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Constitutional Law - Congressional Investigation of Political Activity-*Watkins v. United States* Re-Examined

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COMMENTS

CONSTITUTIONAL LAW—CONGRESSIONAL INVESTIGATION OF POLITICAL ACTIVITY—*Watkins v. United States* RE-EXAMINED—The scope of congressional investigations has expanded in recent years from traditional areas of legislative fact finding and government malfunction to include that of exposure of political deviation from an established norm. In an era when departure from accepted modes of political thought may have harsh results for the deviant, serious questions have arisen concerning the propriety as well as the power of Congress to expose those individuals. While the Fifth Amendment remains an established bulwark against incriminating inquiries,¹ it is no protection against unwarranted inferences which the public may draw from its use.² In *Watkins v. United States*³ the Supreme Court gave strong evidence of limiting the congressional power to compel testimony in the political area, both by suggesting that the First Amendment would bar inquiries by the committee in question, and by adopting a broad interpretation of the statutory requirement that Congress may compel testimony only by questions "pertinent to the question under inquiry."⁴ However in *Barenblatt v. United States*,⁵ the Court has held that the First Amendment is not a valid ground for refusing to answer questions proposed by a congressional investigating committee in the area of Communist activity. It is the function of this comment to examine the traditional scope and limitations of congressional investigations, with particular emphasis on these two cases.⁶

¹ The use of the Fifth Amendment privilege in congressional investigatory hearings has been consistently upheld. E.g., *Quinn v. United States*, 349 U.S. 155 (1955); *Emspak v. United States*, 349 U.S. 190 (1955); *Hoffman v. United States*, 341 U.S. 479 (1951); *Blau v. United States*, 340 U.S. 159 (1950). But cf. *United States v. Thomas*, (W.D. Ky. 1943) 49 F. Supp. 547 (immunity destroys the privilege); note, 35 MARQ. L. REV. 282 at 286 (1952).

² CAUGHEY, IN CLEAR AND PRESENT DANGER 123-133 (1958). It has been argued that when a witness exercises the privilege an inference of guilt is entirely permissible. HOOK, COMMON SENSE AND THE FIFTH AMENDMENT (1957). The contrary view is expressed by GRISWOLD, THE FIFTH AMENDMENT TODAY (1955).

³ 354 U.S. 178 (1957).

⁴ 52 Stat. 942 (1938), 2 U.S.C. (1958) §192. For the entire text of the statute, see note 59 *infra*.

⁵ 360 U.S. 109 (1959).

⁶ On this subject, see, generally, "Congressional Investigations—A Symposium," 18 UNIV. CHI. L. REV. 421 (1951); McGeary, "The Congressional Power of Investigation," 28 NEB. L. REV. 516 (1949); Nutting, "Freedom of Silence," 47 MICH. L. REV. 181 (1948); Landis, "Constitutional Limitations on the Congressional Power of Investigation," 40 HARV. L. REV. 153 (1926); notes, 70 HARV. L. REV. 671 (1957); 65 YALE L.J. 1159 (1956).

I. SCOPE OF THE INVESTIGATORY POWER

Congress' power to investigate and to compel testimony in connection with the investigation is not explicitly stated in the Constitution. However, as early as 1821 the Supreme Court recognized that an implied power to investigate was essential to the enumerated powers of government.⁷ Like any other implied power,⁸ requirements have arisen that the investigation must be in conjunction with and reasonably necessary to some explicit power. In *Kilbourn v. Thompson*,⁹ the Court ruled that Congress could not compel testimony when the particular investigation could not possibly be connected to any valid congressional purpose. While the opinion has often been cited for the principle that Congress has no "general power of making inquiry into the private affairs of the citizen,"¹⁰ subsequent cases have refused to extend the doctrine to cover investigations authorized for valid legislative purposes. In *McGrain v. Daugherty*,¹¹ the Court explicitly held that the mere fact that the information required was private was not sufficient to deprive the government of the right of knowing of it, if the information was pertinent and in aid of its constitutional power. This holding was approved in *Sinclair v. United States*,¹² and has been universally followed.

⁷ *Anderson v. Dunn*, 19 U.S. 204 (1821) (attempted bribe of a legislator). Until 1857, trying the accused before the bar of the Senate or House was the accepted procedure. At that time, contempt was made a statutory offense: 11 Stat. 156 (1857). The constitutionality of the act was upheld in *In re Chapman*, 166 U.S. 661 (1897). The present form of the act is nearly unchanged: 52 Stat. 942 (1938), 2 U.S.C. (1958) §192. For an analysis of the differences in contempt trials and proceedings at the bar of Congress, see *United States v. Fleischman*, 339 U.S. 349 (1950) (dissenting opinion).

⁸ The implied powers of the Constitution were recognized by Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819). See Dodd, "Implied Powers and Implied Limitations in Constitutional Law," 29 YALE L.J. 137 (1919).

⁹ 103 U.S. 168 (1880). The case arose out of an investigation of the failure of a banking firm which was a depository of federal funds. For the authorizing resolution of the committee, see 4 CONG. REC. 598 (1876).

¹⁰ 103 U.S. 168 at 190; *Sinclair v. United States*, 279 U.S. 263 at 294 (1929); *McGrain v. Daugherty*, 273 U.S. 135 at 173-174 (1927). *Accord*: *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943); *Interstate Commerce Comm. v. Brimson*, 154 U.S. 447 at 478 (1894) (administrative agencies exercising adjudicatory and rule making function).

¹¹ 273 U.S. 135 (1927).

¹² 279 U.S. 263 at 294 (1929). This case was an outgrowth of the scandals surrounding the granting of oil leases at Teapot Dome during the Harding administration. The validity of investigations in this area was clearly recognized by the Court: "Congress has plenary power to . . . make all needful rules and regulations respecting the . . . public lands and property of the United States. And undoubtedly the Senate had power to delegate authority to its committee to investigate and report what had been and was being done by the executive departments . . . and to make any other inquiry concerning the public domain."

In light of the *McGrain* holding, one writer has gone so far as to suggest that the *Kilbourn* case has been overruled.¹³ While it would be unfair to say that the restrictive view of the *Kilbourn* case is no longer recognized as applied to similar fact situations, it is clear that a continual broadening of the concept of a valid legislative purpose has rendered the possibility of a direct application of the case a negligible one. In *McGrain v. Daugherty*,¹⁴ a district court holding that the mere mention of legislation as "an afterthought" could not validate the investigation was specifically overruled.¹⁵ In its opinion, the Supreme Court made it clear that once any indication of a congressional purpose was found in the authorizing resolution, a presumption immediately arose as to the validity of the proceedings.¹⁶ The use of a judicial presumption of validity of the investigation would seem wise in light of the nearly impossible burden on the government, in some cases, to prove a valid legislative purpose. This is especially true since some courts have conceded that in certain areas, the power of investigation may be broader than the congressional power from which it flows.¹⁷ One federal court has gone to the point of presuming the validity of the subject matter itself,¹⁸ contrary to the *McGrain* doctrine, which would at least examine the subject matter before invoking the presumption. With this suggested modification, every congressional investigation for any purpose would be presumed valid. This approach has not as yet been adopted by any other tribunal.

¹³ Cousens, "The Purpose and Scope of Investigation Under Legislative Authority," 26 GEO. L.J. 905 at 918 (1938).

¹⁴ 273 U.S. 135 (1927).

¹⁵ Ex parte Daugherty, (S.D. Ohio 1924) 299 F. 620. For a discussion of both district and Supreme Court opinions in the *McGrain* case, see note, 41 MINN. L. REV. 622 at 624 (1957).

¹⁶ "The only legitimate object the Senate could have in ordering the investigation was to aid in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object." 273 U.S. 135 at 178 (1927). It has been suggested that the reason for the Court's reluctance to examine the nature of the proceedings was respect for the committee's long record of effective service in ridding government of corruption. Note, 65 YALE L.J. 1159 (1956).

