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FREEDOM OF SILENCE:
CONSTITUTIONAL PROTECTION AGAINST
GOVERNMENTAL INTRUSIONS IN POLITICAL AFFAIRS

*Charles B. Nutting**

PARADOXICALLY enough, the "right" to be silent has been vociferously asserted by some of our most loquacious citizens. The current activities of Congressional investigating committees and the possible enactment of laws regulating participation in certain political affairs make timely a consideration of the basis for the assertion of the "right" and an attempt to determine the extent to which it may be said truly to be protected against intrusions by the state or national governments. It is proposed first to consider the question of secrecy in connection with the elective process itself and later to extend the inquiry into problems connected with political beliefs and activities in general.

I.

THE BALLOT

*A. Historic Beginnings of the Use of the Ballot in the
American Colonies*

Whether or not secrecy of the ballot is protected by the Constitution of the United States, it clearly is not one of those rights which, like fair trial, has come to us through the traditional common law. Indeed, until recent times secrecy in parliamentary elections did not exist, although the concept of the secret ballot must surely have been known in England for centuries.¹ Be this as it may, the practice was such as to make evident the choice of each individual voter. Originally, parliamentary elections were determined *viva voce* or by a show of hands, the sheriff, as the official in charge of election, deciding and indicating in his return who had been chosen. Although gradual recognition of the right to a poll was accorded² and was fully established by 1696,³ this poll was not secret in character since the name of each

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¹ See MURRAY, A NEW ENGLISH DICTIONARY (1888), definition of "ballot," where the use of the word by Milton and others is shown. The earliest instance given is THOMAS, HIST. ITALIE (1549) referring to Venice.

² BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 157 (1893).

³ 7 & 8 Wm. 3, c. 25 (1896); WIGMORE, THE AUSTRALIAN BALLOT SYSTEM 10 (1889).

voter and the candidate for whom he voted were entered in a poll list maintained by those conducting the election.⁴

In view of the English practice, it is not surprising that the charters granted by the Crown for the establishment of colonies on the North American continent contain nothing which would lead to the conclusion that secrecy in the election of officials was required or even regarded as desirable. It is true that most of the charters indicate that the election of members of the legislative body was contemplated but they are silent as to the manner in which the elections were to be conducted.⁵

However, the tradition of secrecy through the use of the ballot has the sanction of antiquity in this country although it did not come by way of England. In Massachusetts, as early as 1634, the governor and deputy⁶ as well as the assistants were chosen by ballot.⁷ Indeed, throughout the colonial period the use of the ballot in such circumstances as to guarantee substantial secrecy characterized elections of the principal executive officers and the legislators of the New England colonies.⁸ Temporary exceptions to the practice are found, as in Rhode Island, where for a short time beginning in 1715 voters were required to sign their ballots, due to the action of "sundry loose and fractious freemen of said colony, in putting or delivering into the hat sometimes two, three or more votes for one officer. . . ."⁹ This system was soon abandoned, however, because it was found to cause "great dissatisfaction and uneasiness to many of the good people of this colony, who deem it a very great hardship to have their names exposed upon such occasions, to the creating of animosity and heart-burning of their particular friends. . . ."¹⁰ Also, the use of proxy voting necessitated by the expansion of the colonies and the consequent difficulty of requiring all

⁴ BISHOP, *HISTORY OF ELECTIONS IN THE AMERICAN COLONIES* 158 (1893); 7 & 8 Wm. 3, c. 25 (1696).

⁵ The Charter of New England and the Bradford Charter of New Plymouth contained no provision for the election of legislative officers. In several of the early charters, for example, Delaware (1701); New Jersey (1664); North Carolina (1663); Pennsylvania (1682) and Virginia (1621), provision was made for the "choosing" of legislators, while in still others, for example, Georgia (1732) and Massachusetts Bay (1629), provision for "election" is made. See the respective charters as contained in THORPE, *AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS*, 1492-1908 (1909).

⁶ BISHOP, *HISTORY OF ELECTIONS IN THE AMERICAN COLONIES* 141 (1893).

