Limitations on the Power of Congressional Investigations

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LIMITATIONS ON THE CONGRESSIONAL POWER OF INVESTIGATION

INTRODUCTION

"The informing function of Congress should be preferred even to its legislative function." ¹ The obvious desirability of an informed Congress and electorate to which Woodrow Wilson was referring, together with the separate and equal status of the legislative powers within the constitutional framework, has resulted in a legislature with extensive power to obtain information which it deems necessary to the intelligent exercise of its function. Yet the right to acquire information does not necessarily carry with it unbridled discretion in the choice of means and sources to be used. In addition to the limitations imposed by co-equal executive and judiciary branches of the federal government, respect must be accorded the rights and powers reserved to the people and the states under the Bill of Rights.

With the adoption in 1857 of a statute ² imposing criminal penalties for failure to comply with a legislative fact-finding body, the courts acquired the delicate task of reconciling congressional power with individual rights. It was not until the congressional investigations of Communist and subversive activities during the decade following World War II that serious doubts arose concerning the prevailing judicial policy of non-intervention in the affairs of Congress.

In Watkins v. United States ³ the Supreme Court first gave extensive consideration to the objections raised by witnesses who refused to comply with congressional demands. In that case the conviction was reversed on a procedural point, but the flavor of the opinion, particularly the

¹ This note is a sequel to Note, Congressional Investigations: Imbroglio in the Court, 8 WM. & MARY L. Rev. 400 (1967). Frequent reference will be made to the former part, hereafter cited as Note.


discussion of the First Amendment argument, raised serious doubts about the constitutional propriety of the committee procedures. Appearances proved to be deceptive, however, when two years later the same Court, in a five-to-four decision, went in the other direction in Barenblatt v. United States, and gave its approval to the purpose and procedures of the House of Representatives Committee of Un-American Activities. In subsequent cases a divided Court has fluctuated between the blanket approval of Barenblatt, and reversal on narrow procedural grounds as in Watkins.

The great majority of convictions for contempt of Congress in the past twenty years have resulted from investigations by the House Un-American Activities Committee. The primary objections which repeatedly have been made against the constitutional validity of this committee and the contempt convictions have been (1) that the committee investigation was not serving a legitimate legislative purpose, (2) that the committee's charter did not authorize such investigations, (3) that the questions asked were not pertinent to the subject of the investigations as required by the criminal statute, and (4) that the investigations violated the First Amendment. The following discussion will attempt to present the current posture of the courts on these issues, primarily with reference to the House Un-American Activities Committee.

**Legislative Purpose**

Since McGrain v. Daugherty the power of Congress to investigate in aid of legislation has not been seriously challenged. Stated negatively, the maxim is that Congress may not investigate where no valid legislative purpose would be served. While this requirement apparently limits the scope of permissible inquiry, its application by courts has removed most, if not all, prohibitory content. A typical preamble to court opinions on this subject appears in Watkins v. United States:

> The power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, eco-

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5. The Fifth Amendment privilege against self-incrimination was given broad application in regard to congressional investigations in Quinn v. United States, 349 U. S. 155 (1955), and its companion case, Emspak v. United States, 349 U. S. 190 (1955), and has since been a bar to virtually any interrogation.
nomic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste. But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress.\(^7\)

With an eye to this deceptive limitation, a frequent objection posed by witnesses protesting contempt citations has been that no valid legislative purpose existed. With the exception of *Kilbourn v. Thompson*,\(^8\) this contention has never succeeded. The courts with conspicuous consistency have permitted congressional investigations to expose the private affairs of individuals so long as there was somewhere recited a legislative purpose.

In ferreting out the 'red menace,' congressional committees have left few stones unturned. Investigations have probed into education,\(^9\) religion,\(^10\) and the press.\(^11\) In view of the First Amendment freedoms of speech, press, religion, and assembly, which are applicable to congressional investigations,\(^12\) and the dubious pronouncement that Congress cannot investigate where it cannot legislate,\(^13\) the question arises as to whether a valid legislative purpose can underlie such inquiries. In refuting this argument, courts have pointed out that its speciousness lies in its unarticulated assumption that only invalid legislation could result from information so obtained. "Congress obviously can use information gathered by this Committee to pass legislation not encroaching upon civil liberties. . . . [And furthermore] Congress can and should legislate to curtail this freedom [speech] at least where there is a

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8. 103 U.S. 168 (1880). See *Note* at 403.
10. *See Buckley, The Committee and Its Critics* 301, 302 (1962) for a summary of the committee's investigations into Communist methods of infiltration and subversion of churches and religious organizations.
'clear and present danger' that its exercise would . . . imperil the country and its Constitutional system . . . ." 14 Consistent with this line of reasoning, the Supreme Court stated, in affirming the conviction of a college teacher:

Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. . . . But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher. An educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls.15

The logical extension of this argument is that since Congress can initiate amendments to the Constitution, inquiries into the nature and workings of "inalienable rights" are within its domain.16

It is difficult to conceive of an area of society that cannot be directly or indirectly affected by legislative action. It follows that the Bill of Rights does not bar congressional action within the proscribed freedoms. The problem becomes one of gauging how far Congress may encroach upon individual liberties. It is in this context—the balancing of the interests of the state with the interests of the individual—that the First Amendment prohibitions have been handled by the courts.

Yet in spite of the ubiquitous legislative purpose, the view that Congress cannot investigate in the area of speech and association is not without authoritative adherents. Their arguments, however, have been confined to dissenting opinions. Dissenting in Barenblatt v. United States,17 Justice Black, with whom Justice Douglas and Chief Justice Warren concurred, reasoned that the First Amendment prevented any legislative encroachment upon its domain regardless of purpose. Concurring in Russell v. United States,18 Justice Douglas argued that since Congress cannot regulate in the area of the First Amendment, investigation in those areas cannot be justified in terms

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15. Barenblatt v. United States, supra note 4 at 112.
16. See Barsky v. United States, supra note 14 at 246.
18. Supra note 13.
of a legislative function, even though the information might prove useful in related areas.

Conceding that any congressional investigation might conceivably be useful in enacting legislation, statements of committee members give rise to more than a suspicion that the primary goal of the Un-American Activities Committee is exposure rather than useful information.19 This conclusion is reinforced by the practice of the committee, as illustrated by Wilkinson v. United States,20 of summoning witnesses from whom no helpful information can be expected. It was on this basis that Justice Brennan filed separate dissents in Barenblatt and Wilkinson, and it was an additional ground for the dissents in both cases of Justices Black, Douglas, and Warren. From the committee’s record, the inference is compelling that “the chief aim, purpose and practice of the House Un-American Activities Committee, as disclosed by its many reports, is to try witnesses and punish them because they are or have been Communists or because they refuse to admit or deny Communist affiliations. The punishment imposed is generally punishment by humiliation and public shame.”21 Punishment is the function of the judiciary, and it was a usurping of the powers of the courts which was unabashedly struck down in Kilbourn v. Thompson.22 Since that case courts with little difficulty have managed to find a

19. Examples of the countless public statements made by members of the committee are listed in an appendix to Justice Black’s dissenting opinion in Barenblatt v. United States, supra note 4 at 163. The flavor of these pronouncements is exemplified by the following:

“[T]o inform the American people of the activities of any such organizations . . . is the real purpose of the House Committee.” “The purpose of this committee is the task of protecting our constitutional democracy by turning the light of pitiless publicity on [these] organizations.” H.R. Rep. No. 1476, 76th Cong., 3d Sess., 1-2, 24 (1940).