¹⁷ While Congress may not legislate regarding primary elections, investigations in the area are valid. Compare *Newberry v. United States*, 256 U.S. 232 (1921) with *Seymour v. United States*, (8th Cir. 1935) 77 F. (2d) 577. "There is a vast difference between the necessities for inquiry and the necessities for action." *Barsky v. United States*, (D.C. Cir. 1948) 167 F. (2d) 241 at 247, cert. den. 334 U.S. 843 (1948). See also *United States v. Josephson*, (2d Cir. 1947) 165 F. (2d) 82, cert. den. 333 U.S. 838 (1948); note, 23 NOTRE DAME LAWYER 353 at 354 (1948).

¹⁸ *United States v. Bryan*, (D.C. D.C. 1947) 72 F. Supp. 58, revd. per curiam on other grounds (D.C. Cir. 1949) 174 F. (2d) 525, revd. on other grounds 339 U.S. 323 (1950).

A. *Legitimate Areas of Investigation*

The Supreme Court has explicitly recognized only two valid congressional purposes for investigation: legislation,¹⁹ and the composition and order of Congress itself.²⁰ However, once Congress has authorized an investigation there seems to be no way to show that the authorization is unconnected with one of these purposes. It is not necessary for Congress by its authorization to indicate what legislation will result from the inquiry.²¹ The mere possibility that some legislation may ensue seems to be sufficient.²² Nor does the fact that no valid legislation has previously originated as a result of the committee's findings invalidate a continued authorization.²³ Even if the committee is operating in an area where legislation would apparently be unconstitutional, one court has suggested that the committee's findings may result in repeal of unconstitutional legislation already existing, and is therefore valid.²⁴ The result is that with the barest recital of congressional purpose the areas of investigative activity have become nearly limitless. Since the *Kilbourn* case, not one decision has held a witness immune from contempt on the basis that the purpose of the investigation was invalid.

B. *The Presumption of Purpose*

While the presumption of valid purpose prescribed in the *McGrain* case has never been seriously challenged, the conclusiveness of the presumption has come under constant judicial scrutiny. Basically, the question is whether the actions of the investigative committee itself can destroy the presumption that it is acting

¹⁹ *Barenblatt v. United States*, 360 U.S. 109 (1959) (un-American activities); *Sinclair v. United States*, 279 U.S. 263 (1929) (public domain); *Essgee Co. v. United States*, 262 U.S. 151 (1923) (corporations); *Hale v. Henkel*, 201 U.S. 43 (1906) (corporations); *Smith v. Interstate Commerce Commission*, 245 U.S. 33 (1917) (interstate commerce); *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894) (interstate commerce).

²⁰ *Seymour v. United States*, (8th Cir. 1935) 77 F. (2d) 577 (primary elections); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929) (elections); *In re Chapman*, 166 U.S. 661 (1897) (grounds for expulsion).

²¹ *United States v. Orman*, (3d Cir. 1953) 207 F. (2d) 148; *McGrain v. Daugherty*, 273 U.S. 135 at 177-178 (1927). Cf. *People ex rel. McDonald v. Keeler*, 99 N.Y. 463, 2 N.E. 615 (1885) (cited in *McGrain v. Daugherty*).

²² *Barsky v. United States*, (D.C. Cir. 1948) 167 F. (2d) 241, cert. den. 334 U.S. 843 (1948).

²³ *Townsend v. United States*, (D.C. Cir. 1938) 95 F. (2d) 352, cert. den. 303 U.S. 664 (1938).

²⁴ *United States v. Josephson*, (2d Cir. 1947) 165 F. (2d) 82 at 90-91, cert. den. 333 U.S. 838 (1948).

for valid congressional ends. To put the problem in its modern context, can the statements and actions of committee members in evaluating their function, as that of an exposing "grand jury" for example,²⁵ destroy the presumption that they are in fact performing a congressional function? This example clearly defines the problem, since the courts have never expressly acknowledged the existence of a congressional power of "exposure for exposure's sake."²⁶

In *Sinclair v. United States*,²⁷ the Court indicated that there were at least some limits of purpose, beyond which the committee could not go and still retain the stamp of validity.²⁸ However, the Court decided that under the circumstances of the case, the committee had not significantly deviated from its authorized purpose. In only one case have the committee's actions, at the time of hearing, been considered controlling as to the validity of the investigation. In *United States v. Icardi*,²⁹ a prosecution for perjury,³⁰ the court held that a committee could not be considered as "competent" if it was not pursuing a legislative purpose at the time when it secured the testimony, "even though that very testimony be relevant to a matter which could be the subject of a valid legislative investigation."³¹ Other federal courts have taken exactly the opposite position. In *Morford v. United States*³² the court held that once the presumption of validity arises, "it cannot be rebutted by impugning the motives of the individual members of the com-

²⁵ E.g., "I serve notice on the un-American elements in this country now that this 'grand jury' will be in session to investigate un-American activities at all times." Remarks of Rep. Rankin, 91 CONG. REC. 275 (1945). "[T]he House Committee on Un-American Activities is empowered to explore and expose activities by un-American individuals and organizations, which while sometimes being legal, are nevertheless inimical to our American concepts and our American future. . . ." H. Rep. 2742, 79th Cong., 2d sess., p. 16 (1947). See note, 47 COL. L. REV. 416 (1947).

²⁶ E.g., *Sacher v. United States*, 356 U.S. 576 (1958); *Watkins v. United States*, 354 U.S. 178 at 200 (1957); *Rumely v. United States*, (D.C. Cir. 1952) 197 F. (2d) 166 at 173, *affd.* 345 U.S. 41 (1953); *United States v. Josephson*, (2d Cir. 1947) 165 F. (2d) 82 at 89, *cert. den.* 333 U.S. 838 (1948).

²⁷ 279 U.S. 263 (1929).

²⁸ *Sinclair* claimed that the committee was really attempting to publicize facts relating to a pending court controversy and pointed to the committee's refusal to sustain his motion to exempt such facts from the inquiry. The Court held that this was "not enough to show that the committee intended to depart from the purpose to ascertain whether additional legislation might be advisable." 279 U.S. 263 at 295 (1929).

²⁹ (D.C. D.C. 1956) 140 F. Supp. 383. The case is discussed in comment, 9 STAN. L. REV. 574 at 581 (1957).

³⁰ For a comparison between perjury and contempt before congressional investigating committees, see comment, 9 STAN. L. REV. 574 at 581 (1957).

³¹ *United States v. Icardi*, (D.C. D.C. 1956) 140 F. Supp. 383 at 388. Cf. *Quinn v. United States*, 349 U.S. 155 at 161 (1955).

³² (D.C. Cir. 1949) 176 F. (2d) 54, *revd. on other grounds* 339 U.S. 258 (1950).

mittee." In *Josephson v. United States*,³³ the court held that once the authorization stated a valid purpose, that purpose became established, "regardless of any statement by the Committee or its members intimating the contrary." While the claim of invalid purpose has been raised constantly in contempt proceedings, it has never prevailed.

The Supreme Court has considered this problem extensively in two recent decisions. In *Watkins v. United States*,³⁴ the Court, while stating that there was no congressional power "to expose for the sake of exposure," also made it plain that the committee's motives were not conclusive on the issue. In effect, the Court made clear the distinction between the motives of Congress and motives of the committee.³⁵ The Court suggested that if Congress itself had intended mere exposure, then the purpose would be invalid.³⁶ Although the discussion on this point was dictum, the Court gave strong indication of substantially limiting investigative powers in the future through scrutiny of congressional motive and authorization.³⁷ However, in *Barenblatt v. United States*,³⁸ the Court gives exactly the opposite impression. As in *Watkins*, the Court points out that the motives of the committee are of no consequence in determining validity of purpose. But in *Barenblatt* the Court disregarded congressional as well as committee motives. The only test remaining, according to *Barenblatt*, is whether or not Congress acts pursuant to its constitutional power. If the authorizing resolution recites a valid purpose, whether or not that is the real purpose, the investigation will be conclusively

³³ (2d Cir. 1947) 165 F. (2d) 82, cert. den. 333 U.S. 838 (1948).

