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Congressional Investigations: Imbroglio in the Court

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NOTES

CONGRESSIONAL INVESTIGATIONS: IMBROGLIO IN THE COURT

INTRODUCTION

For two days beginning February 28, 1955, John T. Gojack, an officer of the United Electrical, Radio, and Machine Workers of America, testified before a subcommittee of the House Un-American Activities Committee. Gojack proved to be an obstreperous witness, accusing the subcommittee of "union-busting" [1] and "witch-hunting" [2] and declined to answer any questions seeking to connect him with the Communist Party on the grounds that the committee lacked authority for such investigations, and that under the First Amendment he was within his rights in refusing to answer.[3] The subcommittee was unsympathetic, and duly cited him for contempt of Congress.

Gojack was convicted on six counts[4] of contempt of Congress under

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1. *Investigation of Communist Activities in the Fort Wayne, Ind. Area; Hearings before the Committee on Un-American Activities, House of Representatives*, 84th Cong., 1st Sess., 73 (1955).

2. *Id.* at 88.

3. *Id.* at 103. Illustrative of Gojack's frequent objections is the following statement:

> To any question this committee propounds that I feel might be a trap for a frameup with the use of paid informers . . . I will reiterate my basic objection on the ground of the First Amendment that this committee has no right to go beyond the legislative investigation field, that if I have done anything of a criminal nature that is a job for the courts to handle. This committee has no right to usurp the power of the courts, that this committee is using this hearing and these questions in an effort to break a union, as your chairman openly stated, and that this committee has no right to break a union and if the committee had such a right to break a union, that is not authorized by Public Law 601, if the committee had that right under Public Law 601 the First Amendment to the Constitution would forbid it.

The First Amendment provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

4. The specific questions upon which the conviction was based were:
   1. Are you now a member of the Communist Party?
   2. You have left us under the impression at this point that by reading the newspapers you knew that Johnson was chairman of the Communist Party of Indiana and I am asking you if that is the only way you knew Johnson.
   3. Mr. Gojack, did Mr. Elmer Johnson or Mr. Aron ever appear and address a group of people when you were present?
   4. May I ask the witness, do you know whether or not Russell Nixon is a member of the Communist Party?

2 U.S.C. § 192.[5] His conviction was affirmed by the District of Columbia Court of Appeals which found that there was ample evidence of a legislative purpose furthered by the hearings, that the subject of the inquiry appeared with "undisputable clarity," that the pertinency of the questions was clear, and that other grounds given by the appellant, including the First Amendment rights, were insufficient in law to justify his recalcitrance.[6]

The Supreme Court reviewed the conviction along with five companion cases in *Russell v. United States*[7] and reversed all six, ruling for the first time that the indictment must specify the subject of the inquiry at the hearing from which the contempt citation arose.

Undaunted, the Government reindicted Gojack, this time stipulating that "the subject of these hearings was Communist Party activities within the field of labor. . . ." [8] A second conviction ensued. Petitioner Gojack again appealed, his main contention being that there was no adequate proof at the trial of the authority of the subcommittee. The Court of Appeals disagreed, and in a brief per curiam opinion dismissed petitioner's argument with the trenchant remark: "We find no merit in these contentions." [9]

In June, 1966, the Supreme Court finally disposed of the case in a unanimous decision:

> We reverse. It is now clear that the fault in these proceedings is more fundamental than the omission from the indictment of an allegation of the "subject of the inquiry" being conducted by the Subcom-

5. Did you take active part in the peace pilgrimage to Washington which was organized by one of the "front" organizations known as the American Peace Crusade?

6. What method was used to get you as an original sponsor [of the American Peace Crusade]?

Gojack v. United States, 280 F.2d 678, 679 (D. C. Cir. 1960).

5. This statute, first enacted in 1857, provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

6. Gojack v. United States, *supra* note 4.

7. 369 U.S. 749 (1962).

8. Gojack v. United States, 86 S. Ct. 1689 (1966).

9. Gojack v. United States, 348 F.2d 355, 356 (D.C. Cir. 1965).

> mittee. The subject of the inquiry was never specified or authorized by the Committee, as required by its own rules, nor was there a lawful delegation of authority to the Subcommittee to conduct the investigation.[10]

The *Gojack* disposition marked the ninth consecutive reversal of a contempt conviction by the Supreme Court since 1961. In each case the Court managed to adroitly sidestep the fundamental constitutional issue presented—the boundary between the congressional power of investigation and the First Amendment protections of speech and assembly—by confining itself to niceties of procedural or statutory interpretation. While this technique is consistent with the policy of judicial restraint,[11] its exercise in the majority of these decisions amounted to little more than caviling. As a consequence, the legal status of congressional committees as well as that of witnesses appearing before them remains in an unstable form. Most of the cases in this area have arisen from the investigations of the indefatigable Un-American Activities Committee of the House of Representatives, whose controversial character brings it into conflict with both individual rights and judicial authority. In view of the sensitive issues involved, it is not surprising that the Supreme Court has been unable to take a definitive stand. However, a survey of the twenty-year dispute within both the Court and Congress casts doubt upon the expediency of judicial indecision.

Perspective

The power of Congress to conduct investigations with the aid of compulsory process was not mentioned in the Constitution. While the usefulness of this power was soon recognized, its scope and limitations required a surprisingly long time to evolve into its present state of confusion.

Official recognition of the investigative power occurred in 1798, when Congress enacted a statute providing for the summoning of witnesses and the administering of an oath.[12] In 1821 the Supreme Court first took notice of the coercive power of the legislature over non-members in *Anderson v. Dunn*.[13] The Court recognized the legislative power to

10. *Supra* note 8.