In reversing the conviction of a labor union official on the ground that the subject of the inquiry was never specified, the Supreme Court cited statements of the chairman which included the candid revelation:

“[Rep. Francis E. Walter (D. Pa.)] . . . said today he plans to hold large public hearings in industrial communities where subversives are known to be operating, and to give known or suspected commies a chance in a full glare of publicity to deny or affirm their connection with a revolutionary conspiracy—or to take shelter behind constitutional amendments.

“By this means, he said, active communists will be exposed before their neighbors and fellow workers, ‘and I have every confidence that the loyal Americans who work with them will do the rest of the job.’” Gójack v. United States, 86 S. Ct. 1689, 1694 (1966). See Note at 400.

20. Supra note 17 at 414, 415. See Note at 414, 415.


22. Supra note 8.
valid legislative purpose. In *McGrain v. Daugherty*23 such a purpose was presumed. *Sinclair v. United States*24 offset the presumption of regularity by the presumption of innocence attending the accused in criminal prosecutions, and made it incumbent upon the government to plead and prove proper purpose. In subsequent cases this burden has been met by a recital somewhere in the congressional records that legislation might result from the investigations.25 The fact that committee members make contradictory and irresponsible statements has failed to faze the courts:

But we have no occasion now to decide whether a Congressional investigation may have exposure as its principle goal or when, if ever, a statute may. It is sufficient to say that the authorizing statute contains the declaration of Congress that the information sought is for a legislative purpose and that fact is thus established for us . . . regardless of any statement by the Committee or its members intimating the contrary. The fact that there may be 'exposure' incidental to the inquiry goes only to the question of freedom of speech . . . [Citations omitted].26

In *Barenblatt* a similar attitude was expressed by the majority: "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."27 Citing *McCray v. United States*28 with approval, the Court declared that the remedy for the lawful exercise of a power perverted by improper motive lies with the people rather than the Judiciary.29

That the court would be reluctant to delve into the morass of congressional motivation is understandable. The prospect of unraveling the proper from the improper motives would indeed be boggling in most cases. But the argument that the Judiciary lacks the authority to indulge in the psychoanalysis of congressional committees assumes too much. When the exercise of legislative power accomplishes ends

24. 279 U. S. 263 (1929).
25. See, e.g., *Townsend v. United States*, 95 F.2d 352 (D.C. Cir. 1938), and *Note* at 404, n.25.
inconsistent with the ostensible purpose of the action, the distinction between purpose and motive becomes an exercise in semantics. However, it would be both unwise and unnecessary for a court to nullify a congressional investigation on the tenuous ground of improper purpose when more defensible positions are available. It is the trespass on the domain of the Judiciary and the First Amendment freedoms which renders the action improper, and either constitutional objection could be supported by reason and precedent.

The unfortunate effect of the Courts' position is illustrated by the sophistical argument of the Chairman of the Un-American Activities Committee, Representative Willis of Louisiana, while defending the proposed investigation of the Ku Klux Klan on the floor of the House:

The time has come, I believe, to give a factual and a legal answer to the charge sometimes made against the Committee on Un-American Activities that it engages in investigations in order to expose for exposure's sake. . . .

As we all know, committees of Congress can make investigations and hold hearings only in aid of a legislative purpose, and where that legislative purpose is not present, a committee's action may be successfully challenged.

The easiest and most penetrating challenge which can be made to the purposes of a congressional committee is in the Federal courts in criminal cases growing out of its hearings. . . . [T]he courts require that a committee before whom a contempt or perjury is charged not only must be pursuing a legislative purpose at that time, but the executive arm of the Government in order to make a successful prosecution in court must carry the burden to prove beyond a reasonable doubt that the committee had such a legislative purpose. . . .

It is my information, based upon what those who have studied the matter have advised me, that in not one single case of a citation to the courts for contempt of Congress have the courts ever found lacking a legislative purpose for any committee's investigation. This is to the very great credit of both Houses of Congress. And when I say that, I include, of course, the Committee on Un-American Activities.30

At least the Chairman was not misinformed.

AUTHORITY AND JURISDICTION

Granting that Congress has the authority to conduct investigations in aid of legislation, the question remains whether a particular investi-

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Investigation is within the bounds of its constitutional authority. When Congress delegates its authority to an investigative committee, there is in addition the question of whether a particular undertaking of the committee is within the authority conferred upon it. When a subcommittee is involved, the issue is refined still further. This chain of authority from the Constitution to the inquisitor clearly makes congressional investigations vulnerable to judicial rear-attacks, and the history of legislative fact-finding bodies is not without a casualty list. In *Kilbourn v. Thompson*,\(^31\) the Supreme Court found that an investigation was without the constitutional authority of Congress. In *United States v. Rumely*,\(^32\) the High Bench held that a select House committee authorized to investigate lobbying activities lacked authority to investigate efforts to influence public opinion. In *United States v. Kamin*,\(^33\) a Senate subcommittee authorized to investigate government operations was found lacking in jurisdiction to investigate defense plants privately owned and operated. *United States v. Lamont*,\(^34\) involving facts similar to *Kamin*, dismissed indictments for contempt of Congress when the trial court found that, inter alia, they failed to allege either the source of the subcommittee's authority or that the investigation was within the authority conferred by Congress. The circuit court affirmed the ruling,\(^35\) citing the *Kamin* case, since even if the indictments were sustained, the prosecution would fail because authority was in fact absent. In *Sweezy v. New Hampshire*,\(^36\) the Court found no clear delegation of authority to investigate classroom teachings and beliefs of a Communist sympathizer. In *Gojack v. United States*,\(^37\) the Supreme Court found that the subcommittee investigation was never authorized as required by the rules of the Un-American Activities Committee.

\(^{31}\) Supra note 8.

\(^{32}\) Supra note 12. See Note at 410.

\(^{33}\) 136 F. Supp. 791 (D.C. Mass. 1956). This case, another contempt conviction, arose when defendant refused to disclose his communist associates before a subcommittee of the Senate Committee on Government Operations. The Subcommittee was empowered to investigate “the operation of Government activities of all levels with a view to determining its economy and efficiency.” Legislative Reorganization Act of 1946, c. 753, § 102 (g) (2) (B). The court held that the jurisdiction of the committee was limited to government activity, and not private industry acting under government contracts.

\(^{34}\) 18 F.R.D. 27 (S.D. N.Y. 1955), aff'd, 236 F.2d 312 (2d Cir. 1956).

\(^{35}\) Id.