³⁴ 354 U.S. 178 (1957).

³⁵ "Their [committee members] motives would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served." 354 U.S. 178 at 200 (1957).

³⁶ "We have no doubt that there is no congressional power to expose for the sake of exposure." *Id.* at 200.

³⁷ *Watkins* may possibly be viewed as a high-water mark of a recent judicial trend toward greater protection from committee investigation. Previous decisions were based on more traditional limitations. E.g., *Emspak v. United States*, 349 U.S. 190 (1955) (Fifth Amendment); *Quinn v. United States*, 349 U.S. 155 (1955) (same); *United States v. Rumely*, 345 U.S. 41 (1953) (statutory construction); *United States v. Kamin*, (D.C. Mass. 1956) 136 F. Supp. 791 (jurisdiction).

³⁸ 360 U.S. 109 (1959). *Barenblatt* had refused to answer questions as to his former or present membership in the Communist party. His contempt conviction was affirmed by the court of appeals, (D.C. Cir. 1957) 240 F. (2d) 875. Certiorari was granted by the Supreme Court, judgment vacated, and the case remanded for reconsideration in the light of *Watkins*, 354 U.S. 930 (1957). Upon rehearing, the court of appeals reaffirmed by a divided court, (D.C. Cir. 1958) 252 F. (2d) 129. Certiorari was again granted by the Supreme Court, 356 U.S. 929 (1958).

presumed to be valid.³⁹ By this extension, in a case involving First Amendment freedoms, the Court has flatly refused to recognize the statement in *Watkins* that "the mere semblance of a legislative purpose would not justify an inquiry in the face of the Bill of Rights."⁴⁰

It cannot be denied that these two cases represent fundamentally different approaches to the problem.⁴¹ In *Watkins* the Court was willing to minimize both the propriety and ability of Congress to conduct investigations which result in little more than destruction of individual reputation. In *Barenblatt* the emphasis is placed upon the necessity of allowing a means by which Congress may gather information "over the whole range of national interests, concerning which Congress might legislate or decide upon due investigation not to legislate. . . ." Once the need and the legality of the power has been ascertained, the Court will refuse to deny it merely because it has been abused in some instances.

The position of the Court in *Barenblatt* may be rationalized in two ways. Were the Court ever to adopt the doctrine that the varying motives of the committee, or even of Congress, could vitiate an otherwise valid investigation, it would then be faced with the nearly insurmountable difficulty of ascertaining what those motives were in particular instances. In any committee, there are bound to be men of differing motivation.⁴² In such a situation the difficult problem of whose motives are controlling is insoluble. The question of ascertaining the motives of Congress as a whole verges on the impossible.

³⁹ "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." 360 U.S. 109 at 132 (1959). The discussion was not necessary as the court of appeals had held that "the primary purposes of the inquiry were in aid of legislative processes." (D.C. Cir. 1957) 240 F. (2d) 875 at 881.

⁴⁰ 354 U.S. 178 at 198 (1957).

⁴¹ For an analysis of this difference in outlook, see Schwartz, "The Supreme Court—1958 Term" 58 MICH. L. REV. 165 (1959).

⁴² For example, in one public hearing two members of the Un-American Activities Committee took issue with each other over the methods employed. One, Rep. Clardy, was seemingly interested in discrediting the witness before the public and press present at the hearings. Rep. Doyle, at least verbally, felt that such motivation was improper in view of the legislatively ordained function of the committee. The following colloquy resulted when Rev. Jack McMichael was asked to identify a supposed past Communist associate.

"Mr. Clardy: Would you know him if you saw him?"

Rev. McMichael (Witness): I'll be glad to look at him.

Mr. Clardy: Answer my question: would you know him if you saw him?

Rev. McMichael: How can I answer that question? I'll let the record show that question—how unfair it is.

Second, there is a feeling on the part of the Court that the responsibility for insuring the usefulness of congressional committees should lie with the parent body of Congress and the population as a whole. To restrain an otherwise lawful use of the legislative power because of an improper motive would be an abuse of the judicial function.⁴³ Motives may be controlled by Congress only in appointing to committees men truly dedicated to legislative ends.

Thus the conclusion emerges that while the Court has previously enunciated tests to limit "exposure for exposure's sake," and even currently has not explicitly recognized such a power, congressional committees do possess a power of exposure, often unconnected with the fact-finding process. Of course, the mere reluctance of the courts to admit the power does not of itself indicate that it is undesirable. Throughout history some writers have felt that informing the public is in itself a valid congressional function.⁴⁴ But most commentators have agreed that the danger that such a power could fall into irresponsible hands outweighs whatever value it may represent to society.⁴⁵

Mr. Clardy: If you were a truthful man, you would answer that question, sir.

Mr. Doyle: Well now, Mr. Chairman—

Rev. McMichael: What kind of a question—

Mr. Doyle: Just a minute now. I don't want to differ with my distinguished colleagues, but I submit that sort of statement by a member of this committee is highly improper.

Mr. Clardy: I stand by it.

Mr. Doyle: It is highly improper at this time. We are not judges. We are here to get the facts, whatever they are, and I think it is very unfortunate to have to disagree with my colleagues, and yet I can't sit as a member of this committee and complacently be silent when that sort of statement is made from the committee bench. I just can't be silent.

Mr. Clardy: You should be convinced by now, Mr. Doyle.

Mr. Doyle: That is all right. Whatever I am convinced of, I am not going to announce from the bench before the hearing is over. . . ."

Hearings Regarding Jack R. McMichael, House Committee on Un-American Activities, 83d Cong., 1st sess., v. 2, p. 2771 (1953).

⁴³ *McCray v. United States*, 195 U.S. 27 at 55 (1904), quoted in *Barenblatt v. United States*, 360 U.S. 109 at 132-133 (1959).

⁴⁴ "Unless Congress have and use every means of acquainting itself with the acts and disposition of the administrative agents of the government, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function." WILSON, CONGRESSIONAL GOVERNMENT 303 (1885). See, also Liacos, "Rights of Witnesses Before Congressional Committees," 33 BOST. UNIV. L. REV. 337 at 346 (1953); Herwitz and Mulligan, "The Legislative Investigating Committee," 33 COL. L. REV. 1 at 6, note 78 (1953).

⁴⁵ See Justice Frankfurter's discussion in *Rumely v. United States*, 345 U.S. 41 at 43-44 (1952); Gellhorn, "Report on a Report of the House Committee on Un-American Activities," 60 HARV. L. REV. 1193 (1947); notes, 70 HARV. L. REV. 671 (1957); 65 YALE L.J. 1159 (1956); 47 COL. L. REV. 416 (1947).

II. LIMITATIONS ON THE POWER OF INVESTIGATION

While the original limitation of the *Kilbourn* case has become nearly meaningless, some effective safeguards do remain. These restrictions may be divided into two basic categories: jurisdictional limitations and limitations of pertinency.

A. *Jurisdictional Limitations*

Any examination of the jurisdictional limits of an inquiry assumes the fact that the authorizing resolution setting up the inquiry is within Congress' power. Once this is determined, it still must be shown that the particular inquiry directed to a witness falls within the scope of that authorizing resolution.⁴⁶ In *United States v. Kamin*⁴⁷ it was held that the presumption of a valid legislative purpose does not apply in determining whether the committee has jurisdiction over a particular subject matter.⁴⁸ But even more important, while recognizing that the committee might make some special inquiries outside of its jurisdiction "to the extent that such inquiry might cast light upon a subject over which it does have jurisdiction," the court reserved the right to inquire into the motives of the committee in deviating from their jurisdictional area.⁴⁹ In *United States v. Lamont*⁵⁰ the court held an indictment defective when the authorized function of the committee had no apparent connection with the inquiry from which prosecution

⁴⁶ The authority of all investigating committees is prescribed by The Legislative Reorganization Act of 1946, c. 753, 60 Stat. 812, codified partially in 2 U.S.C. (Supp. III, 1956) §§72b-1, 190-190 (g), 198. The act allocates jurisdiction of subject matter among the various committees, c. 753, §§102, 121, 60 Stat. 814, 822. While all standing committees of the Senate are clothed with permanent power to compel testimony and require the production of documents, the only House Committee with such power is the Un-American Activities Committee.