⁷ *Id.* 142.

⁸ *Id.* 141-155.

⁹ 4 RHODE ISLAND COLONIAL RECORDS 195 (1859); BISHOP, *HISTORY OF ELECTIONS IN THE AMERICAN COLONIES* 148 (1893).

¹⁰ 4 RHODE ISLAND COLONIAL RECORDS 207 (1859); BISHOP, *ibid.*

the voters to come in person to the court of general election tended in at least one instance to destroy the secrecy of the ballot so far as those casting proxy votes were concerned.¹¹ But it is fair to state that in the main the element of secrecy was preserved.

Apparently, written ballots were cast in many instances but in some cases other methods were used. Thus, for a period beginning in 1643 the assistants in the Massachusetts Bay Colony were chosen by "Indian beanes, the white beanes to manifest election, the black for blanks."¹² The corn or bean ballot was also used in New Haven, but in Rhode Island and Hartford written ballots were required. The Fundamental Orders of Connecticut in 1638-39 provided that magistrates should be chosen by "one single paper." The name of the candidate was written on the paper to indicate a favorable vote. The blank paper was cast for an unfavorable vote. It was provided that "every one that hath more written papers than blanks shall be a Magistrate for that yeare."¹³

Considerable speculation has arisen regarding the origin of the secret ballot as far as its use in colonial America is concerned. The ballot, of course, was used in Greece and Rome in early times,¹⁴ and northern Europeans at least as early as the sixteenth century were aware of its use in Venice.¹⁵ However, it seems probable that those who later came to New England first observed it in Holland, and particularly in the Dutch churches. Douglas Campbell¹⁶ points out that in Emden which, although not in the Netherlands proper, is culturally Dutch, elections by ballot were held. This town was familiar to the English Puritans, thousands of whom visited the city. William Penn also resided there just prior to going to Pennsylvania. Campbell also

¹¹ The proxy system seems to have been in general use in New England during the colonial period and for some time thereafter. Under this system the votes were generally cast at town meetings and carried to the general court of elections. BISHOP, *HISTORY OF ELECTIONS IN THE AMERICAN COLONIES* 148 (1893) states that in Rhode Island those voting by proxy were required to sign their votes, although this was not the general practice.

¹² 2 *Records of Massachusetts Bay* (1853) 42. Another instance is recorded at page 220, *ibid.*

¹³ 1 THORPE, *AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS* 519 at 520 (1909).

¹⁴ Gosnell, *Article on the Ballot*, 2 *ENCYC. SOC. SCI.* 410 (1930).

¹⁵ *Supra*, note 1.

¹⁶ 2 CAMPBELL, *THE PURITAN IN ENGLAND, HOLLAND AND AMERICA* 431 et seq. (1892). It is also believed that many of the colonial election practices, including the use of the "lot" were derived from Harrington's *OCEANA*. See BISHOP, *HISTORY OF ELECTIONS IN THE AMERICAN COLONIES* 126 (1893); 3 ANDREWS, *THE COLONIAL PERIOD IN AMERICAN HISTORY* 213 (1937).

states that elections of officers by ballot were held in various Dutch churches and that the Puritans were doubtless aware of the practice.

Corroboration of Campbell's theory seems to be furnished not only by the general use of the ballot in New England but also by the recognition of this method of voting in Pennsylvania and to some extent in other proprietary colonies where Puritan influence was substantial. Penn's Frame of Government of 1682 provided that all elections to the council and general assembly should be by ballot.¹⁷ However, it has been stated on apparently reliable authority that in practice the ballot was used in Pennsylvania only when an election *viva voce* or by show of hands was in doubt and that it actually took the place of the English poll.¹⁸ In any event, when the procedure was prescribed by statute in 1706, secrecy depended on the option of the voter, who might use the simple English poll if he wished to do so.¹⁹