11. *See, e.g.*, United States v. Rumely, 345 U.S. 41, 45, 46 (1953).

12. Act of May 3, 1798, ch. 36 2 Stat. 554.

13. 19 U.S. (6 Wheat.) 204 (1821). This case apparently involved an attempted bribe of a congressman.

punish non-members for contempt as necessary to maintain the dignity and authority of the legislature. Reinforcement came in 1848 when an attempted challenge of this contempt power through judicial review was summarily quashed by the District of Columbia Circuit Court in no uncertain terms:

> [E]very court, including the Senate and House of Representatives, is the sole judge of its own contempts; and . . . in the case of commitment for contempt in such a case, no other court can have a right to inquire directly into the correctness or propriety of the commitment, or to discharge the prisoner on habeas corpus.[14]

This pithy pronouncement was specifically repudiated in 1875 when another contempt case reached the consideration of the same court through a habeas corpus petition.[15]

In the meantime, Congress had enlisted the judiciary in auxiliary support of this power by a statute,[16] the forerunner of the present 2 U.S.C. § 192. By providing for criminal contempt Congress sought to impose more severe sanctions than were presently available, since confinement by order of a house of Congress could not extend beyond the session of Congress during which the contempt occurred. The constitutionality of this statute was upheld in *In re Chapman*.[17]

The idea that Congress was the sole judge of its own contempts, struck down in 1875, was finally interred in 1881 when *Kilbourn v. Thompson*[18] reached the Supreme Court. This case involved a suit for false imprisonment instituted by Kilbourn against the Sergeant-at-Arms of the House of Representatives. Petitioner had been incarcerated for refusing to answer questions before a House committee set up to investigate the bankruptcy of a banking firm which was indebted to the United States. This matter was at that time being investigated by a federal district court. The Supreme Court, speaking through Justice Miller, emphatically pointed out that the affair was solely within the province of the judiciary, since it involved the private affairs of individuals whose rights and remedies were beyond the determination of the committee. The Court conceded that Congress had the power of compulsory process, but only in pursuit of the constitutionally as-

14. Ex parte Nugent, 18 Fed. Cas. 471, 481 (C.C.D.C. 1848).

15. Irwin's case, reprinted in 3 CONG. REC. 707 (1875).

16. Act of Jan. 24, 1857, ch. 19, § 1, 11 Stat. 798. This statute is basically the same as 2 U.S.C. § 192, *supra* note 5.

17. 166 U.S. 661 (1897).

18. 103 U.S. 168 (1880).

signed judicial functions such as judging elections and qualifications of its members and trying impeachments. Justice Miller specifically declined to comment on whether Congress had the power to use compulsory process in gathering information in aid of legislation, the inference being that no such power existed.[19]

The *Kilbourn* decision has been condemned for unduly restricting the scope of congressional probes, since it went so far as to taint with illegitimacy any investigation regardless of purpose.[20] Yet in spite of its import, the muscle of the *Kilbourn* decree atrophied through disuse. It was briefly revived in 1924 by a federal district court[21] as a basis for releasing on habeas corpus one Daugherty, who had been arrested for failure to comply with a subcommittee looking into charges of malfeasance against the Attorney-General in the Harding administration. Three years later the Supreme Court reversed this ruling in *McGrain v. Daugherty*.[22] The gist of the latter decision was ". . . that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." [23] Reiterating the idea that Congress was not free to meddle generally in the private affairs of individuals, being limited to inquiries in aid of the legislative function, the Court imprudently added that considering the subject matter involved, the presumption should be indulged that the investigation was to aid in legislation. Furthermore, the Court felt it unnecessary that the authorizing resolution should declare in advance what the Senate contemplated doing when the investigation was concluded.[24]

Hence the *McGrain* decision, while apparently refining *Kilbourn* down to acceptable standards without expressly overruling, in effect swings toward the opposite extreme. The practical effect was virtual emasculation of *Kilbourn*, since, as might be expected, the presumption of a valid legislative purpose defies rebuttal.[25]

19. *See Alfange, Congressional Investigations and the Fickle Court*, 30 U. CINC. L. REV. 117 (1961).

20. *See, e.g.*, Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 214 (1926); Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV. 691 (1926).

21. Ex parte Daugherty, 299 Fed. 620 (S. D. Ohio 1924).

22. 273 U.S. 135 (1927).

23. *Id.* at 174-175.

24. *Id.* at 178. In support of this latter holding, the Court quoted with approval In re Chapman, 166 U.S. 669, 670 (1897).

25. To illustrate the effect of such a presumption, in Townsend v. United States, 95 F. 2d 352 (D.C. Cir. 1938), *cert. denied*, 303 U.S. 664 (1938), the court considered as

On the heels of the *McGrain* decision came *Sinclair v. United States*[26] which outlined the status of the law at that time and which in general represents the present understanding of the scope and limitations of the legislative power of investigation. Like *McGrain*, the *Sinclair* decision recognized as unassailable the implied power of Congress to gather information as "an essential and appropriate auxiliary to the legislative function . . ." [27] This power may be used to investigate the administration of existing laws as well as the need for further legislation. This power does not include a general authority to inquire into the private affairs of individuals, nor into the exclusive province of the executive or judiciary branches, but when a valid legislative purpose exists, these limitations do not abridge the power.[28] The inquiries must be pertinent to the authorized subject of the investigation. The presumption of regularity obtains to the investigations, but the presumption of innocence attends one accused of contempt, and the government must plead and show that the question pertained to some matter under investigation.[29]

The score of years following the *McGrain* case was, with the exception of a few procedural limitations,[30] a period marked by judicial non-intervention in congressional investigations.[31] It became clear that

irrebutable the assertion of the House of Representatives that the investigation was pursuant to a legislative purpose, saying: "A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress . . . ."