⁴⁷ (D.C. Mass. 1956) 136 F. Supp. 791.

⁴⁸ The investigation was conducted by the Permanent Subcommittee on Investigations of the Senate Committee on Government Operation, under authority given by The Legislative Reorganization Act of 1946, c. 753, §102 (g): "(2) Such committee shall have the duty of . . .

(B) Studying the operation of Government activities at all levels with a view to determining its economy and efficiency."

Questions directed to the witness regarding private manufacturers holding defense contracts with the federal government were considered *prima facie* outside the limit of the committee's jurisdiction. *United States v. Kamin*, (D.C. Mass. 1956) 136 F. Supp. 791 at 804. See also *McGrain v. Daugherty*, 273 U.S. 135 at 176 (1927) (dictum); *Barsky v. United States*, (D.C. Cir. 1948) 167 F. (2d) 241 at 246, cert. den. 334 U.S. 843 (1948) (dictum). Cf. *Thomson v. Gaskill*, 315 U.S. 442 (1942); *Doidge v. Cunard S.S. Co.*, (1st Cir. 1927) 19 F. (2d) 500 at 502 (jurisdiction of federal courts is never presumed but must affirmatively appear).

⁴⁹ *United States v. Kamin*, (D.C. Mass. 1956) 136 F. Supp. 791 at 804.

⁵⁰ (2d Cir. 1956) 236 F. (2d) 312.

arose, and jurisdiction was not affirmatively alleged by the government. The court recognized that "the result might be different" if the inquiry in question was apparently within the authority of the committee.⁵¹

Recent cases have indicated, however, that jurisdictional bounds will be extremely difficult to delimit in the future. In the *Barenblatt* case, the Court recognized that the authorizing statute of the Un-American Activities Committee,⁵² criticized harshly in the *Watkins* case for its vagueness,⁵³ was sufficient to confer upon the committee the power to investigate Communist activities. In ascertaining the intent of Congress, the court considered repeated re-authorization of and appropriation for the committee by Congress as indirect approval of the investigation.⁵⁴ While such indirect approval may be sufficient in some circumstances, the wisdom of the type of analysis seems doubtful where the authorized power conflicts with First Amendment freedoms.⁵⁵ The reluctance of the court to limit strictly the areas of investigation seems to be based on interpretation of legislative policy. One of the purposes of the Legislative Reorganization Act of 1946⁵⁶ was to establish permanent committees with broad powers, so that *ad hoc* committees would not have to be established to investigate related areas with resulting duplication and waste. To construe the au-

⁵¹ See *United States v. Josephson*, (2d Cir. 1947) 165 F. (2d) 82, cert. den. 333 U.S. 838 (1948) (un-American activities); *Bowers v. United States*, (D.C. Cir. 1953) 202 F. (2d) 447 (organized crime in interstate commerce). But cf. *United States v. Rumely*, 345 U.S. 41 at 44 (1953) (lobbying).

⁵² "The Committee on Un-American Activities . . . is authorized to make . . . 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). For a discussion of the inherent vagueness of the statute, as well as some legislative attempts at definition, see note, 47 COL. L. REV. 416 (1947).

⁵³ *Watkins v. United States*, 354 U.S. 178 at 202 (1957). The enormous range of activity covered by the authorization is evidenced to some extent by the organizations the committee has investigated since its inception. For a partial list, see *United States v. Josephson*, (2d Cir. 1947) 165 F. (2d) 82 at 95 (dissenting opinion), cert. den. 333 U.S. 838 (1948).

⁵⁴ The House of Representatives extended the life of the special committee five times: H. Res. 26, 76th Cong., 1st sess., 84 CONG. REC. 1098 at 1127-1128 (1939); H. Res. 321, 76th Cong., 3d sess., 86 CONG. REC. 572 (1940); H. Res. 90, 77th Cong., 1st sess., 87 CONG. REC. 886, 899 (1941); H. Res. 420, 77th Cong., 2d sess., 88 CONG. REC. 2282, 2297 (1942); H. Res. 65, 78th Cong., 1st sess., 89 CONG. REC. 795, 809-810 (1943). This was done with full knowledge that the committee was spending the major part of its time investigating communism. E.g., H. Rep. 2, 76th Cong., 1st sess. (1939); H. Rep. 2233, 79th Cong., 2d sess. (1946).

⁵⁵ See the opinion of Justice Black, dissenting in *Barenblatt v. United States*, 360 U.S. 109 at 140, note 7 (1959).

⁵⁶ Legislative Reorganization Act of 1946, 60 Stat. 812.

thorized jurisdiction of the committees strictly would be to fly directly in the face of the act, and the Court has apparently felt that government efficiency outweighs the individual interest in having jurisdiction more specifically defined.⁵⁷

B. *The Requirement of Pertinency*

Conviction under 2 U.S.C. §192⁵⁸ can result only if a witness refuses to answer questions which are "pertinent to the question under inquiry." The term "pertinency" has never been authoritatively defined and, while it is generally equated to relevancy, the precise degree of relevancy has not been agreed upon. Some courts have suggested that nearly any degree of relevance will make the question pertinent, even though the question would not be relevant under the rules of evidence.⁵⁹ Another decision has suggested that in order to be pertinent a question must be in some degree "material."⁶⁰ While "material" is as elusive a term as "pertinency," it does at least suggest a stronger relationship between question and inquiry than that of mere relevancy. In a prosecution for perjury, one court has gone so far as to hold that material questions are those to which answers might be capable of influencing the tribunal on the issue being considered.⁶¹ Questions asked purely to trap the witness into a perjured statement, though possibly relevant to the subject of the investigation, were not considered "material." This suggests that "materiality" may be judged in light of the committee's motive in asking the question. This test has never been adopted by a court in a contempt proceeding.

Whatever standards are used it is clear that possible answers, not necessarily the true answer, to the question will determine its

⁵⁷ However, Congress seems to have suggested that too vague a definition of jurisdiction would also result in waste and duplication of function. S. Rep. 1011, 79th Cong., 2d sess., p. 5 (1946). See also note, 70 HARV. L. REV. 671 (1957).

⁵⁸ "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 . . . 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. . . ." 52 Stat. 942 (1938), 2 U.S.C. (1958) §192.

⁵⁹ Compare *United States v. Orman*, (3d Cir.1953) 207 F. (2d) 148 and *Townsend v. United States*, (D.C. Cir. 1938) 95 F. (2d) 352 at 361, with 1 WIGMORE, EVIDENCE, 3d ed., §§31-32 (1941; Supp. 1957).

⁶⁰ *Bowers v. United States*, (D.C. Cir. 1953) 202 F. (2d) 447. See also Senate debate on the original contempt statute: CONG. GLOBE, 34th Cong., 3d sess., 439-441 (1857) (favoring a rigorous test).

⁶¹ *United States v. Icardi*, (D.C. D.C. 1956) 140 F. Supp. 383. See also *Fraser v. United States*, (6th Cir. 1944) 145 F. (2d) 145 at 149, cert. den. 324 U.S. 842 (1945).

pertinency.⁶² While the witness must reach his own conclusion as to pertinency,⁶³ subject to later judicial review, the courts are uniform in holding that the witness must have a fair opportunity to make that decision; he is entitled to have knowledge of the subject to which the interrogation is deemed pertinent.⁶⁴ Information from which the witness may make his conclusion must be available at the time of the hearing, not at the time of trial,⁶⁵ and it "must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense."⁶⁶

In *Watkins v. United States*,⁶⁷ the Court held that the pertinency of the question must be made to appear "undisputably clear" to the witness and suggested three sources from which the information may be derived: (1) the authorizing resolution creating the committee,⁶⁸ (2) the remarks of the chairman or members of the committee, and (3) the nature of the proceedings themselves.⁶⁹ The last two sources have been mentioned generally in situations where the authorizing resolution is insufficient to give the proper amount of information.