\(^{36}\) 354 U.S. 234 (1957).

\(^{37}\) Supra note 19.
The authority of any congressional committee must devolve from Congress. Its jurisdiction is embodied in the authorizing resolution, the purpose of which is to define the limits of the power conferred, and how and for what purpose that power is to be used. When authority is lacking, a contempt conviction would be a denial of due process under the Fifth Amendment.

Initially, investigatory commissions expired when the investigation ceased, and their usefulness was likewise limited. The advantages of permanent investigating committees—competent staff, stability, continuity, and efficiency—were apparent. The difficulties inherent in the delegation of broad powers include the possibility that it may afford no standard of conduct to the committee and defy meaningful interpretation for the purpose of supervision by either Congress or the courts. In the extreme case, a vague authorization may be totally ineffective, since by authorizing any inquiry it may be voided by the courts.

The Legislative Reorganization Act of 1946 was enacted with a view to establishing permanent committees with broad powers. Included therein was the Un-American Activities Committee, with the authorizing resolution of the 1938 Special Committee and the 1945 Standing Committee adopted substantially intact. This authorization is the epitome of vagueness, and the controversy it has spawned in the courts makes it clear why its author has never taken a bow. In the Watkins case, Chief Justice Warren assailed its ambiguity:

> It would be difficult to imagine a less explicit authorizing resolution. Who can define the meaning of ‘un-American’? What is that single, solitary ‘principle of the form of government as guaranteed by our Constitution’?

These words, however, were in vain:

> At one time, perhaps, the resolution might have been read narrowly

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39. Legislative Reorganization Act, ch. 753, § 121(a), (b), 60 Stat. 812 (1946).
40. "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (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." H. Res. 5, Rule XI, § 17 (b), 83d Cong., 1st Sess., 99 Cong. Rec. 18 (1953).
to confine the Committee to the subject of propaganda. The events that have transpired in the fifteen years before the interrogation of petitioner make such a construction impossible at this date.\textsuperscript{42}

In support of his conclusion, the Chief Justice pointed out that the House has repeatedly approved the committee's excursions by renewing its charter when on a special committee basis, by elevating it to standing committee status, by incorporating it into the rules of the House, and by innumerable appropriations for its support.

That reasonable men might differ about the vagueness of the resolution is illustrated by the opinion in \textit{Barsky v. United States}:

\begin{quote}
It is said that the resolution is too vague to be valid. Perhaps the one phrase 'Un-American propaganda activities', taken alone... would be subject to that condemnation. But the clause, above quoted, 'subversive and un-American propaganda that... attacks the principle of the form of government as guaranteed by our Constitution'... is definite enough. It conveys a clear meaning, and that is all that is required.\textsuperscript{43}
\end{quote}

The first series of cases raising the constitutional questions concerning the Committee in the period between 1947 and 1950 were disposed of at the Court of Appeals level.\textsuperscript{44} The question of authority was handled in each case with language similar to that in the \textit{Barsky} case, and the Supreme Court was content to let the opinions stand. Those cases that did reach the High Tribunal\textsuperscript{45} were disposed of without reaching the basic issues. The \textit{Watkins} case was the first attempt by the Supreme Court to deal with the conundrum of constitutional issues, and there only by way of dicta.

In the \textit{Barenblatt} case, the petitioner again raised the problem of vagueness, relying on the strong language of the \textit{Watkins} decision. Barenblatt's contentions on this point were twofold; the first being that the authorizing resolution was wholly ineffective, and the second, that if the resolution were effective to confer some authority, this authority did not include investigation into Communist activities.

As to the first contention, Justice Harlan, writing the majority opinion, ably pointed out that the \textit{Watkins} language implied more than it

\textsuperscript{42} Id.
\textsuperscript{44} See \textit{Note} at 408.
\textsuperscript{45} See \textit{Note} at 410, n.50.
said. Rather, the Court in the *Watkins* case “drew upon Rule XI [the authorizing resolution] only as one of the facets in the total *mise en scene* in its search for the ‘question under inquiry’ in that particular investigation.” 46

While it is no doubt true that *Watkins* said less than Barenblatt contended, it is likewise misleading to construe the discussion in *Watkins* of the problem of authority presented by the vague authorization 47 as subordinate to the discussion of the pertinency requirements. 48 It would be more accurate to say that the problem of pertinency which controlled in *Watkins* was one of the difficulties presented by a vague authorization. It is this latter interpretation which prompted the dissenting opinion of two judges, Edgerton and Bazelon, in the circuit court reaffirmation of Barenblatt's conviction, 49 which had been remanded for consideration in the light of *Watkins*. Strictly speaking it could be said that *Watkins* left open the question of authority.

Justice Harlan disposed of both of petitioner's contentions by rebutting the second, since authority to investigate Communist activities was sufficient to uphold the conviction. The Court's first argument was implied by the statement: “We cannot agree with the contention [that authority to investigate Communism was lacking] which in its farthest reach would mean that the House Un-American Activities Committee under its existing authority has no right to compel testimony in any circumstances.” 50 The apparent inference of this statement is that if the committee had any authority, it was to investigate Communist activities, and if no such authority in fact existed the charter was void from its inception in 1938. This conclusion, to the court a reductio ad absurdum, was indeed Barenblatt's contention. Yet its absurdity lay not in its internal logic, but rather in the effect it would have if sustained.

The Court, by its own doing, was in the embarrassing position of ruling for the first time on the validity of an authorizing resolution, certainly as objectionable as any the Court had yet encountered, which, in its twenty year existence, has supported more than forty convictions. 51

47. *Supra* note 3 at 200-206.
48. *Id.* at 206-215.
51. See BACk, CONTEMPT OF CONGRESS 217 (1958).
The Court's solution was inevitable:

Granting the vagueness of the Rule, we may not read it in isolation from its long history in the House of Representatives. Just as legislation is often given meaning by the gloss of legislative reports, administrative interpretation, and long usage, so the proper meaning of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite content furnished them by the course of congressional actions. The Rule comes to us with a 'persuasive gloss of legislative history' . . . which shows beyond doubt that in pursuance of its legislative concerns in the domain of 'national security' the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country. 52 [Citations omitted.]

This statement represents the final deposition of the problem of authority as it relates to Communist activities and, no doubt, activities of organizations under investigation during World War II. 53 In this conclusion the Court is undoubtedly on firm ground. The committee had been operating under its charter for more than fifteen years before Barenblatt's appearance. While in the Rumely case the approval by Congress of the actions of the Select Committee on Lobbying Activities occurred after the appearance of defendant Rumely, and therefore had the effect of "post litem motam, self-serving declarations," 54 such was not the case with Barenblatt. 55

The argument that the High Tribunal cannot now do what it should have done at the first opportunity, while no doubt true, merits a passing criticism. Invalidating the authorization in 1948, assuming political feasibility, 56 would have at least forced Congress to reconsider the desirability of its brainchild. If it resulted in a more explicit authorization, it would have alleviated much of the problem of pertinency troubling the court in Watkins, and subsequent cases. Not the least of its salutory effects, it would have prevented the justification of abuse of power by a process of "retroactive rationalization" 57 demonstrated in Watkins and Barenblatt.