26. 279 U.S. 263 (1929).

27. *Id.* at 291.

28. *Id.* at 295.

29. *Id.* at 296, 297.

30. Reed v. County Commissioner's, 277 U.S. 376 (1928) (Congressional committee must obtain authority of the parent house in order to call on the federal judiciary for a court order.); Hearst v. Black, 87 F. 2d 68 (D.C. Cir. 1936) (A subpoena duces tecum issued by Senate committee calling for all telegrams sent or received in the city of Washington over a period of seven months constituted an unreasonable search and seizure).

31. The more significant cases during this period were: Barry v. United States *ex rel.* Cunningham, 279 U.S. 597 (1929) (Congress may order the arrest of non-members for the purpose of obtaining information without first issuing a subpoena where it is apparent that a subpoena will not be honored.); Jurney v. MacCracken, 294 U.S. 125 (1935) (Congress can punish for contempt not only for purposes of coercion, but also for sanctioning the past act of a person who permitted destruction of papers he was ordered to produce.); United States v. Morris, 300 U.S. 564 (1937) (Conviction for perjurious statements before congressional committee is valid even though witness returned and retracted the statements).

the constitutional propriety of the investigatory power, an open question following the *Kilbourn* decision, had been foreclosed by *McGrain.*

ENTER HUAC

With the investigatory power of Congress firmly entrenched between the lines of the Constitution, the stage was set for testing its scope. Uniquely suited for this purpose, the Special House Committee for the Investigation of Un-American Activities—better known as the Dies Committee after its first chairman—was created by the House of Representatives in 1938. Given a vague authorization to investigate unpopular beliefs,[32] it was not long before the Committee's activities prompted the courts to shift their focus from the power of Congress to the rights of the individuals confronting it. This shift of emphasis, however, was not accompanied by a shift of attitude.

The Committee's performance during the War years, while occasionally sensational, was on the whole a lack-luster, one-man operation. Nevertheless, it became a standing committee in 1945.[33] In the immediate post-War period its activities were often in the headlines, and its controversial nature raised questions as to its constitutionality within and without Congress.[34] Yet it was not until the late 1940's that the courts first encountered the legal issues it presented. The primary reason for this lag was that witnesses faced with disconcerting questions were content to invoke the privilege against self-incrimination afforded by the Fifth Amendment, and until 1950 the committee was content with this embarrassing admission.[35]

Beginning in 1946 witnesses began objecting on grounds other than the privilege against self-incrimination. Their contumacy was often flagrant, and the subsequent contempt proceedings brought several novel

32. The committee was authorized to investigate: "(1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." 83 CONG. REC. 7568 (1938).

33. *See* CARR, THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, 19-21 (1952).

34. *Id.* at 364-405.

35. *Id.* at 433.

questions squarely before the bench, most of which have yet to be satisfactorily resolved. These issues may be briefly summarized as follows:[36]

(1) Whether the committee's inquiries further any valid legislative purpose, or whether they are primarily for the purpose of exposing to public shame and obliquy those who subscribe to unpopular tenets, particularly communism and fascism. This argument is supported by the paucity of legislation originating from the committee, and also numerous public statements to this effect made by members of the committee.

(2) Whether the authorization to investigate "un-American" activities is too vague to impose limitations on the jurisdiction of the committee. The problem with such vague authority is that it provides no standard of conduct for the committee, the House, or the courts.

(3) Another aspect of the problem of vague authorization arises in conjunction with the contempt statute, which provides criminal sanctions for failure to answer questions "pertinent to the question under inquiry." If the subject of the investigation is no more specific than "un-American" activities, there is much force in the contention that the criminal statute does not afford an ascertainable standard of guilt as required by the Due Process clause of the Fifth Amendment.

(4) The most vexing question is the effect of the First Amendment guarantees of freedom of speech and assembly, which, if given literal effect, would bar any inquiry into political beliefs and associations. The alternative to this absolute approach is the argument that the interest of the state in preserving itself must be balanced against the right of the individual to privacy.

The first series of contempt convictions to reach the courts of appeals arose from the 1946 and 1947 hearings. The 1946 investigations delved into the activities of "subversive" organizations, and citations for contempt resulted when officers of the organizations refused to produce the

36. These issues warrant individual discussion and, therefore, cannot be considered in this note.

contents of their files.[37] The 1947 hearings dealt with the activities of high-ranking members of Communist organizations in the United States, the Communist penetration of labor unions, and the Communist influence in the motion picture industry.[38] The "Hollywood Hearings," which occupied nine days of October, 1947, were more sensational and widely publicized than was the Alger Hiss exposé during the Communist espionage hearings of 1948.[39]

The trend of these decisions was set by the circuit court opinions in *Josephson v. United States*[40] and *Barsky v. United States*.[41] In each case the court gave carte blanche to the committee in determining policies, casting aside the knotty issues posed by the defendants with unreserved assurance.