The use of the authorizing resolution as a means of notification has resulted in much difficulty. Under the statute "pertinency" relates only to the "question under inquiry." Prior to the establishment of contempt as a statutory offense, the "question under inquiry" was entirely defined by the authorization of the committee. Investigations were conducted by ad hoc committees, whose investigations encompassed the full limit of their authority.⁷⁰ With the broadening of investigatory authorizations, the "question under inquiry" and the jurisdictional reach of the committee have become separate and distinct entities. As the test for

⁶² *United States v. Orman*, (3d Cir. 1953) 207 F. (2d) 148; *Sinclair v. United States*, 279 U.S. 263 (1929).

⁶³ *Watkins v. United States*, 354 U.S. 178 at 200 (1957); *Sinclair v. United States*, 279 U.S. 263 at 299 (1929); *United States v. Kamin*, (D.C. Mass. 1956) 135 F. Supp. 382.

⁶⁴ *Watkins v. United States*, 354 U.S. 178 at 209 (1957); *United States v. Rumely*, 345 U.S. 41 at 45-47 (1953).

⁶⁵ *United States v. Rumely*, 345 U.S. 41 at 45-47 (1953).

⁶⁶ *Watkins v. United States*, 354 U.S. 178 at 208-209 (1957). See also *Scull v. Virginia*, 359 U.S. 344 (1959); *Flaxer v. United States*, 358 U.S. 147 (1958).

⁶⁷ 354 U.S. 178 (1957).

⁶⁸ E.g., *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 at 613 (1929). Some members of Congress seem to feel that the authorization is exclusively controlling on pertinency. See remarks of Rep. Sherry in debate on H.R. 151, 84th Cong., 1st sess., 101 CONG. REC. 3569 (1955). But see *Watkins v. United States*, 354 U.S. 178 (1957).

⁶⁹ *Watkins v. United States*, 354 U.S. 178 at 209-215 (1957).

⁷⁰ Landis, "Constitutional Limitations on the Congressional Power of Investigation," 40 HARV. L. REV. 153 at 170-190 (1926) and cases therein cited.

jurisdiction has nothing at all to do with notification of pertinency to the witness,⁷¹ the authorization should not be tested for its notification qualities. Its function is that of prescribing the area in which "questions under inquiry" may fall, and it is only those "questions under inquiry" that must be made clear to the witness.

Moreover, severe problems result if the authorization is considered as one source of notice. The contempt statute is of a criminal nature, and therefore must be judged by criminal standards.⁷² If an investigation of pertinency will relate back to the authorization, that authorization should have to be sufficiently specific to meet criminal tests. But this would make the establishment of permanent committees with broad powers nearly impossible, contrary to the policy of the Legislative Reorganization Act.⁷³ In recognition of the problem, one court has frankly refused to measure the authorization by criminal standards⁷⁴ and, while other courts have purported to do so, it is significant that with one exception⁷⁵ the supposed vagueness of an authorization has never prevailed as a conclusive defense in a prosecution for contempt.

Barenblatt is the first case to make a realistic distinction between the jurisdictional test and the requirements of pertinency. In considering whether or not the committee had jurisdiction, the Court examined the authorization in the light of its legislative history, of which the witness probably had little knowledge.⁷⁶ But in considering the witness's contention that he had not been apprised of the pertinency of the question, the Court considered only statements by the committee at the time and the conduct of the witness.⁷⁷ It concluded that together they made the question appear with "undisputable clarity."

⁷¹ See text at notes 46 through 57 *supra*.

⁷² A penal statute must be phrased in such terms that its words have either (a) a technical meaning known to those within their reach; (b) an obvious common law meaning; or (c) a meaning settled by other words in the statute. See *Connally v. General Construction Co.*, 269 U.S. 385 at 391 (1926); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921); note, 47 *Col. L. Rev.* 416 at 429 (1947).

⁷³ Legislative Reorganization Act of 1946, 60 Stat. 812.

⁷⁴ *United States v. Bryan*, (D.C. D.C. 1947) 72 F. Supp. 58 at 63. But cf. *M. Kraus & Bros. v. United States*, 327 U.S. 614 at 620 (1946).

⁷⁵ *United States v. Peck*, (D.C. D.C. 1957) 154 F. Supp. 603. The decision seems to be based on a misinterpretation of the *Watkins* case. See 154 F. Supp. 603 at 608.

⁷⁶ Note 55 *supra*. Justice Black, dissenting, argued that these sources were invalid for purposes of ascertaining *pertinency*, a typical indication of the confusion which may easily result.

⁷⁷ Five sources of notice were mentioned: (1) the chairman's opening statement, (2) the statement at the commencement of the investigation, (3) petitioner's previous attendance at the hearings, (4) the fact that petitioner stood mute in the face of the chairman's statement as to why he had been called as a witness, and (5) the fact that questions were directed at the witness's own affiliations, rather than those of others. *Barenblatt v. United States*, 360 U.S. 109 at 124-125 (1959).

While a clear distinction between the test for jurisdiction and the test for pertinency may be desirable, it may also lead to some disturbing conclusions. Legislative policy dictates judicial tolerance of vague and indeterminate authorizing resolutions. Within the broad jurisdictional framework, the committee is free to select particular areas of inquiry, and to compel testimony pertinent to that area. The particular subjects of inquiry selected may not, in all cases, correspond to those which Congress had in mind in authorizing the investigation. The power to conduct the investigation has been substantially separated from the direction and responsibility of the investigation. Such separation was condemned in *Sweezy v. New Hampshire*,⁷⁸ under the due process clause. A recent decision,⁷⁹ however, has seemingly restricted the *Sweezy* case to the concurring opinion which based the holding upon the ground that New Hampshire's interest was insufficient to overbalance defendant's First Amendment rights.⁸⁰

The results of the separation are twofold. First, pertinency may no longer be generally represented as justifying compulsory testimony by evidencing a close nexus with congressional interest. The justification must now be based on a broad statement of congressional purpose, coupled with a specific committee interest. Secondly, the protection for a witness has become minimal. While questions must be pertinent to a subject of inquiry, the requirement loses its effectiveness when there are many questions of inquiry upon which a committee may compel testimony. Questions not pertinent to a subject under inquiry may be redefined by subsequently changing the subject, and if the circumscription governing the choice of subjects is vague, a change is easily made. The result may be that "pertinency" no longer has meaning as a protection from inquiry, now serving only as a protection from confusion.

Perhaps an equally significant departure from established notions of contempt proceedings is the recent suggestion that the claim of pertinency may be waived by the witness's failure to object

⁷⁸ 354 U.S. 234 at 253 (1957): "It is . . . clear that the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigating agency. The Attorney General has been given such a sweeping and uncertain mandate that it is his decision which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked." See also *Watkins v. United States*, 354 U.S. 178 at 205 (1957) (dictum). But cf. *United States v. Bryan*, (D.C. D.C. 1947) 72 F. Supp. 58.

⁷⁹ *Uphaus v. Wyman*, 360 U.S. 72 (1959). The same New Hampshire authorization was involved in both cases, N.H. Laws 1953, c. 307.