The problem of authority was far from settled, however, by the

52. Barenblatt v. United States, supra note 50 at 117, 118.
53. See id. at 118.
55. Supra note 50 at 121, 122.
56. See Note at 409.
Barenblatt decision. As illustrated by Gojack v. United States, attacks on the authority of subcommittees are not precluded.

The latest—and most ironic—development in this area of authority is the September 13, 1966, conviction of Robert M. Shelton, head of the Ku Klux Klan, who was summoned by the House Un-American Activities Committee to appear October 19, 1965, and bring with him all the records of the Klan and related organizations. The purpose of the Klan investigation was to determine if any legislation in this area was necessary. Shelton appeared, but refused to produce the records on the grounds that the information was not germane to the subject of the investigation, that it would not aid Congress in considering valid legislation, and that it was not within the scope of the authorizing resolution of the committee. Shelton also relied on the Fifth Amendment when questioned about his Klan activities. In spite of his contentions a contempt conviction resulted.

On appeal the defense will no doubt bring up the question of authority, since the Klan investigation was the first time the Committee had investigated non-Communist activities in twenty years. At least in one sense of the word, the Ku Klux Klan is as "American" as the committee itself, and an investigation by the Un-American Activities Committee is, at first glance, somewhat ludicrous. While the investigation

58. Supra note 19.
60. Id. at 1659, 1660.
62. To rebut this apparent inconsistency Representative Willis of Louisiana, Chairman of the committee, presented the following argument:

MR. WILLIS. Mr. Speaker, it has been suggested that the Committee on Un-American Activities is not the proper committee to investigate the Ku Klux Klans. I am convinced that it has clear authority to do so, that its mandate is unmistakable on this point.

Foreignisms—such as Nazism, fascism, and communism—are not the only ideologies which are un-American, a threat to our national security and to the preservation of our democratic form of government...

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"Any group that engages in organized large-scale intimidation in the political, economic and social fields and terrorizes individuals and groups, attacks the very root of the democratic process. It does so because it destroys freedom and, without free citizens, our representative form of government is not secure and cannot be preserved.

When large numbers of people in any part of our country... fear physical, economic or social injury if they dare to speak as they honestly feel... then, I say, the very foundation of our form of government is being attacked, weakened and undermined. If such a condition is allowed to continue and to spread, it could lead eventually to the end of the form of government guaranteed
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may appear to be beyond the authority of the committee due to the lack of a "gloss of legislative history," the problem is complicated by the fact that the House of Representatives, prior to the investigations, voted an appropriation specifically designated for the committee’s Klan investigation. If this House resolution was sufficient to expand the authority of the committee, the Klan investigation heralds a new dimension in congressional investigations. In addition to the Klan, the committee is considering an investigation of the Minutemen, the American Nazi Party, and the Black Muslims. It was also suggested by more than one member of the House that the committee investigation should ferret out the "Red tinge" in several civil rights organizations. Investigation of civil rights organizations is highly unlikely, however, in view of the Supreme Court's position in Gibson v. Florida Legislative Investigation Committee. In that case the court invalidated a state investigation of Communist influence in the Miami branch of the N.A.A.C.P. on the First and Fourteenth amendment grounds, since there was no evidence of a substantial relationship between that organization and subversive activities.

PERTINENCY

Statutory Pertinency

The relevant parts of the criminal contempt statute, 2 U.S.C. § 192, provide that:

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... 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...


Apparently the "Liberal" from Louisiana did not see the uncanny resemblance between his argument and the arguments advanced against the constitutionality of the Un-American Activities Committee by its critics, including three members of the Supreme Court. See Barenblatt v. United States, supra note 50 at 145 (dissenting opinion).

64. Id. at 8026.
65. Id. at 8022.
The starting point for determining pertinency—and the most troublesome aspect of the problem—is establishing the subject of the inquiry.67

Assuming that the "question under inquiry" has been established with sufficient precision, pertinency of the unanswered question or the requested papers to the matter under inquiry becomes the controlling element in determining whether an offense has been committed.

The witness is justified in refusing to answer irrelevant questions, but he acts at his peril. The question of pertinency is a question of law for the courts to determine, and the utmost good faith on the part of the witness in concluding that information sought is not relevant will not justify his refusal if the court thinks otherwise.68

With few exceptions, Courts have little difficulty in determining statutory pertinency, giving it a liberal interpretation as exemplified by the opinion in Townsend v. United States:69 "A judicial inquiry relates to a case, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates all possible cases which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry, which generally is very broad." Nor has any formulistic test been necessary: "The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate’s resolutions that such facts reasonably could be said to be ‘pertinent to the question under inquiry.’" 70

Where a question is not clearly pertinent on its face nor from its content as gleaned from the record of the hearing, the Government may bring in background information for consideration by the court.71 In spite of this latitude allowed the prosecution, in cases where there was genuine doubt as to the relevancy of the question the convictions have failed. Bowers v. United States72 arose from a Senate subcommittee investigation of organized crime in interstate commerce. The court held that questions concerning the witness' activities in Chicago and Florida were not made relevant to the topic of interstate activities by

70. Sinclair v. United States, supra note 68 at 299.
72. Id.
either the transcript of the testimony or by extrinsic evidence. In *Deutch v. United States*, the questions which the petitioner was convicted of refusing to answer [concerning his student activities at Cornell] obviously had nothing to do with the Albany area or with Communist infiltration into labor unions." These cases suggest a narrower concept of pertinency than had been previously applied. Although a strict pertinency requirement has frustrated attempts to convict, it is not difficult as a practical approach. As explained in *Bowers v. United States*:

It will not do to say the questions were preliminary in nature and, had they been answered, would have led to and been followed by questions plainly pertinent, for on that theory pertinency need never be shown in a prosecution under the statute. It could always be said the questions were preliminary.

Considering the fact that the contempt of Congress is a criminal offense, it is not unreasonable to require that pertinency be established beyond a reasonable doubt. Nor is it reasonable to impose criminal sanctions for withholding information of little or no benefit to a committee's line of inquiry.