In the *Josephson* case the defendant had appeared but had refused to be sworn and to testify. In affirming the conviction the Court of Appeals for the Second Circuit stated:

> [M]atters which potentially affect the very survival of our Government are by no means the purely personal concern of any one. And investigations into such matters are inquiries relating to the personal affairs of private individuals only to the extent that those individuals are a part of the Government as a whole.[42]

With this rationale the court disposed of one limitation upon the power of investigation expressed in the *Kilbourn* case. As for the requirement of a legislative purpose, the court accepted as conclusive the declaration of a legitimate purpose set forth in the authorizing statute, notwithstanding statements by members of the committee to the contrary. The fact that the Committee had spawned little legislation in the past was immaterial. The subject of un-American and subversive activities was

37. Barsky v. United States, 167 F.2d 241 (D.C. Cir. 1948), *cert. denied*, 334 U.S. 843 (1948); United States v. Bryan, 339 U.S. 323 (1950); United States v. Fleischman, 339 U.S. 349 (1950); Morford v. United States, 339 U.S. 258 (1950); Marshall v. United States, 176 F.2d 473 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 933 (1950).

38. Contempt convictions of high-ranking Communist Party officials arising from 1947 hearings include United States v. Josephson, 165 F.2d 82 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948); Dennis v. United States, 339 U.S. 162 (1950); Eisler v. United States, 170 F.2d 273 (D.C. Cir. 1948), *dismissed as moot*, 338 U. S. 189 (1949).

Convictions resulting from the Hollywood hearings include Lawson v. United States, 176 F.2d 49 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950).

39. CARR, *supra* note 33, at 55.

40. *Supra* note 38.

41. *Supra* note 37.

42. United States v. Josephson, *supra* note 38, at 89.

unquestionably within the investigating power of Congress. The First Amendment protection of free speech and assembly is not absolute, but may be abridged where there is a "clear and present danger." [43] Congress may surely investigate the extent of existing danger, if any. While invalid legislation may result from the information so obtained, that result cannot be presumed in advance to bar investigation, since valid legislation may likewise ensue.

By refusing to give any testimony, defendant Josephson lacked standing to challenge the constitutionality of the authorizing resolution and the criminal statute as lacking a sufficient standard by which to judge the pertinency of questions. This contention, with respect to subpoenaed records, was disposed of in *Morford v. United States*.[44]

In the *Barsky* case, the defendant used a different tack, claiming that the authorizing resolution was too vague to validly confer authority upon the committee. The court thought otherwise; the Resolution "is definite enough. It conveys a clear meaning, and that is all that is required." [45]

Belying this apparent harmony of the *Josephson* and *Barsky* opinions are the forceful dissents by Judge Clark in *Josephson*,[46] and Justice Edgerton in *Barsky*.[47] Both dissenters found the Un-American Activities Committee unconstitutional, and their arguments would admit no compromise. The authorizing resolution did not afford a sufficient standard of guilt. Also, the investigations violated the First Amendment, and inflicted punishment without due process of law.

Why the Supreme Court denied certiorari in each case is a moot question, but undoubtedly the influence of current events of the period was felt. To declare the Un-American Activities Committee unconstitutional during the height of its glory, when world events had created an almost paranoidal fear of Communism in the United States, would have subjected the Court to severe criticism, to say the least. The tenor of the times found expression in *Lawson v. United States*:[48]

> No one can doubt in these chaotic times that the destiny of all nations hangs in the balance in the current ideological struggle between com-

43. This test was first espoused by Justice Holmes in Schenck v. United States, 249 U.S. 47, 52 (1918).

44. 176 F. 2d 54, 57 (D.C. Cir. 1949), *rev'd on other grounds*, 339 U.S. 258 (1950).

45. Barsky v. United States, *supra* note 37, at 247.

46. United States v. Josephson, *supra* note 38, at 93.

47. *Supra* note 37, at 252.

48. 176 F.2d 49, 53 (D.C. Cir. 1949).

> munist-thinking and democratic-thinking peoples of the world. Neither Congress nor any court is required to disregard the impact of world events, however impartially or dispassionately they view them.

In 1949 the Supreme Court agreed to review the conviction of Gerhart Eisler,[49] reputed to be the boss of the Communist Party in the United States, and who had refused to co-operate with the committee unless he was first permitted to read a three-minute statement. The case was removed from the docket when Eisler fled to England. The Supreme Court was content to leave undisturbed the opinions of the circuit courts on the major issues. In those contempt cases which did reach the High Court, the discussion was limited to peculiarities of the individual cases.[50] It was not until 1957 that the Supreme Court deigned to consider the conundrum of constitutional issues arising from the investigations of the Un-American Activities Committee.

In the meantime, a decision handed down by the Supreme Court was significant in relation to the problem of authority of investigative bodies. *United States v. Rumely*[51] involved the contempt conviction of the secretary of a right-wing organization which published books of a "particular political tendentiousness." [52] Witness Rumely refused to disclose the names of persons who made bulk purchases of these publications before a select House committee authorized to investigate "all lobbying activities intended to influence, encourage, promote, or retard legislation." [53] In order to avoid the constitutional issues involved,[54] the Court

49. Eisler v. United States, *supra* note 38.

50. United States v. Bryan, 339 U.S. 323 (1950). Witness refused to comply with a subpoena requiring production of certain records. Defense of a lack of a quorum present to receive records on return date of subpoena was not available since, *inter alia*, witness evidenced no intent to comply with the subpoena.

United States v. Fleischman, 339 U.S. 349 (1950): Respondent, a member of the executive board of an association, refused to produce records. The defense that respondent did not have custody of the records was not available, since each director was similarly subpoenaed, and by joint action the directors could have caused production of the records.

Dennis v. United States, 339 U.S. 162 (1950). (Presence on jury of government employees was not a denial of petitioner's right to an impartial jury); Morford v. United States, 339 U.S. 258 (1950). (Conviction reversed because defense was denied the opportunity to prove actual bias of prospective jurors who were government employees).