In East New Jersey an elaborate system of election to the council was prescribed by the Fundamental Constitutions for the Province in 1683. Certain persons of a group selected by ballot were chosen by lot as being eligible for office. A number of these were proposed for further consideration by "nominators" who themselves had been chosen by the original ballot but had not been selected by the lot. Final selection from among the nominees was also by ballot. Of possible interest to modern students of government was the requirement that the nominators should solemnly declare before the sheriff "that they shall not name any known by them to be guilty for the time, or to have been guilty for a year before, of adultery, whoredom, drunkenness, or any such immorality, or who is insolvent, or a fool. . . ."²⁰

On the other hand, colonies whose governing inhabitants had not been exposed to influences from Holland or other parts of continental Europe appear for the most part to have followed the traditional English procedure. Thus, Virginia, New York (although apparently not without opposition from the Dutch inhabitants, as will appear later²¹) Maryland, Georgia and New Jersey (after the surrender of the proprietary charter in 1701) seem to have conducted their elections

¹⁷ 5 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 3052 at 3059 (1909).

¹⁸ BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 167-169 (1893).

¹⁹ 4 Anne, c. 23, as printed in LAWS of the Province of Pennsylvania (Bradford, 1714) p. 53.

²⁰ 5 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 2574 at 2575 (1909). It appears that Dutch and New England Puritan settlements had been established in this area during the seventeenth century. 3 ANDREWS, THE COLONIAL PERIOD IN AMERICAN HISTORY 141 (1937).

²¹ *Infra*, pp. 185, 186.

through the mechanism of the voice vote and the English poll.²² North Carolina in 1760 provided that a poll was to be maintained and that votes were to be given openly.²³ South Carolina, however, was an exception to the general practice, since it was provided that each elector should vote on a "piece of Paper, rolled up, wherein is written the Names of the Representatives he votes for, and to which Paper the Elector shall not be required to subscribe his Name. . . ." ²⁴

During the colonial period, then, both the secret ballot and the traditional English system were in general use and to some extent, as in Pennsylvania, a fusion of the two systems was in operation. However, the written ballot seems to have appealed to the colonists generally as it became more familiar to them, for an examination of the early state constitutions indicates that the use of the written ballot for the purpose of electing state officers was quite generally required. This was true, either expressly or by clear implication as to Connecticut, Georgia, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Rhode Island and Vermont.²⁵ In New York, the legislature was

²² Virginia Laws 1662-1715 (1727) p. 195. This law, enacted in 1699, follows and refers to the act of 7 & 8 Wm. 3, c. 25 (1696); New York Acts, 7 Wm. & Mary (Sept. 5, 1700) as printed in Acts of Assembly 1691-1725 (Bradford, 1726) p. 32; Maryland, Act of 1716, c. XI as printed in 1 Laws of Maryland (Nicklin, 1811) p. 137; Georgia, Act of June 9, 1761 as printed in BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 279 (1893); New Jersey, Act of Aug. 13, 1725 as printed in Acts of the General Assembly of the Province of New Jersey, 1702-1776 (Allinson, 1776).

²³ Act 33 Geo. 2, c. 1 (1760) as printed in Complete Revisal of the Acts of Assembly of North Carolina (Davis, 1773) 247.

²⁴ Act 1721 as printed in Laws of the Province of South Carolina (Trott, 1736) pp. 373, 374. It is not clear why South Carolina should have differed in this respect from the other proprietary colonies. A possible explanation, which would lend support to the Campbell theory, is that Puritans and other groups of Dissenters made up some 40 per cent of the population, and that the Huguenots were also influential in the affairs of the colony. See 3 ANDREWS, THE COLONIAL PERIOD IN AMERICAN HISTORY 242 (1937).