**Due Process and the Pertinency Requirement**

The *Watkins* decision brought out another aspect of the pertinency requirement closely related to the problem of authority of congressional committees. The Due Process clause of the Fifth Amendment does not permit a conviction for refusal to answer a question before a congressional committee, unless the committee had the authority to obtain the type of information sought. If a question is not pertinent to the subject of inquiry as stated in the authorizing resolution of the committee or subcommittee, an attempted conviction for contempt would fail on two grounds. First, the statutory element of pertinency would be lacking. Second, the committee lacked jurisdiction to inquire into the area to

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73. Supra note 67.
74. Id. at 470. The finding of pertinency in the lower courts and by two dissenters, Justices Whittaker and Clark, of the Supreme Court, was based upon a broader interpretation of the subject under inquiry. *Deutch v. United States*, 280 F. 2d 691, 695 (D. C. Cir. 1961); *Deutch v. United States*, supra note 67.
75. Supra note 71 at 452.
77. See *Bowers v. United States*, supra note 71 at 448.
which the question related. The latter idea was characterized in the *Watkins* case as the “jurisdictional concept of pertinency.” 78

A second aspect of Due Process requirement arises where the authorizing resolution is too vague to permit delineation of the authority of a committee. Due Process requires that a criminal statute be sufficiently precise to apprise a defendant of the nature of the offense. 79 Under the contempt statute a “question under inquiry” is an essential ingredient of the pertinency requirement. It is necessary to refer to sources outside the statute to determine the subject of the inquiry, the most logical source being the authorizing resolution of the committee. A vague charter such as that of the Un-American Activities Committee, while perhaps sufficient to confer authority, hardly satisfies the standard of precision required for criminal statutes. It is not surprising that witnesses cited for contempt of Congress have assailed doggedly the authorizing resolution, incorporated by reference in the criminal statute, as lacking a sufficient standard of criminality. Since a witness may rightfully refuse to answer a question not pertinent to the investigation, he “is entitled to have knowledge of the subject to which the interrogation is deemed pertinent . . . with the same degree of explicitness and clarity that the Due Process clause requires in the expression of any element of a criminal offense.” 80

The defense of a lack of a standard of criminality was initially overcome by finding that the authorizing resolution of the Un-American Activities Committee “conveys a clear meaning . . . ”, 81 and that “there was no misapprehension [on the part of the witness] as to what was called for.” 82 A more realistic approach was devised in *Watkins*, where Chief Justice Warren indicated sources other than the authorizing resolution which may be used to shed light on the question under inquiry. These sources include remarks by the committee members during the course of the hearings, and even the nature of the proceedings themselves. In *Watkins* none of these criteria proved adequate. As a future guide to courts and committees, the Chief Justice laid down a new set of procedural rules, and a new standard of pertinency applicable when a witness objects to a question on the grounds of pertinency:

Unless the subject matter has been made to appear with undisputable

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79. *Id. at 208.*
80. *Id. at 208, 209.*
82. *Id. at 248.*
clearly, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it.\(^8\)

Implicit in this directive is the ruling in *Quinn v. United States* that "unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under § 192 for refusal to answer that question."\(^8\)

The procedural outline of the *Watkins* decision took its toll among contempt convictions pending in the courts.\(^8\) The Supreme Court, in the interval between *Watkins* and *Barenblatt*, reversed three convictions relying on *Watkins*.\(^8\)

Apparently, the requirement that pertinency appear with "undisputable clarity" applies only when a witness makes a pertinency objection.\(^8\) Yet the Court applied this standard in succeeding cases although no pertinency objection had been raised.\(^8\) In each, the Court avoided ruling on the effect of a failure to object by finding that pertinency was "clear beyond doubt".\(^8\)

An example of a pertinency objection being a significant factor occurred in *Sacher v. United States*.\(^8\) The petitioner was a lawyer who was apparently associated with the Communist Party. The avowed purpose of his interrogation by the Senate Internal Security Subcommittee was to determine why another witness had recanted on testi-

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84. 349 U.S. 155, 166 (1955); accord, United States v. Miller, 259 F. 2d 187 (D. C. Cir. 1958).


90. *Supra* note 86.
mony he had given at a former hearing. The subcommittee indicated a suspicion that it was the result of a Communist plot. During the hearing the subcommittee indulged in a "brief excursion" \( ^{91} \) into the possibility of legislation barring Communists from practice at the Federal bar. Following this digression, clearly beyond the subcommittee's authority, the petitioner refused to inform the panel concerning his affiliation with the Communist Party. The Court seized upon the unauthorized digression to reverse the conviction, holding that the questions were not clearly pertinent to the authorized subject of the investigation. The dissenting opinion of Justices Clark and Whittaker, in agreement with the circuit court, \( ^{92} \) argued persuasively that not only were the questions clearly pertinent to either subject, but that the "brief excursion" had obviously terminated before at least one of the disputed questions had been posed. The circuit court addressed itself at length to the question of pertinency, concluding that petitioner was aware of the pertinency beyond a reasonable doubt. However, the three-judge dissent in the circuit court lends support to the per curiam reversal by the Supreme Court on this point.

The Sacher case, by giving literal effect to the Watkins formula, illustrated that the Supreme Court did not consider the Due Process requirement of "undisputable clarity" to be as picayune as it appeared. \( ^{93} \)

Prior to Watkins the courts had uniformly held that there was no justification for refusing to answer a question that was in fact pertinent as a matter of law. Thereafter, it became a question of fact whether the defendant had reasonable grounds to believe the questions were not pertinent. \( ^{94} \) The test becomes whether "a reasonable man in the situation of the particular witness would have known [beyond a reasonable doubt] the question asked was pertinent to the subject under inquiry." \( ^{95} \)

Once a committee has undertaken an explanation of the pertinency of a question to which the witness objected, any contempt prosecution must stand or fall on the basis of that explanation. \( ^{96} \) By "freez-

\( ^{91} \) Id. at 577.

\( ^{92} \) Sacher v. United States, 252 F. 2d 828 (D. C. Cir. 1958).

\( ^{93} \) See, e.g., Kalven, Mr. Alexander Mieklejohn and the Barenblatt Opinion, 27 U. Chi. L. Rev. 315, 322 (1960); Alfange, Congressional Legislations and the Fickle Court, 30 U. of Chi. L. Rev. 164 (1961).


\( ^{95} \) Sacher v. United States, id.

\( ^{96} \) Deutch v. United States, supra note 67 at 472 (dissenting opinion).
ing" the issue in this manner the defendant prevents the Government from asserting at the trial every "subject under inquiry" which the record might support. It might also be added that by triggering an explanation from the committee, the witness probably removes any possibility of challenging a contempt prosecution on grounds of pendency. This clarification of the issue also simplifies the task of the courts by alleviating the tedious process of sifting the records, often containing ambiguous or conflicting statements, to ascertain the subject of the investigation. These advantages were recognized by the Supreme Court in *Russell v. United States*, where the Court required that the indictment recite the subject of the inquiry regardless of whether the witness objected on that ground. While the Court's decision was admittedly influenced by a desire to simplify its task, its primary justification was the deprivation of a "basic protection which the guarantee of the intervention of a grand jury was designed to secure." The majority argued that where no subject was stated in the indictment, the decision of the grand jury could be based on one theory, the conviction on another, and the appellate court decision on still another. The dissenters, Justices Harlan and Clark, did not deny the validity of the majority argument, but rather argued that the indictments satisfied the requirements of the Federal Rules of Criminal Procedure, that the decision would encourage recusancy of witnesses, and it would perhaps prompt Congress to revert to its original practice of trying contempt cases itself.

The *Russell* decision was supported by cogent reasoning, since the records of the hearings at which the petitioners testified contain glaring errors when judged by *Watkins* standards. Yet technically, *Watkins* was not controlling precedent, since none of the petitioners had objected to questions for lack of pertinency.