51. 345 U.S. 41 (1953).

52. *Id.* at 42.

53. H. Res. 298, 81st Cong., 1st Sess., 96 CONG. REC. 13873 (1950).

54. The Rumely decision removed any lingering doubt about the applicability of First Amendment rights to congressional investigations. United States v. Rumely, 345 U.S. 41, 44 (1953).

narrowly construed the term "lobbying activities" to mean representations made directly to Congress. Acquiescence by the House after the investigations took place could not serve as retroactive authority for the prior exercise of the power.[55] Hence the contempt conviction failed.

In the Rumely case, the Court made it clear that it would not tolerate irresponsible use of the power nor condone the unlimited discretion for the exercise of the authority placed in investigating committees by Congress. It remained to be seen whether the Supreme Court would react with similar resolve to the Un-American Activities Committee.

The moment of truth came three years later when *Watkins v. United States*[56] reached the Supreme Court. John T. Watkins, a labor organizer for the United Automobile Workers, had appeared before the Un-American Activities Committee in its April, 1954, investigation of "Communist activities in the Chicago area."[57] Watkins answered freely all questions concerning his own activities, pointing out that he had never been a card-carrying Communist, but refused to disclose the activities of past associates which he believed were no longer Communist Party members. He objected to the line of questioning on the ground that information sought was irrelevant and beyond the authority of the committee. His subsequent conviction for contempt of Congress was reversed by the Supreme Court in an eloquent if prolix opinion written by Chief Justice Warren. The Chief Justice impugned at length the constitutional propriety of the committee.[58] All those words, however, were an aside. The reversal, rather, was based upon a denial of due process—the lack of a sufficient standard of criminality. The question under inquiry was never "made to appear with undisputable clarity."[59]

The *Watkins* decision turned upon a procedural point, rather than substantive law. As Chief Justice Warren pointed out in his closing paragraph, all that was required of the committee was "a measure of added care."[60] The committee must clarify the subject of the inquiry, and upon objection as to pertinency by the witness, explain the relevancy of the question.

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55. *Id.* at 47, 48.

56. 354 U.S. 178 (1957).

57. *Investigation of Communist Activities in the Chicago Area—Part 3; Hearing Before the Committee on Un-American Activities, House of Representatives,* 83rd Cong., 2d Sess., 4265-4279 (1954).

58. 354 U.S. at 201-206 (1957).

59. *Id.* at 214.

60. *Id.* at 215.

Of the seven justices hearing the case, only Justice Clark dissented,[61] labeling the decision as a "mischievous curbing of the informing function of the Congress" and criticising its procedural requirements as "unnecessary and unworkable." [62]

Along with *Watkins v. United States*, the Supreme Court on June 17 —"Red Monday" to the Court's foes—handed down three other decisions dealing with Communism and subversion, each unfavorable to governmental interests.[63] The effect of this quartet upon the public was electric; reaction was immediate and outspoken. With respect to the *Watkins* decision criticism was apparently based on a misunderstanding of its narrow holding. Cutting through substance to form, critics of the Court variously denounced the *Watkins* case as "[making] it easy for treason to be protected," [64] and as "[leveling] most of the erected barriers against Soviet infiltration." [65]

Reaction in Congress was no less emphatic. If the reprehensive tone of the Chief Justice's opinion was for the purpose of producing in Congress a contrite heart and a more responsible use of its powers, it was a dismal failure. The Court's decisions precipitated in the Senate a bitter struggle over legislative proposals to curb the Court's jurisdiction which were only narrowly defeated.[66] In the House, Representative Hoffman of Michigan was so bold as to suggest the impeachment of the Supreme Court.[67] Least moved of all by the *Watkins* decision, the Un-American Activities Committee merely modified its procedure and probed onward.[68]

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61. *Id.* at 217.

62. *Id.* at 217, 218.

63. Yates v. United States, 354 U.S. 298 (1957) (reversing fourteen Smith Act convictions of Communist leaders); Service v. Dulles, 354 U.S. 363 (1957) (invalidating the dismissal of a State Department employee who failed to get loyalty clearance); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (reversing contempt conviction of college professor for failure to disclose his classroom teachings to the Attorney General of New Hampshire, who was investigating subversive activities in the state).

64. Columnist David Lawrence, New York Herald Tribune, June 19, 1957, at 19. *See* BECK, CONTEMPT OF CONGRESS 163 (1959).

65. Robert Morris, former counsel for the Senate Internal Security Sub-committee, 26 U.S.L. WEEK 2162 (1957).

66. For a detailed account of the reaction in Congress to the June 17th decisions, see MURPHY, CONGRESS AND THE COURTS—A CASE STUDY IN THE AMERICAN POLITICAL PROCESS 127-223 (1962).

67. Cong. Rec., 85th Cong., 1st Sess., CIII, No. 109, 9099 (daily pagination).

68. *See* BECK, CONTEMPT OF CONGRESS 166 (1958); Alfange, *Congressional Investigations and the Fickle Court*, 30 U. CINC. L. REV. 149, 150 (1961).

The hostile reception of *Watkins* and related cases was apparently heeded by the Supreme Court as a word to the wise. In 1959 the Court in a decision as discordant as its title—*Barenblatt v. United States*[69]—affirmed a contempt conviction by a 5-4 majority.

