.

48. PACKER, *op. cit. supra* note 21, at 241.

49. Schechter, *The Liberals Have Helped the Radical Right*, N.Y. Times, Apr. 29, 1962, § 6 (Magazine), pp. 13, 93.

50. CARR, *THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 1945-1950*, at 211 (1952).

Must this be so? Is there no role for a congressional committee devoted to keeping the public informed about organized anti-democratic movements in the country? If liberal Congressmen do not succeed in restructuring HUAC along their lines, is it not clear that the alternative will *not* be HUAC's abolition?