The pertinency problems of the pre-*Watkins* investigations have been thoroughly hashed out by the courts, and it is unlikely to present much of a problem in future cases. With a few exceptions, the contempt of Congress convictions reviewed by the Supreme Court since 1957 arose from hearings held prior to *Watkins*. The effect of the *Watkins* decision on the Un-American Activities Committee can be

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98. *Id.* at 770.
99. *Id.* at 791.
seen in Wilkinson v. United States, where the committee undertook a lengthy explanation of the purpose and relevance of a question to which the witness had objected on the grounds of moral scruples.

The defect highlighted in the Watkins case was easily cured. So long as the subject is made clear to the witness, there is nothing to prevent a committee from switching topics between questions if it so desires. While a subcommittee may be constrained by its specific authorization, there is nothing to prevent the delegation by the parent committee of powers as broad as its own. Spelling out the pertinency of questions would be a meaningless ritual in most cases. It is hard to believe that witnesses, particularly those who fail to object, have any serious doubts about the pertinency of a question concerning their own Communist activities and associations, when in essence, that is the subject under inquiry. A recital by the committee that the subject under inquiry is Communism in education, or labor, or the South, is not likely to prove much help to a witness unwilling to expose his political beliefs and activities to the glare of publicity. The Watkins ruling was a temporary and inadequate solution to the fundamental problems presented by a committee free to define its own jurisdiction. The Un-American Activities Committee, for one, has virtually unlimited discretion in determining who and what is subversive. It is free to compel testimony from anyone so long as it pays lip service to a legislative purpose. The fact that most of those “exposed” by the committee have been connected in some way with Communism is hardly justification for the hands-off attitude of the courts and Congress.

**The First Amendment**

In Barenblatt v. United States the Supreme Court split into opposing camps over the meaning of the First Amendment in the context of legislative investigations. Inevitably the opinions contained more political philosophy than black-letter law. While the arguments are somewhat sophisticated, the issue is simple enough: Does congressional interrogation of individuals concerning their knowledge of Communist Party activities violate the freedoms of speech and association guaranteed by the First Amendment? The answer, at least to a narrow majority of the Court, was in the negative.

The majority view in Barenblatt, which has so far prevailed, saw

101. *Id.*

the problem as one which required a "balancing" of the conflicting individual and state interests. The minority approach interpreted the First Amendment as an "absolute" bar to governmental interference with certain types of political expression, particularly utterances and activities which are not themselves criminal in nature. This controversy, which has caused considerable comment,\textsuperscript{103} concerns the full spectrum of first amendment issues,\textsuperscript{104} congressional investigations being one aspect of the problem. Only a brief summary of the arguments and their relation to legislative investigations will be attempted in this discussion.

Chief exponent of the "absolute" approach, Justice Black, views the problem in this manner:

\begin{quote}
The phrase 'Congress shall make no law' is composed of plain words, easily understood. The Framers knew this.

To my way of thinking, at least, the history and language of the Bill of Rights . . . make it plain that one of the primary purposes of the Constitution with its amendments was to draw from the Government all power to act in certain areas—whatever the scope of those areas may be. If I am right in this then there is, at least in those areas, no justification whatever for 'balancing' a particular right against some expressly granted power of Congress.\textsuperscript{105}
\end{quote}

Spokesman for the "balancers," Justice Frankfurter, saw the matter in a different light.

Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society are better served by candid and informed weighing of competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.\textsuperscript{106}


\textsuperscript{105} Black, The Bill of Rights, 35 N.Y. U. L. Rev. 865 (1960).

\textsuperscript{106} Dennis v. United States, supra note 104 at 524, 525 (concurring opinion).
Before briefly examining the rationale for the two approaches, it would be useful to clarify the issue. The "absolutists" do not claim that the First Amendment is unambiguous. The concepts of "freedom of speech" or "freedom of the press" are not self-defining, and most of the uncertainty as to the meaning of the First Amendment involves the determination of which acts come within these terms.\textsuperscript{107} The crux of the problem is whether Congress is bound by the first amendment prohibitions when the act in question falls clearly and admittedly within the area of the protected freedoms. For example, an editorial opinion in a newspaper would normally be squarely within the scope of the freedoms of speech and the press, while an act prohibiting the indiscriminate littering of the streets with newspapers is a valid regulatory measure only incidentally fettering freedom of expression.\textsuperscript{108}

With respect to congressional investigations it is conceded by both sides that the First Amendment restrictions apply.\textsuperscript{109} Nor is it questioned that certain practices of investigative committees infringe upon speech and association.\textsuperscript{110} At this point the two approaches part ways.

Upon first impression the "balancing" approach would appear the more difficult to accept under the mandate that "Congress shall pass no law. . . ." To support this interpretation it is first argued "that the language of the first amendment is highly ambiguous, and that this ambiguity is at best compounded by history."\textsuperscript{111} It is of little help to courts faced with a particular set of facts, and therefore it is necessary to weigh the interests involved in each case.\textsuperscript{112}

It is next suggested that the Bill of Rights is not to be interpreted as law, but rather as a moral admonition to Congress which cannot be enforced by the courts.\textsuperscript{113} It is consonant with a democratic form of government, and with the concept of judicial restraint, that the electorate and the legislature should work out solutions to major policy questions involving deep rooted and conflicting interests.\textsuperscript{114} Judicial fiat


\textsuperscript{108} See Schneider v. State, 308 U.S. 147 (1939).


\textsuperscript{111} Mendelson, \textit{supra} note 107 at 821.

\textsuperscript{112} \textit{Id.} at 825-26.

\textsuperscript{113} This view was suggested by Judge Learned Hand, \textit{Hand Spirit of Liberty}, 204 (2d ed. 1953).

\textsuperscript{114} Mendelson, \textit{supra} note 107 at 827.
in such areas are not likely to be of much success nor do they enhance
the prestige of the judiciary.\textsuperscript{115}

It is also contended that:

Open balancing compels a judge to take full responsibility for his
decisions, and promises a particularized, rational account of how he
arrives at them—more particularized and more refined at least than the
familiar parade of hollowed abstractions, elastic absolutes and selective
history.\textsuperscript{116}

A fourth argument of the "balancers" is critical of the "absolute"
approach, and was expressed by Justice Harlan:

Throughout its history this Court has consistently recognized at least
two ways in which constitutionally protected freedom of speech
is narrower than an unlimited license to talk.\ldots On the one hand
certain forms of speech, or speech in certain contexts, has [sic] been
considered outside the scope of constitutional protection.\ldots On the
other hand, general regulatory statutes, not intended to control the
context of speech but incidentally limiting its unfettered exercise, have
not been regarded as the type of law the First or Fourteenth Amend-
ment forbade Congress or the States to pass, when they have been
found justified by subordinating valid governmental interests.\ldots\textsuperscript{117}