The *Barenblatt* case was remarkably similar in its facts to *Watkins*.[70] Lloyd Barenblatt, a psychology instructor at Vassar College,[71] was subpoenaed to appear before the Un-American Activities Committee investigating Communism in the field of education.[72] Barenblatt had been named as affiliated with Communist Party groups of the University of Michigan. Unlike Watkins, he refused to answer questions concerning his own political activities for reasons contained in an eleven-page statement of objections which he was not permitted to read by the committee. His objections were overruled and he was directed to answer the questions. It was not until he was about to be dismissed that a member of the committee put into the record a statement of the purpose of the investigation and the relevance of Barenblatt's activities.[73] Barenblatt expressly disaffirmed reliance on the Fifth Amendment, but challenged the "power and jurisdiction" of the committee to inquire into his political beliefs, personal and private affairs, and associational activities.[74]

It was no mean feat to distinguish factually this case from *Watkins*, but Justice Harlan, who had been with the majority in *Watkins*, was equal to the task. In a compact opinion he systematically disposed of each of Barenblatt's contentions. Premising his remarks with the usual postulates on the investigatory power of Congress, Justice Harlan turned to the problem of the vague authorization of the committee. Pointing out that the discussion of this issue in *Watkins* was merely obiter dicta, he went on to say that the long history of the authorizing

69. 360 U.S. 109 (1959).

70. See Alfange, *supra* note 19, at 156-164.

71. Barenblatt's contract expired two weeks before the hearing and was, curiously, not renewed.

72. The subject of the hearing was explained by the committee counsel in an opening statement:

> The field covered will be in the main communism in education and the experience and background in the party by [sic.] Francis X. T. Crowley.
>
> It will deal with activities in Michigan, Boston, and in some small degree, New York.

Communist Methods of Infiltration (Education—Part 9); *Hearings before the Committee on Un-American Activities, House of Representatives*, 83rd Cong., 2d Sess., 5754 (1954).

73. *Id.* at 5813, 5814.

74. *Id.* at 5807.

resolution has clearly established the authority of the committee to investigate Communist activities.

As to the pertinency claim, the prepared statement of Barenblatt could not be construed as an objection to the pertinency of the questions. Furthermore, the relevancy of the questions was made to appear with "undisputable clarity" by the opening remarks of the committee, by the testimony of prior witnesses which Barenblatt heard, and by the closing remarks of the committee to which he did not reply. Finally, the First Amendment is not an absolute barrier to all inquiry into an individual's personal affairs. Where, as in the instant case, the right of self-preservation of the State outweighs the interests of the individual. Finally, the power of Congress to legislate in the field of Communist activity is unquestionable: "So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." [75]

In a vigorous and pursuasive dissent,[76] in which Justice Douglas and Chief Justice Warren concurred, Justice Black reached the opposite conclusions. Justice Brennan filed a separate dissent based on the lack of a valid legislative purpose. The position of the dissenters was diametric.

On the same day that *Barenblatt* was decided, the majority took similar positions in *Uphaus v. Wyman*,[77] affirming the contempt conviction of the director of a "Communist front" organization. This prosecution, like *Sweezy v. New Hampshire*,[78] arose out of a state investigation of subversive activities.

The retreat by the Supreme Court in *Barenblatt* and *Uphaus* has been described as a "tactical withdrawal, not a rout." [79] It is a fair conclusion that the shift of position of the Court—specifically Justices Harlan and Frankfurter—in *Barenblatt* was prompted at least in part by public disapproval and the threat of remedial legislation. Likewise, the conclusion that the high ground taken by the five-man majority is a temporary camp is justified, although two decisions in 1961, *Wilkinson v. United States*[80] and *Braden v. United States*,[81] both supporting the *Barenblatt* ruling, weaken the argument.

75. Barenblatt v. United States, 360 U.S. 132 (1959).
76. *Id.* at 134.
77. 360 U.S. 72 (1959).
78. 354 U.S. 234 (1957). *See* note 63 *supra.*
79. MURPHY, *supra* note 63, at 246.
80. 365 U.S. 399 (1961).
81. 365 U.S. 431 (1961).

In *Wilkinson v. United States*, petitioner had no sooner arrived in Atlanta, Georgia, to stir up opposition to the 1958 Un-American Activity Committee hearings there, than he was handed a subpoena to appear before the committee for a repeat performance. He had been before the committee nineteen months previously, and had at that time refused to cooperate.

The division of the Supreme Court was identical with the *Barenblatt* case. The majority found the case indistinguishable from *Barenblatt* on its constitutional issues, and affirmed the conviction. The dissenters found a new element—that the only reason for summoning the petitioner was harassment, since there was no basis to believe he would give any new information to the committee. Unlike the majority, the dissenters felt that the purpose of the committee in summoning the witness was a proper subject for judicial scrutiny.

Braden v. United States[82] arose out of the same hearings as the *Wilkinson* case. The novel issue presented in this case was the witness' reliance on the *Watkins* decision in refusing to comply with the committee. The majority rightly pointed out that good faith does not excuse recusancy, and a mistake of law is no defense. The opposite view was taken in the dissent by Justice Douglas, with which Justice Black, Justice Brennan, and Chief Justice Warren concurred:[83]

> One would be wholly warranted in saying, I think, in light of the Watkins and Sweezy decisions that a Committee's undisclosed information or unsupported surmise [that a witness was connected with Communism] would not justify an investigation into matters that on their face seemed well within the First Amendment. If Watkins and Sweezy decided anything, they decided that before inroads in the First Amendment domain may be made, some demonstrable connection with communism must first be established and the matter be plainly shown to be within the scope of the Committee's authority.