⁸⁰ *Sweezy v. United States*, 354 U.S. 234 at 256 (1957).

at the time of inquiry.⁸¹ Traditionally, pertinence was considered an element of the offense which had to be proved by the prosecution⁸² and which could not be waived. Though one recent case has specifically held that there is no doctrine of waiver,⁸³ the Supreme Court has suggested by way of allusion that such a doctrine does in fact exist.⁸⁴ If so, it may be a departure from the view that a congressional contempt prosecution is to be treated like any other criminal proceeding. In light of the purpose underlying the investigative process, a doctrine of waiver has no rational basis whatsoever. Whatever the basis of the refusal of the witness to answer the question, there is no reason to uphold contempt proceedings against him unless there was some purpose to be fulfilled by his answering. If the committee, confronted with the witness's refusal to reply, did not demonstrate pertinency, the significance of the question would seem to be negated.⁸⁵

III. PROTECTION OF THE FIRST AMENDMENT

In the field of political inquiry, reluctant witnesses searching for means to protect their names and reputations have generally relied upon the Fifth Amendment,⁸⁶ or the claim of lack of pertinency. With the adoption of the term "Fifth Amendment Communist," one of the most precious of our freedoms has, as a practical matter, lost much of its original meaning. The solution for some witnesses, faced with pertinent questions, has been a flat denial of the committee's right to inquire into the area of political belief and association, an argument grounded on the First Amendment's prohibitions.

⁸¹ *Barenblatt v. United States*, 360 U.S. 109 at 123-124 (1959). See also *United States v. Kamin*, (D.C. Mass. 1956) 136 F. Supp. 791 (dictum); *United States v. Bryan*, (D.C. D.C. 1947) 72 F. Supp. 58. But see *Bowers v. United States*, (D.C. Cir. 1953) 202 F. (2d) 447.

⁸² *Sinclair v. United States*, 279 U.S. 263 at 296-297 (1929). See also *Christoffel v. United States*, 338 U.S. 84 (1949) (objection to lack of a quorum need not be raised at a time of hearing), distinguished in *United States v. Bryan*, 339 U.S. 323 at 329 (1950).

⁸³ *Bowers v. United States*, (D.C. Cir. 1953) 202 F. (2d) 447.

⁸⁴ *Barenblatt v. United States*, 360 U.S. 109 at 123-124 (1959).

⁸⁵ If the committee is sincerely interested in obtaining the testimony there is little doubt that they will attempt to show pertinency, whether or not the witness objects on that grounds. If they fail to indicate the question's relevance, the conclusion follows that their main purpose in asking the question is to trap the witness into grounds for contempt proceedings. To require an indication of pertinency, whether or not the witness objects, would seem a valid limitation on these particularly flagrant cases of exposure. See note, 41 MINN. L. REV. 622 at 637 (1957).

⁸⁶ See note 1 *supra*.

A. *The Policy of the First Amendment*

While perhaps a preferred right,⁸⁷ freedom of speech has never been considered an absolute one.⁸⁸ Limitations of the right were originally grouped in two classes, dependent upon the nature of the speech. First, if the language was such that it would tend to provoke a criminal act, limitations only of proximity and degree were placed upon the utterances. The words must be "of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent."⁸⁹ The doctrine was clarified in a subsequent case in which it was stated that the danger must be so "imminent" that "it may befall before there is an opportunity for full discussion."⁹⁰

The second category of limitation was prescribed in *Gitlow v. New York*,⁹¹ where the Court was faced with a statute which made speech itself criminal. In this situation, the Court deviated from a clear and present danger test, and instead suggested that so long as the language has a tendency to create an evil which the state may legally prohibit, then the speech itself may be made criminal, providing there is a "reasonable" relationship between the speech and the state power to regulate the evil.

Recent decisions have indicated that there is little if any merit left in the original distinction because, perhaps, of the difficult classification of restraining statutes.⁹² The current test seems to be that of balancing the public interest in curtailing the speech

⁸⁷ *Thomas v. Collins*, 323 U.S. 516 at 529-530 (1945) (speech and assembly); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 at 629 (1943) (religion); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (assembly); Cahn, "The Firstness of the First Amendment," 65 *YALE L.J.* 464 (1956); CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941). But see *Kovacs v. Cooper*, 336 U.S. 77 (1949) (opinion of Justice Frankfurter).

⁸⁸ E.g., *Dennis v. United States*, 341 U.S. 494 (1951) (Smith Act); *American Communications Assn., C.I.O. v. Douds*, 339 U.S. 382 (1950) (non-Communist affidavits); *Gitlow v. New York*, 268 U.S. 652 (1925) (criminal anarchy); note, 61 *HARV. L. REV.* 1208 at 1209-1210 (1948). But see the opinion of Justice Black in *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

⁸⁹ *Schenck v. United States*, 249 U.S. 47 at 52 (1919). The evil must be sufficiently grave to justify oppression: *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Craig v. Harney*, 331 U.S. 367 at 373, 378 (1947); *Whitney v. California*, 274 U.S. 357 at 378-379 (1927) (concurring opinion).

⁹⁰ *Whitney v. California*, 274 U.S. 357 at 377 (1927) (concurring opinion). See also *Pennekamp v. Florida*, 328 U.S. 331 at 334 (1946); *Bridges v. California*, 314 U.S. 252 at 262 (1941); *Thornhill v. Alabama*, 310 U.S. 88 at 104-106 (1940).

⁹¹ 268 U.S. 652 (1926). See also *Whitney v. California*, 274 U.S. 357 (1927).

⁹² In particular, the Smith Act, 54 Stat. 670 (1940), now 18 U.S.C. (1958) §2385 defines as criminal both advocacy and particular overt acts connected with that advocacy. See *Dennis v. United States*, 341 U.S. 494 (1951).

against the individual's interest in preserving it.⁹³ While courts often speak of "clear and present danger," few actually employ the test.⁹⁴

The balancing test has been criticized as failing to differentiate between two fundamental interests involved in the concept of free speech. One is the personal right of each individual affected by a curtailment. The second, and seemingly more important, is "the social interest in the attainment of truth."⁹⁵ The majority of the Court has generally disregarded the second interest in its balancing test.⁹⁶ In opposition to the Court's position, it may be cogently argued that the prohibitions of the First Amendment were adopted to protect and foster the free flow of ideas, a concept which loses all efficacy when considered purely from an individual viewpoint. Four of the members of the current Court appear to base their test on this enlarged concept, which verges closely on an absolutist interpretation of the First Amendment.⁹⁷

B. *The Application of the First Amendment to Legislative Inquiries*

1. *Generally.* The extension of the prohibitions of the amendments to investigations as well as "laws" which abridge free speech is but a logical extension of the doctrine that any government

⁹³ *Barenblatt v. United States*, 360 U.S. 109 (1959) (investigation of Communist activities); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (criminal libel act); *Dennis v. United States*, 341 U.S. 494 (1951) (Smith Act); *American Communications Assn., C.I.O. v. Douds*, 339 U.S. 382 (1950) (non-Communist affidavits from labor leaders); *Barsky v. United States*, (D.C. Cir. 1948) 167 F. (2d) 241, cert. den. 334 U.S. 843 (1948) (investigation of Communist activities).

⁹⁴ "No matter how rapidly we utter the phrase 'clear and present danger' or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedom which the judge must disentangle." FREUND, *ON UNDERSTANDING THE SUPREME COURT* 27-28 (1949), quoted in *Dennis v. United States*, 341 U.S. 494 at 542-543 (1951); note, 101 UNIV. PA. L. REV. 870 at 871 (1953). But see *Barsky v. United States*, (D.C. Cir. 1948) 167 F. (2d) 241 at 246, cert. den. 334 U.S. 843 (1948).

⁹⁵ *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (dissent of Justice Black); *Whitney v. California*, 274 U.S. 357 (1927) (concurring opinion of Justice Brandeis); *Abrams v. United States*, 250 U.S. 616 (1919) (dissent of Justice Holmes); Meiklejohn, "What Does the First Amendment Mean?" 20 UNIV. CHI. L. REV. 461 (1953); CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 33, 34 (1941); note, 29 IND. L.J. 162 (1954).

⁹⁶ The preoccupation with individual interest may be grounded in the Court's reluctance to allow one individual to raise the constitutional rights of others. E.g., *United States v. Josephson*, (2d Cir. 1947) 165 F. (2d) 82 at 90, cert. den. 333 U.S. 838 (1948); *Tileston v. Ullman*, 318 U.S. 44 (1943). But see *NAACP v. Alabama*, 357 U.S. 449 (1958); *Barrows v. Jackson*, 346 U.S. 249 at 255-259 (1953); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 at 183-187 (1951); comment, 27 N.Y. UNIV. L. REV. 656 (1952).