To illustrate his point, Justice Harlan observes that the "absolute"
argument "cannot be reconciled with the law relating to libel, slander,
misrepresentation, obscenity, perjury, false advertising, solicitation of
crime, complicity by encouragement, conspiracy, and the like."\textsuperscript{118}

The "absolutists" parry these agreements rather convincingly. First,
while the First Amendment is somewhat vague, the same may be said
of the entire Constitution. In interpreting the Constitution, courts have
been able to ascribe some meaning to its provisions, and the First
Amendment should not be an exception. If it is found to apply to a
particular set of facts, it should be given literal effect.\textsuperscript{119}

Similarly as to the second argument, if the Bill of Rights is merely
an "admonition," why not the entire Constitution? If the Constitu-
tion were so interpreted, the concept of a government of limited

\textsuperscript{115} Id. at 827, 828.
\textsuperscript{116} Id. at 825, 826.
\textsuperscript{117} Konigsberg v. State Bar, supra note 104 at 49-51 (1961).
\textsuperscript{118} Id. at 49, n. 10.
\textsuperscript{119} See Frantz, Is the First Amendment Law?—A Reply to Professor Mendelson,
powers fails completely. The scope of governmental power becomes whatever Congress and the Court deem reasonable in the particular case.\textsuperscript{120} It can hardly be considered "judicial restraint" to read out of the Constitution the concepts it clearly was intended to embody.\textsuperscript{121} The political force of a Court decree can hardly be gainsaid in light of recent civil rights cases such as the School Desegregation decision.\textsuperscript{122} The argument that a "balancing" approach gives a better account of how a decision was reached is flatly rejected by an examination of the court's decisions. In \textit{Barenblatt v. United States},\textsuperscript{123} the Court weighed the "individual constitutional rights at stake"\textsuperscript{124} against the State's "right of self-preservation, 'the ultimate value of any society',"\textsuperscript{125} and concluded "that the balance between the individual and 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."\textsuperscript{126} The rationale by which the Court arrived at this conclusion was at best simplistic, an inevitable, characteristic judicial balancing. Assuming all the interests at stake—both individual and state—could be recognized, the weight ascribed to each would vary with the individual judge. The information required for a thorough consideration of each factor would clog a computer. That future events will uphold the wisdom of a particular decision is beyond the realm of informed speculation.\textsuperscript{127} The result reached in one case would be of little value in a future set of circumstances.

Finally, the view that the "absolute" approach is inconsistent with unshakeable legal theory misunderstands the argument. The distinction must be kept in mind among (1) regulation of when, where, and in what manner an individual may speak,\textsuperscript{128} (2) prohibition of speech inciting people to commit unlawful acts,\textsuperscript{129} and (3) restrictions on

\textsuperscript{120} Frantz, \textit{The First Amendment in the Balance}, \textit{71 Yale L. J.} 1424, 1445 (1962).

\textsuperscript{121} Frantz, \textit{supra} note 119 at 741, 742.


\textsuperscript{123} \textit{Supra} note 109.

\textsuperscript{124} \textit{Id.} at 127.

\textsuperscript{125} \textit{Id.} at 128.

\textsuperscript{126} \textit{Id.} at 124.

\textsuperscript{127} See Frantz, \textit{supra} note 119 at 746-749.

\textsuperscript{128} Mieklejohn, \textit{The First Amendment is an Absolute}, \textit{The Supreme Court Review}—1961, 245, 257 (1961).

\textsuperscript{129} Justice Holmes was of the opinion that speech should be abridged only where there is a "clear and present danger" that substantive evils will result. Schenck v. United States, 249 U.S. 47, 52 (1919). Justice Brandeis refined this idea: "... no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.
the freedom of those activities of thought and communication by which we 'govern.'" 130 It is the latter area which the "absolutists" would remove from the sphere of governmental regulation. The "absolutists" do not claim the distinction is clear-cut, but it is claimed and demonstrated that some delineation is possible. 131 The primary criticism of ad hoc balancing is that in applying the technique, court decisions have not attempted to identify even those inviolate areas of free speech which they impliedly recognize. 132

An example of the inconsistencies which ad hoc balancing permits can be found in cases dealing with compulsory disclosure of organizational membership lists. Where civil rights groups are involved, the Court has asserted that "inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." 133 The state was denied access to membership lists, since it could not demonstrate an interest sufficient to offset "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." 134

The same Court also stated: "Of course it is immaterial whether the beliefs sought to be advanced by association pertains to political, economic, religious or cultural matters. . . ." 135 Yet in cases where dis-

If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927) (concurring opinion). This view was cited with approval in Communications Assn. v. Douds, 339 U.S. 382, 395, 396 (1950), but was not followed because the non-Communist affidavits required of union officials under the Labor Management Relations Act, 1947, was designed to curtail conduct harmful to commerce rather than discourage the beliefs of Communists.

A year later the Court carried the balancing concept a step further in affirming convictions under the Smith Act, which made it a crime to advocate the overthrow of the Government by force or violence, or to conspire to do so. Dennis v. United States, supra note 104. The "clear and present danger" test was interpreted to permit action by the State against "a group aiming at its overthrow [ready to] strike when the leaders feel the circumstances permit." "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. . . ." 136

130. See Mieklejohn, supra, note 128 at 255.
131. Id. at 256-263.
132. See Frantz, supra, note 120 at 1430.
134. N.A.A.C.P. v. Alabama, id. at 463.
135. Id. at 460.
closure of Communist or "subversive" group membership was at stake, the balance was struck in favor of federal or state interests. In *Uphaus v. Wyman*, the disclosure of members of a summer camp was justified even though "the nexus between World Fellowship [summer camp] and subversive activities may not be conclusive. . . ."  

The distinguishing factor is said to be "the nature of the organization," and that the Communist Party is not "an ordinary political party." This distinction is certainly justified, but it does not follow that the activities of those even remotely associated with the movement become a threat to national security. Yet if one conclusion may be drawn from cases applying the "balancing" approach, it is that where the government's "right of self-preservation" is involved, the interests of the individual under the First Amendment will be subordinated. The balance is struck in favor of the Government regardless of the seriousness of the threat to national security. Nor is it important that any subversive activity actually exist. Testimony concerning political beliefs and associations may be compelled even though the witness played no part in any questionable activity, nor is it necessary that the witness be associated with Communism. Apparently it is not

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138. *Id.*
139. *Id.* at 79.
143. "Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt." *Dennis v. United States*, 341 U.S. 494, 509 (1951).
144. "As the Barenblatt opinion makes clear, it is the nature of the Communist activity involved, whether the momentary conduct is legitimate or illegitimate politically, that establishes the Government's overbalancing interest." *Wilkinson v. United States*, 365 U.S. 399, 414 (1961).
145. "The subcommittee's legitimate legislative interest was not the activity in which the petitioner might have happened to be engaged, but in the manipulation and infiltration of activities and organizations by persons advocating overthrow of the Government." *Id.*
146. "Information about Communists is not the exclusive property of Communists. Many persons innocent of Communist Party connections and bitterly hostile to Communism may possess important information about such activities. Hence a belief in showing that the Committee must have reason to believe the witness is or once was a
even necessary that the committee have good reason to believe that the witness has any useful information before issuing a subpoena, so long as there is no evidence that the summoning of the witness was the result of "indiscriminate dragnet procedures lacking in probable cause for belief that he possessed information which might be helpful." All presumptions appear to favor the committee.