Since *Wilkinson* and *Braden*, every contempt conviction arising from congressional investigations which has reached the Supreme Court has been reversed on statutory or procedural grounds. *Deutch v. United States*[84] was one of the few cases in which the Court found as a matter

82. *Id.*

83. *Id.* at 456, 457.

84. 367 U.S. 456 (1961).

of law, that the questions asked by a committee were not pertinent to the subject of the investigation.[85] The subject of the investigation was apparently "Communist infiltration in the Albany or 'capital' area, particularly in the field of labor." [86] There was nothing in the record to connect this subject with petitioner's activities while attending Cornell University. The Court took judicial notice of the fact that Cornell was more than one hundred miles from Albany.

Russell v. United States[87] involved the en masse reversal of six convictions on a novel procedural requirement. *Yellin v. United States*[88] reversed a contempt conviction on another technicality. The witness had requested that he be interrogated in an executive session, believing that a public hearing would injure his reputation. Committee rules required it to vote on the propriety of an executive session. The request by petitioner was rejected by the committee's staff directer—a fatal shortcut.

The resourcefulness of witnesses fighting contempt convictions was further illustrated in a recent circuit court reversal of convictions in three companion cases.[89] Part of the criminal contempt statute makes it the "duty" of the Speaker of the House, when Congress is not in session, to certify reports of recusant witnesses before House committees before they are acted upon by the Department of Justice.[90] The Speaker, John McCormack of Massachusetts, was advised by the House Parliamentarian that certification was mandatory regardless of the Speaker's personal judgment. The District of Columbia Court of Appeals reversed, finding

85. Other cases reversing contempt convictions for lack of pertinency are: Sacher v. United States, 356 U.S. 576 (1958) (questions posed by Internal Security Subcommittee of the Senate Committee on the Judiciary were not within its scope of inquiry), Bowers v. United States, 202 F.2d 447 (D.C. Cir. 1953) answer to inquiry of Senate subcommittee investigating organized crime would not further the purpose of the investigation).

86. 367 U.S. at 469, 470 (1961).

87. 369 U.S. 749 (1962).

88. 374 U.S. 109 (1963).

89. Wilson v. United States, 369 F.2d 198 (D.C. Cir. 1966).

90. The pertinent parts of 2. U.S.C. § 194 provide:

> Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before . . . any committee . . . and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with . . . the Speaker of the House, it shall be the duty of the said . . . Speaker of the House . . . to certify, and he shall so certify, the statement of facts aforesaid . . . to the appropriate United States Attorney. . . .

it "the consistent legislative course that the Speaker is not under a 'mandatory' duty to certify . . . ." [91]

The inherent conflict between the Supreme Court opinions in *Watkins* and *Barenblatt* provides a fertile field for speculation and argument as to the underlying motivations which produced the inconsistency and the manner in which it will eventually be resolved. Reading *Watkins* in the strict sense of the *Barenblatt* interpretation, it is clear that *Barenblatt* represents today the most authoritative statement by the High Court on the constitutional issues involved in congressional investigations. Yet the fact remains that the Court in each case discussed the problems at length and approached, if it did not reach, conflicting conclusions. As stated by Professor Harry Kalven:

> On the most literal level it is true that *Watkins* and *Barenblatt* can be read together consistently as Justice Harlan does. But the impression will not down that the cases are really deeply inconsistent, and that it might have been better to say so candidly and overrule *Watkins*. . . . Yet it is also possible that the future may not read *Barenblatt* as overruling *Watkins*. We may see instead to powerful precedents so close on their facts that future courts will for all practical purposes be free to choose between them and decide that it is one and not the other that controls the case before it.[92]

Perhaps the best explanation of the narrow holding in *Watkins* is the recognition by the Court that ultimate responsibility for use of the congressional power of inquiry should lie with Congress.[93] The hypothesis that *Watkins* represented an appeal to the legislature to exercise that responsibility, couched with a threat of judicial invalidation if the advice went unheeded, is suggested by the closing paragraphs of Chief Justice Warren in *Watkins:*

> We are mindful of the complexities of modern government and the ample scope that must be left to the Congress as the sole constitutional depository of legislative power. Equally mindful are we of the indispensable function, in the exercise of that power, of congressional investigations. The conclusions we have reached in this case will not

91. Wilson v. United States, *supra* note 82, at 201.

92. Kalven, *Mr. Alexander Meiklejohn and the Barenblatt Opinion,* 27 U. CHI. L. REV. 315, 321, 322 (1960).

93. *See id.* at 322, 323.

> prevent the Congress, through its committees, from obtaining any information it needs for the proper fulfillment of its role in our scheme of government. . . . It is only those investigations that are conducted by the use of compulsory process that give rise to a need to protect the rights of individuals against illegal encroachment. That protection can be readily achieved through procedures which prevent the separation of power from responsibility and which provide the constitutional requisite of fairness for witnesses.[94]

That the appeal failed was amply demonstrated by the upheaval it caused in Congress. *Barenblatt* forced the court to either make good its threat, or back down. The retreat by a majority of justices is somewhat puzzling, since by the time *Barenblatt* reached the Supreme Court two years later, the crisis had passed.[95] Perhaps this withdrawal was prompted by threats of remedial legislation. Alternatively:

> It is conceivable that some of the Justices could have acted on the theory that the Court, having reminded the other branches of government as well as the general public of the commands of the Constitution, could best protect civil liberties by allowing non-judicial officials to exercise responsibility for achieving the most satisfactory reconciliations between conflicting and competing rights. This has long been the ideal of judicial restraint.[96]

The least likely explanation is that the divergent views of the Court sprang from fundamentally different interpretations of the intendment of the First Amendment. Rather, the crux was how, when, and by whom its protections were to be applied. The solution, at least for the majority of Justices, was a matter of political expediencey.