²⁵ Connecticut Const. (1818) Art. VI, § 7, 1 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 536 at 544 (1909); Georgia Const. (1777) Art. IX, 2 id. 777 at 779. [For some reason Georgia changed its position in 1798 when Art. IV, § 2 of the constitution provided for a *viva voce* vote unless the legislature should otherwise direct. In February, 1799 the legislature passed a law specifying *viva voce* voting but this was repealed and the ballot required in December of the same year. See Geo. Laws (1799) as printed in Marbury and Crawford's Digest 199, 202 (1802)]. Massachusetts Const. (1780) c. I, § II, Art. II; c. I, § III, Art. III, 3 THORPE, id. 1888 at 1895, 1898; New Hampshire Const. (1784), Part II, 4 THORPE, id. 2453 at 2459, 2461; North Carolina Const. (1776) Arts. II and III, 5 THORPE, id. 2787 at 2790; Pennsylvania Const. (1776) § 9, 5 THORPE, id. 3081 at 3084; Rhode Island Const. (1842) Art. VIII, §§ 2, 3, 6 THORPE, id. 3222 at 3230; Vermont Const. (1777) c. II, § VIII, 6 THORPE, id. 3737 at 3742.

permitted to provide for ballot voting and to abolish that method if it should "be found less conducive to the safety or interest of the State than the method of voting *viva voce*."²⁶ Delaware, New Jersey and Virginia made no provision for the manner of voting in the earliest constitutions, although in 1792 Delaware joined the majority of the states by adopting a constitutional provision requiring the use of the ballot.²⁷ South Carolina provided that elections should be conducted in accordance with the provisions of the election law previously referred to.²⁸ Only Maryland, in 1776, insisted on the retention of *viva voce* voting for delegates to the legislative body.²⁹

Modern state constitutions very generally require that elections of state officers be by ballot.³⁰ In a few instances the legislature is empowered to prescribe other methods of voting but in each such case it is specified that secrecy must be preserved,³¹ and the legislatures have required the use of the ballot or of voting machines.³² It is clear that the principle of voting by ballot except in some instances involving purely local offices has now become definitely established in the United States as a result of action in all of the states presumably occasioned by popular demand for this method of expressing the will of the electorate.

²⁶ New York Const. (1777) Art. VI, § 5 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 2623 at 2630 (1909). Apparently the legislature originally provided for the use of the ballot in the election of the governor and the lieutenant governor only. In 1787 the use of the ballot was provided for in elections of assemblymen. *Ibid*.

²⁷ Del. Const. (1792) Art. IV, § 1, 1 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 568 at 574 (1909).

²⁸ Const. (1776) Art. XI, 6 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 3245 (1909); *supra*, note 24.

²⁹ Md. Const. (1776) Part 2, Arts. II, IV, XIV, 3 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 1686 at 1691, 1693 (1909).

³⁰ See LUDINGTON, AMERICAN BALLOT LAWS, 1888-1910 (1911), where the various constitutional provisions are set out. After the publication of this work, New Mexico became a state and its constitution contains such a provision. N.M. Const. (1911) Art. VII, § 5. New Jersey seems to have no constitutional provision requiring the use of the ballot but its laws provide for the use of ballots and voting machines. New Jersey Rev. Stat. (1937) 19:14, 19:48. The Oregon Constitution of 1857, Art. II, § 15 provides that "... in all elections by the people, votes shall be given openly or *viva voce*, until legislative assembly shall otherwise direct." The legislature has provided for the use of ballots. 5 Ore. Comp. Laws Ann. (1940) §§ 81-1501 et seq.

³¹ Ariz. Const. (1911) Art. VII, § 1; Cal. Const. (1879) Art. II, § 5 (as amended, Nov. 3, 1896); N.Y. Const. (1938) Art. II, § 7; Pa. Const. (1873) Art. VIII, § 4, as amended 1901.

³² Ariz. Code Ann. (1939) §§ 55-401 et seq.; Cal. Elections Code (Deering, 1939) §§ 3700 et seq.; 17 N.Y. Consol. Laws (McKinney, 1943) Arts 5, 9; 25 Pa. Stat. (Purdon, 1938) 2961 et seq.