It seems inconsistent for the Supreme Court to give such overriding importance to the Government's "right of self-preservation" with regard to the First Amendment, while the Fifth Amendment privilege against self-incrimination has consistently been held to bar any interrogation concerning Communist activities. Apparently the interests of the individual and the State in freedom of speech and association is significantly less than their interest in avoiding self-accusation that might lead to criminal prosecution. The explanation for this standard of values is not included in the balancing process.

The "balancers" profess to weigh the competing interests at stake "in the particular circumstances shown." Yet none would claim that a thorough assessment in each case of all relevant data and political theory is a practical or even possible procedure. Inevitably, some scale of values and abstract principles must be accepted without proof before particular facts are considered. The necessary selection of values, according to the "absolutists," was made by those who put the First Amendment into the Constitution.

While Congress appears to have a heavy thumb on the scales of Justice, the balancing process has produced results less favorable to state investigations of subversive activities. Since Pennsylvania v. Communist or in sympathy with them is unnecessary. Shelton v. United States, 280 F. 2d 701, 707, 708 (D. C. Cir. 1960), rev'd on other grounds, Russell v. United States, 369 U.S. 749 (1962). The witness in this case was summoned as a result of mistaken identification on the part of the Senate subcommittee. An undisclosed source had suggested that one Willard Shelton, who worked for The New York Times, might have useful information. After discovering that no such person worked for the newspaper, Robert Shelton, who did work there, was subpoenaed by the committee's council. A second conviction was reversed on procedural grounds, since the court thought the committee itself should authorize the subpoenas. Shelton v. United States, 327 F. 2d 601 (D.C. Cir. 1963).

Nelson, holding that under the Smith Act Congress had preempted the field in providing against subversion directed against the federal government, state interest in such activities has been confined to subversion which threatens the state itself. This distinction not only limits state probes to activity within its borders, but apparently gives state interest less weight in the balance.

The most significant development in this area is *DeGregory v. Attorney General,* where the Supreme Court for the first time found that the first amendment rights, applicable to the states under the Fourteenth Amendment, were not outweighed by governmental interests in self-preservation. In this case appellant had been summoned to testify in 1963 concerning his knowledge of Communist activities. He disclaimed any knowledge of these affairs since 1957, and refused to divulge information concerning earlier periods. With the exception of *Sweezy v. New Hampshire,* the Supreme Court had upheld previous investigations by the Attorney General of New Hampshire. Yet in *DeGregory* the Court broke precedent:

> [W]hatever justification may have supported such exposure in [*Uphaus v. Wyman*] is absent here; the staleness of both the basis for the investigation and its subject matter makes indefensible such exposure of one's associational and political past—exposure which is objectionable and damaging in the extreme to one whose associations and political views do not command majority approval. . . . There is no showing of 'overriding and compelling state interest' . . . that would warrant intrusion into the realm of political and associational privacy protected by the First Amendment. The information being sought was historical, not current. . . . The present record is devoid of any evidence that there is any Communist movement in New Hampshire.

The *DeGregory* case bodes ill for congressional investigations as well. While the national interest weighs more heavily than that of

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152. 350 U.S. 497 (1956).
154. Supra note 151. This case involved the contempt conviction of a classroom teacher. The majority opinion emphasized the first amendment rights involved, but the reversal was based on the lack of a clear indication that the information sought was requested by the legislative authorization.
156. Id.
157. Supra note 153 at 828-830.
a state, it nevertheless must be demonstrated. The infirmities of the New Hampshire investigation may be easily avoided by a committee of Congress, but the scope of inquiry may be restricted in addition to the pertinency requirement. DeGregory also indicates that the balance between individual and state interests is delicate, and that governmental interest in discouraging dissident beliefs for the sake of self-preservation is not a constant.

While both the "balancing" and the "absolute" approaches may reach the same conclusion, their effect is dissimilar. Under the "absolute" interpretation, the interests are weighed in advance, and the conclusion is inevitable. Hence the "absolute" approach would be preventative, voiding certain types of congressional investigations altogether. The "balancing" approach, with its unpredictable results, would have only the proscriptive effect which the facts of the case required.

The decisions of the Supreme Court since 1961 leave little doubt that a majority of the Court finds certain procedures of the Un-American Activities Committee and similar bodies highly objectionable. If it be conceded that such procedures should be eradicated, it is clear from the recurrence of contempt cases that reversal on narrow grounds—lack of pertinency, lack of authority, or through a delicate "balancing" of interests—is an inadequate approach.

**Conclusion**

It is clear beyond question that the power of Congress to inform itself and the public is both necessary and proper. It is likewise indisputable that Congress has authority to inquire and legislate in the area of subversion. No court should or would deny Congress access to vital or even useful information where the means employed to obtain that information are reasonable. It would seem that where public and private interests conflict in the area of legislative investigations, the obvious approach by the courts would be to determine whether the methods selected by a committee to gather information were necessary and appropriate under the circumstances. As yet courts have failed to give more than a passing reference to this question of reasonableness. They have accepted without question the determination by Congress and its committees of not only what information is required, but also how it is to be obtained. While it is not contended that the motives of committee members are anything but noble or that the judicial policy of non-interference in congressional matters is less than desirable, it is difficult
to see why the time-honored theory of judicial review applies with less force to congressional investigations. No doubt Communists could give valuable insight into their nefarious activities to a committee. But it is unrealistic to expect them to openly confess their criminal conspiracies under the threat of a contempt conviction when they have only to hide behind the Fifth Amendment. Nor is it likely that witnesses would disclose unpopular activities and associations which would subject them to social and economic reprisals.

For every witness refusing to testify there are others not only willing but eager, and presumably the sources of information used by government internal security agencies are available to Congress. Just how the legislative function of Congress is furthered by summoning witnesses that obviously will not testify is apparently something only committeemen and judges can comprehend. It is also difficult to perceive how the denial of First Amendment rights makes available information which could be obtained in no other way.

What is clear is that persons have been subjected to criminal prosecution merely for relying on the equivocal language of Supreme Court decisions. An inevitable by-product of compelling disclosure of dissonant political beliefs is the subtle repression of honest dissent. The Constitution nowhere indicates that those who denounce its philosophy are not entitled to its protections. It provides a single set of rules, one of them being that the courts, and not Congress, shall mete out punishment.

Self-restraint, like constructive legislative proposals, has not been a conspicuous feature of the thirty-year record of the House Un-American Activities Committee. Congress has repeatedly disclaimed responsibility for the committee's activities, relying on the courts to protect individual rights. In light of these facts judicial restraint comes to little more than judicial retreat—hopefully not a rout.

Kent B. Millikan