The question is, however, academic. The effect of the two decisions was, and still is, to place the law in this area in an unsatisfactory state of ambivalence.

Professor Kalven's prediction that the Court might select the most appealing of the two precedents has been borne out through succeeding cases. Both *Watkins* and *Barenblatt* remain weighty precedents, but it is not likely to be a viable co-existence. In *Sacher v. United States*[97] the *Watkins* precedent was controlling. *Wilkinson* and *Braden* gave un-

94. 354 U.S. 178, 215, 216 (1957).
95. *See* MURPHY, *supra* note 66, at 267.
96. *Id.*
97. 356 U.S. 576 (1958).

reserved obeisance to *Barenblatt*. *Deutch* clearly favored the *Watkins* ruling. Although *Watkins* turned upon a denial of due process under the pertinency requirement and *Deutch* centered upon lack of pertinency of the questions, each case involved a close question of fact which required a process of selective dissection to support the majority view.

Russell v. United States, requiring for the first time that the indictment specify the subject of the inquiry, was an extension of the *Watkins* approach and relied heavily on that precedent. The same may be said of *Gojack v. United States*, where the Court again faced the problem of the unascertainable subject of inquiry.

Yellin v. United States is also in the *Watkins* camp. Again a conviction was reversed on a trivial point of procedural due process. The decision by the majority on the ultimate question of whether the petitioner was entitled to raise the issue of departure from committee rules in court, not having objected at the hearing, was, as the four dissenters point out, inimical to *Barenblatt*.[98]

Assuming that a contempt conviction could survive the procedural pitfalls created by inspired judicial scrutiny and reach the High Tribunal on its basic constitutional issues, it would not be premature to predict that the *Watkins* perspective would prevail. It would not be difficult to distinguish *Barenblatt* on its facts, and find that in a particular case the interests of the state do not override the First Amendment rights of the individual. This conclusion is supported by the fact that since *Wilkinson* not one contempt conviction under 2 U.S.C. § 192 has survived the appellate process, while thirteen have been reversed.[99] This record clearly reflects a hostile attitude toward the Un-American Activities Committee. If a majority of the present Court could sustain the committee's activities in the face of the constitutional arguments against it, there would be little need for the practice of straining to find procedural flaws.

CONCLUSION

The hesitation of the Court to hamstringing the committee, while open to criticism, is at least understandable. Congressional power is not lightly to be trammeled, and the Supreme Court can hardly be called pussillanimous. Yet the Un-American Activities Committee still roams at large, and has indicated no intention to temper its crusade. Its potential for doing irreparable harm to guiltless individuals requires little elucida-

98. 374 U.S. at 135, 136 (1963).

99. *See* The New York Times, Sept. 14, 1966, p. 24, col. 1.

tion, nor does its record of abuse of power need chronicling here.[100] At present those summoned by the committee are faced with the dilemma of choosing among submitting to public disclosure of their past and present activities, associations, and beliefs with its injurious repercussions, invoking the Fifth Amendment, or undergoing a costly and protracted battle through the courts. Even if the litigation is eventually successful, a reversal on a procedural point is scarcely an adequate remedy for damage long since inflicted.[101] That the Supreme Court is moved by considerations other than the written law is praiseworthy, but the public interest or ulterior policies served by this set of circumstances appear with less than "undisputable clarity."

Kent B. Millikan

100. *See generally* BECK, CONTEMPT OF CONGRESS (1959); CARR, THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES (1952); OGDEN, THE DIES COMMITTEE (1945); TAYLOR, GRAND INQUEST (1955).

101. Recent attempts to secure court injunctions against scheduled hearings of the Un-American Activities Committee have fared poorly.

In May, 1965, a hearing was scheduled in Chicago to investigate "certain organizational changes in the Communist Party." One of the witnesses summoned was Dr. Jeremiah Stamler, an internationally known heart specialist working with the Chicago Board of Health. Stamler sought a federal district court injunction against the hearing, which was rejected by Federal District Judge Hoffman on the ground that the committee's "motives and purpose cannot be judicially challenged." The order was appealed. Dr. Stamler walked out of the hearings without testifying. Opponents of the committee claimed the hearings were an attempt to link the Communist Party with unions, Negro groups, and pacifist organizations. The hearings were chaotic—five hundred pickets, one hundred police and scores of U. S. marshals. A total of thirty-nine were arrested. Of thirteen unfriendly witnesses, three walked out, the rest refused to testify. The New York Times, May 25, 1965, p. 16, col. 3, May 26, 1965, p. 29, col. 3, May 27, 1965, p. 20, col. 3, May 28, 1965, p. 36, col. 1.

In an unprecedented move, Federal District Judge Corcoran of the District Court of The District of Columbia granted a temporary injunction against Un-American Activities Committee hearings on a bill which would make it a crime to aid the Viet Cong. The injunction was sought by the American Civil Liberties Union, which requested that a three-judge panel consider the constitutionality of the hearings. The reaction of the committee was intemperately expressed by its acting chairman, Representative Pool of Texas, "I don't think Judge Corcoran has the constitutional right to issue such an order. I will go to jail until hell freezes over to prove my point." A three-judge panel quickly convened and dissolved the injunction pending further consideration. The hearings went on as scheduled, with resulting pandemonia. The New York Times, Aug. 16, 1966, p. 1, col. 1.