B. *Secrecy as an Object of Ballot Voting*

The evidence shows almost beyond question that, in requiring the use of the ballot, the framers of the constitutions intended to preserve the New England tradition of secrecy rather than simply to create a means by which votes could be cast and counted more readily. The meaning attached to the word "ballot" by general usage in itself indicates the truth of the assertion.³³ Confirmation is also afforded by the provisions in modern constitutions, previously referred to,³⁴ that other methods of voting may be provided by the legislature only if secrecy is preserved. In addition, early cases in which the term as used in state constitutions is interpreted uniformly recognize that secrecy, rather than the form in which the vote is cast, is the controlling factor.

These cases, although neither numerous, nor, for the most part, sufficiently old to constitute contemporaneous evidence of constitutional meaning can, it is believed, be regarded as authoritative in view of the uniformity of the result reached. They are chiefly concerned either with the question of the privilege of a voter to refuse to reveal how he has exercised his franchise³⁵ or with the use of voting machines instead of the written ballot.³⁶ Cases in the former category recognize the voter's privilege as being founded on the policy, implicit in the constitutional provisions, that elections by ballot shall be secret. Thus *Christiancy, J.*, concurring in *People v. Cicott*, states:

"The object of this requirement [voting by ballot] . . . is too plain to be misunderstood. It was to secure the entire independence of the electors, to enable them to vote according to their own individual convictions of right and duty, without the fear of giving offense or exciting the hostility of others. And with this view the right is secured to every voter of concealing from all others, or from such of them as he may choose, the nature of his vote, or for what person or party he may have voted."³⁷

³³ See Wigmore, "Ballot Reform: Its Constitutionality," 23 AM. L. REV. 719 at 725 (1889) where numerous examples supporting this conclusion are given.

³⁴ *Supra*, note 31.

³⁵ *Denio, Ch. J.*, in *People v. Pease*, 27 N.Y. 45 at 81 (1863). This is a dissenting opinion, but the statement referred to is apparently accepted by the court. *People v. Cicott*, 16 Mich. 283 at 311, 312 (1868); *Williams v. Stein*, 38 Ind. 89 at 95 (1871). For later cases recognizing the same principle see 90 A.L.R. 1362 (1934).

³⁶ *Ohio ex rel. Automatic Registering Machine Co. v. Green*, 121 Ohio St. 301, 168 N.E. 131 (1929); *Lynch v. Malley*, 215 Ill. 574, 74 N.E. 723 (1905); *Spickerman v. Goddard*, 182 Ind. 523, 107 N.E. 2 (1914); *State ex rel. Fenner v. Keating*, 53 Mont. 371, 163 P. 1156 (1917). See 66 A.L.R. 855 (1930). An early case embodying the same principle is *Temple v. Mead*, 4 Vt. 535 (1832), holding that a printed ballot rather than one written by hand satisfied the requirement of a written ballot.

³⁷ 16 Mich. 283 at 311, 312 (1868).

Opinions dealing with the use of voting machines also confirm the view previously stated. They are based on the proposition that the word "ballot" as used in constitutional provisions is not to be taken literally in the sense of requiring a written vote or any other particular form, but rather to signify secret as opposed to *viva voce* or other types of public voting.³⁸

However, although the constitutional policy is clear, it is equally evident that constitutional provisions cannot in themselves guarantee the secrecy which they are designed to attain. Even though, as Cooley has stated, ". . . all devices by which party managers are enabled to distinguish ballots in the hand of the voter, and thus determine whether he is voting for or against them, are opposed to the spirit of the Constitution. . . ." ³⁹ The general requirement of the use of the ballot in popular elections did not in fact result in secrecy in any substantial sense.

The written ballot, as opposed to *viva voce* voting, makes secrecy possible in that the choice of the voter is not necessarily made public. However, it can be effective in securing secrecy only if it is employed in such a way as to prevent the action of the voter from becoming known. It was at this point that the system broke down. Early election laws did not prescribe the form or appearance of the ballot, nor did they require ballots to be furnished by public authority. As a result, candidates or political organizations would provide voters with ballots which had been prepared before hand and which could be identified by their shape or color. Since the voters were not sufficiently protected from public view while casting their ballots, watchers could determine what ballots were being cast and hence how the electors had voted.⁴⁰ Consequently, the element of secrecy was almost entirely lacking, even though in theory it was regarded as the essential feature of voting by ballot.