⁹⁷ Chief Justice Warren and Justices Black, Douglas, and Brennan. See dissenting opinions in *Barenblatt v. United States*, 360 U.S. 109 (1959) and *Uphaus v. Wyman*, 360 U.S. 72 (1959). Justice Black's language in *Barenblatt* strongly suggests that no public interest could ever overbalance the interest in the free exchange of ideas. 360 U.S. 109 at 144-145.

interference with the guaranteed freedoms will be considered "abridgement" within the meaning of the amendment.⁹⁸ That the amendment applies specifically to investigative actions has been assumed by the present Court to be settled.⁹⁹

Equally clear is the recognition that though the amendment is couched in terms of speech, it applies to political activity as well.¹⁰⁰ Some writers have suggested that the protection of the "political process," involving both belief and activity, was the fundamental purpose behind the amendment.¹⁰¹ In defining political activity, the Court has been quick to realize that "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."¹⁰²

Whether "exposing" an individual to the wrath of the community is "interference" or "abridgment" of his political activity and belief is not entirely settled. There can be little doubt that exposure of a witness may have disastrous effects upon his life, effects amounting to a penalty for that political conduct.¹⁰³ Although the effects are the result of private action, uncontrolled by the First Amendment,¹⁰⁴ it would be unrealistic to refuse to recognize the government's role in the overall result. The majority of cases have recognized that the inhibition of speech and political affiliation caused by fear of exposure does constitute an "abridgment" of speech within the confines of the amendment.¹⁰⁵ The substantiality of government action in the matter, while still re-

⁹⁸ Abridgments which have been invalidated have included licensing, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); denial of government privileges, *Wieman v. Updegraff*, 344 U.S. 183 (1952); criminal statutes, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and taxation, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). See CHAFEE, *FREE SPEECH IN THE UNITED STATES* 9-31 (1948).

⁹⁹ *Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957) (dictum); *United States v. Rumely*, 345 U.S. 41 (1953) (dictum). Cf. *Bridges v. California*, 314 U.S. 252 at 260, 263 (1941).

¹⁰⁰ The Court has often indicated that of all freedoms guaranteed by the First Amendment, political action is most highly protected. E.g., *Beauharnais v. Illinois*, 343 U.S. 250 at 263 (1952); *United States v. Carolene Products Co.*, 304 U.S. 144 at 152-153 (1938); *DeJonge v. Oregon*, 299 U.S. 353 at 364-365 (1937).

¹⁰¹ E.g., Meiklejohn, "What Does the First Amendment Mean?" 20 *UNIV. CHI. L. REV.* 461 at 479 (1953).

¹⁰² *NAACP v. Alabama*, 357 U.S. 449 at 460 (1958). See, generally, Solter, "Freedom of Association—A New and Fundamental Civil Right," 27 *GEO. WASH. L. REV.* 652 (1959).

¹⁰³ See Hearings before the Committee on Un-American Activities on Blacklisting, 84th Cong., 2d sess., pp. 5175-5419 (1956). See also *Speiser v. Randall*, 357 U.S. 513 at 531 (1958); *Black v. Cutter Laboratories*, 351 U.S. 292 (1956).

¹⁰⁴ *Breard v. City of Alexandria*, 341 U.S. 622 at 643-644 (1951).

¹⁰⁵ *Barenblatt v. United States*, 360 U.S. 109 (1959); *United States v. Harriss*, 347 U.S. 612 (1954) (dictum); *United States v. Rumely*, 345 U.S. 41 (1953) (concurring opinion); *American Communications Assn., C.I.O. v. Douds*, 339 U.S. 382 (1950). Cf. *Quinn v. United States*, 349 U.S. 155 at 161 (1955).

quired in some degree, seemingly will be presumed if that action is the initial one in the government-private action interplay.

2. *Investigation of Un-American Activities.* While committees entrusted with the function of investigation of un-American activities have made infrequent glances at right-wing groups,¹⁰⁶ the term has come to mean little more than investigation of the Communist Party. Contempt proceedings originating from those hearings have brought the question of First Amendment limitations on the committee constantly before the federal courts.¹⁰⁷

The fundamental question the Court has been forced to decide is that of the nature of the Communist Party. Traditionally, it has not been considered as a merely political group. Either through a policy of judicial notice or judicial restraint,¹⁰⁸ the Court has accepted the expressions of Congress that, regardless of its political nature, the party is a conspiratorial and revolutionary group, organized to reach ends and to use methods which are incompatible with our constitutional system.¹⁰⁹ For this reason, the Court has consistently refused to view the Communist Party in the same light as any other organization, and has upheld legislation aimed at it "which in a different context would certainly have raised constitutional issues of the gravest character." While a possible, if somewhat implausible, argument may be maintained that the First Amendment was framed to protect even revolutionary groups,¹¹⁰ the discussion is one of purely academic significance, as the point is well settled.

But while differentiating between legitimate political activity which is protected and Communist activity which is not, the Court formerly recognized that the latter does not, of necessity, exclude

¹⁰⁶ Even during the Second World War, the Dies Committee scarcely glanced at Fascist organizations, and seemingly was verbally supported by them. See Remarks of Rep. Sadowski, 89 CONG. REC. 798 (1943).

¹⁰⁷ E.g., *Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *Barsky v. United States*, (D.C. Cir. 1948) 167 F. (2d) 241, cert. den. 334 U.S. 843 (1948); *United States v. Josephson*, (2d Cir. 1947) 165 F. (2d) 82, cert. den. 333 U.S. 838 (1948). The committee has also been responsible for one recognized bill of attainder, *United States v. Lovett*, 328 U.S. 303 (1946).

¹⁰⁸ In *Barenblatt*, the Court considered the formal expression by Congress of the aims of the Communist Party as partially determinative of its legitimacy. See Subversive Activities Control Act of 1950, Title I of Internal Security Act of 1950, §2, 64 Stat. 987-989. For a critical analysis of the application of judicial restraint in the area of civil liberties, see Beth, "Group Libel and Free Speech," 39 MINN. L. REV. 167 (1955).

¹⁰⁹ *American Communications Assn., C.I.O. v. Douds*, 339 U.S. 382 at 422 (1950) (concurring opinion of Justice Jackson).

¹¹⁰ Both Hamilton and Madison, the framers of the Bill of Rights, seem to have recognized a right of revolution: HAMILTON, MADISON, AND JAY, *THE FEDERALIST*, ON THE NEW CONSTITUTION, XXVIII, 135-136 (1788).

the former. Justice Vinson, speaking for the Court in *American Communications Assn. v. Douds*¹¹¹ observed: "Communists, we may assume, carry on legitimate political activities." Justice Jackson, concurring in the same case, pointed out that there was a fundamental distinction between an oath requiring overt acts of affiliation with the party and one which called for disclosure of belief unconnected with any overt act.¹¹² In *Wieman v. Updegraff*,¹¹³ the Court invalidated a loyalty oath because mere party association was the determining factor; no distinction had been made for innocent association. To inhibit individual freedom by "indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."¹¹⁴ In *DeJonge v. Oregon*,¹¹⁵ a unanimous Court held that mere membership in or presence at a Communist rally was not significant, unless some criminal or violent act had been advocated there.

These cases seem to be a direct corollary to the "least abridgment" test of the First Amendment, which suggests that while the legislature may limit First Amendment freedoms, the means of curtailment must lead to the least possible abridgment of those freedoms.¹¹⁶ Under this policy, vaguely worded abridgments, which have included conduct which could not be fully justified by a public need, have been struck down.¹¹⁷ Least abridgment, if applied to Communist activities, would mean that simple association or membership was too broad a category to be regulated. It must be the particular aspects of membership that are a threat to society that may be regulated.¹¹⁸

*Barenblatt v. United States*¹¹⁹ is the first case directly involving the effect of the First Amendment on congressional investigations

¹¹¹ 339 U.S. 382 at 393 (1950).

¹¹² *Id.* at 435-445.

¹¹³ 344 U.S. 183 (1952).

¹¹⁴ *Id.* at 191. But cf. *Adler v. Board of Education*, 342 U.S. 485 (1952); *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951); *Garner v. Board of Public Works*, 341 U.S. 716 (1951) (loyalty oaths upheld when scienter was implicitly required).

¹¹⁵ 299 U.S. 353 (1937). See also *Stamps*, "Freedom of Assembly," 11 *UNIV. KAN. CITY L. REV.* 187 (1943).

¹¹⁶ In the following cases, abridgments were struck down as not being the least restrictive means of achieving the desired end: *Wieman v. Updegraff*, 344 U.S. 183 at 190 (1952); *Kunz v. New York*, 340 U.S. 290 at 293-295 (1951) (lack of standards for grant of license); *Cantwell v. Connecticut*, 310 U.S. 296 at 307-308 (1940) (criminal law too encompassing); *Thornhill v. Alabama*, 310 U.S. 88 at 100 (1940) (criminal law too encompassing).

¹¹⁷ E.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Winter v. New York*, 333 U.S. 507 (1948). Cf. *United States v. Rumely*, 345 U.S. 41 (1953); *United States v. C.I.O.*, 335 U.S. 106 (1948).

¹¹⁸ See *Barenblatt v. United States*, 360 U.S. 109 at 148, note 16 (1959) (dissenting opinion of Justice Black).

¹¹⁹ 360 U.S. 109 (1959).

to be decided by the Supreme Court.¹²⁰ The witness refused to answer questions as to whether he was, or had ever been, a Communist. The Court, in upholding the committee's right to inquire into this association, expressly rejected the claim that "because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary political party. . . ."¹²¹ The Court has thus clearly taken the view, with regard to congressional investigations, that although there may be a distinction between political activity and overt criminal acts, the differentiation will not be made within the framework of membership in the Communist Party.

Although the Court refused to consider the party in the same light as any other political group, it still recognized that the First Amendment would afford protection in some situations. The decision in the case was actually reached, not on the basis that the Communist Party was not a legitimate group, but rather because the public interest in disclosure was greater than the witness's interest in keeping silent.¹²² Therefore, the majority, while claiming that the party is not legitimate, does not seem to be entirely convinced of the fact and has sought an alternative legal technique to uphold its result.

Four members of the Court strongly dissented from the opinion. Justice Black, writing for three of the dissenters, reasoned that neither the Communist Party nor the particular witness lost the full protection of the First Amendment because one of the party's aims was violent overthrow of the government. If the Court was willing to recognize the party as legitimate, no public need could ever justify abridgment of political beliefs and associations.¹²³ While Justice Black has often been criticized for his absolutist approach to the First Amendment, his rationale would seem much more sensible in the area of political freedoms than in that of speech.¹²⁴ It is also significant that at least two, and possibly three members of the Court joined Black in his interpretation.¹²⁵

¹²⁰ But see *United States v. Rumely*, 345 U.S. 41 at 47-48 (1953); *United States v. Harriss*, 347 U.S. 612 at 626 (1954) (restrictive statutory construction adopted to avoid First Amendment problems). And see *Quinn v. United States*, 349 U.S. 155 at 161 (1955).

¹²¹ 360 U.S. 109 at 128-129 (1959).

¹²² *Id.* at 126-128. For a discussion of "public interest," see *Dennis v. United States*, 341 U.S. 494 at 508-509 (1951).

¹²³ *Barenblatt v. United States*, 360 U.S. 109 at 140-153 (1959) (dissenting opinion of Justice Black).

¹²⁴ See notes 101 and 102 *supra*.

¹²⁵ Justices Douglas and Warren concurred in Black's dissent. Justice Brennan dissented separately on the ground that there was no congressional power of exposure for

The decision in *Barenblatt* has restricted *Watkins v. United States*¹²⁶ to its barest holding—that of the pertinency of the question. In doing so, the Court has given enormous power to the Un-American Activities Committee, a power which the Court in *Watkins* was loathe to confer. The Court has also indicated that the balancing test is becoming more and more weighted toward the government. In effect, the application of the First Amendment has been restricted to currently “safe” political associations. The difficulty with this rationale is that it leaves to the individual the dangerous function of deciding for himself today what will be considered “safe” by the government in the future. This cannot but deter persons from engaging in unpopular political activity. While it is true that the Court would undoubtedly distinguish between unpopular and dangerous political activity, danger is merely defined by government doctrine or even propaganda, and it is difficult, if not impossible, to ascertain future governmental policy. It must therefore be recognized that the Court’s opinion has made serious inroads into First Amendment limitations. If protection is to be forthcoming for the reluctant witness, it will not be a result of the very amendment framed to protect those activities which he refused to disclose.

CONCLUSION

The Court’s reluctance to interfere with the action of congressional committees may be grounded in the thesis that as committees perform an important and essential function of government, restrictions upon them should be kept to a minimum. The dilemma the Court faces is how to lay down restrictions on irresponsible committees which would not apply with equal force to responsible ones.

Assuming that some judicial control of investigatory methods is desirable, there is a possibility of applying the due process clause in certain situations. If “silence” is considered as a liberty, it is clear that Congress could compel a witness to speak only by a procedure suitable and proper to the particular situation. This would involve the establishment by the Court of some basic concepts of “fairness” in committee hearings.¹²⁷ The difficulty with

exposure’s sake, but did not take issue with Black’s analysis of the First Amendment. Cf. *Uphaus v. Wyman*, 360 U.S. 72 at 82 (1959) (dissenting opinion of Justice Brennan); *Scull v. Virginia*, 359 U.S. 344 at 353, note 7 (1959).

¹²⁶ 354 U.S. 178 (1957).

this test is that it will inevitably involve an investigation of committee motives in questioning a witness.

An alternative solution is the establishment of basic procedural limitations on committee action, an exercise of legislative self-control. Many proposals of this nature have been submitted,¹²⁸ but none has received serious consideration, probably because of the basic belief that an irresponsible committee could best be cured "not by differences in rules but in differences of men."¹²⁹ The decline of the activities of the House Un-American Activities Committee in recent years may also have contributed to congressional laxity. However, the possible revival of such activity demands a congressional reappraisal of committee procedure.

A final possibility is that of discarding the balancing test completely and enforcing the prohibitions of the First Amendment absolutely in the area of political activity. The result of a strict interpretation of the amendment may not be as chaotic as some might imagine. By restricting the absolute prohibitions to the political area, the way is left open for control of non-political speech. The result in the political sphere would not be to deny the nation its right of self-preservation; rather it would require a more specific definition of those abuses the nation seeks to preserve itself from. Acts of subversion would still remain open to curtailment and investigation, but guilt by association, either judicially or publicly, would be foreclosed. Congress might still seek information regarding treason or espionage, but it could not act indirectly by equating the abuse to a political party, and then seeking information regarding the party. To do so is to supplant the policy of the First Amendment with a vague probability ratio, which even if nearly conclusive is still no justification for inquiry into political association. Criminal sanctions remain available for those members of a group who act outside our governmental framework, but the First Amendment should remain a bulwark of protection for those who work within it.

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¹²⁷ *Wieman v. Updegraff*, 344 U.S. 183 at 191 (1952); note, 47 MICH. L. REV. 181 at 219 (1948). Cf. *Hadacheck v. Los Angeles*, 239 U.S. 394 at 410 (1915).

¹²⁸ E.g., H.R. 4564, 80th Cong., 1st sess. (1947). For a summary of proposed legislation, see Meader, "Limitation on Congressional Investigation," 47 MICH. L. REV. 775 (1949); note, 23 NOTRE DAME LAWYER 353 (1948). See also procedural rules suggested by Wyzanski, J., reprinted in 94 CONG. REC. A 1547 (1948).

¹²⁹ 94 CONG. REC. A 1547 (1948).