Thus the ballot, which was designed to secure honest elections through insuring secrecy, became an instrument of corruption. Although in colonial times rudimentary forms of ballot box stuffing may have been in existence,⁴¹ it was not until the nineteenth century that corrupt elections became a matter of great popular indignation. The

³⁸ Supra, note 36.

³⁹ COOLEY, CONSTITUTIONAL LIMITATIONS, 7th ed., 912 (1903).

⁴⁰ EVANS, A HISTORY OF THE AUSTRALIAN BALLOT IN THE UNITED STATES 6 et seq. (1917).

⁴¹ For example, the instance in Rhode Island referred to supra, p. 182.

growth of cities, the influx of ignorant voters and the development of political machines coupled with an increase in the number of officials chosen by popular vote made corruption easy as well as profitable. The unofficial printed ballot facilitated the process, since voters could be provided with the ballot to be cast and any failure to obey orders could easily be detected. Furthermore, other types of fraud, such as inserting the names of certain candidates on ballots purporting to be those of the opposition, could be perpetrated.⁴² The existence of such conditions led to many complaints, such as that of the Citizen's Municipal Reform Association, which stated in a memorial to the Pennsylvania Constitutional Convention of 1873: "It is not too much to say that in Philadelphia . . . the perpetration of these frauds has been reduced to a science, and systematized to that degree that the confidence of the people in the result of an appeal to the ballot box is being undermined with dangerous rapidity."⁴³

It should be noted, however, that the system of ballot voting failed to secure honest elections, not because it was inherently objectionable but rather because in practice it failed to attain the ends sought by its proponents. The same sort of corruption, although its form was somewhat different, prevailed in England, where the poll was in operation. There, while bribery was rife, intimidation was also present perhaps to an even greater degree than was the case in the United States. Jeremy Bentham noted the prevalence of both of these factors, which he attributed to lack of secrecy, and as a result he advocated secret voting as the only effective means of securing substantial freedom of suffrage.⁴⁴ Many other British publicists reached the same conclusion.⁴⁵ Thus, both in Great Britain and the United States observers saw that some means of guaranteeing secrecy was essential and that existing methods of voting failed to provide it.

⁴² EVANS, A HISTORY OF THE AUSTRALIAN BALLOT IN THE UNITED STATES 10 et seq. (1917).

⁴³ 1 DEBATES, CONST. CONV. OF PENNSYLVANIA 216 (1873). It is interesting to note that the abandonment of secrecy was suggested as a cure for this situation, and that a proposal was offered to the convention that voters be required to sign their ballots. See 5 id. 134-140. This proposal was not adopted, but the convention did propose, and the people adopted, a provision that "any elector may write his name upon his ticket." Pa. Const. (1873) Art. VIII, § 4. This was changed in 1901, and the legislature was directed to maintain the secrecy of the ballot.

⁴⁴ 3 BENTHAM, WORKS, Bowring ed., 487 (1843).

⁴⁵ Including James Mill, Peel, O'Connell, Bright, Lord Russell, Grote and Macaulay. WIGMORE, THE AUSTRALIAN BALLOT SYSTEM 13 (1889).

In the meantime, a device had been developed in Australia, where similar conditions existed, which seemed to offer a solution to the problem. The so-called Australian Ballot was adopted in 1856 by Victoria and in 1857-1858 by South Australia.⁴⁶ Although variations have since been introduced, the essentials of this form were the printing and distribution of uniform official ballots at public expense, the establishment of voting places where the voter was required to mark his ballot privately just before casting it, and the provision that election officials were prohibited from revealing how individual votes were cast.⁴⁷ In effect, the use of the Australian system provided for *compulsory* secrecy. It made the use of bribery and intimidation to the extent which previously had characterized popular elections much more difficult.

The Australian Ballot quickly found favor with those who advocated electoral reform. After an elaborate investigation it was adopted in Great Britain through the passage of the Ballot Act of 1872⁴⁸ which, although its operation was originally limited to a period of eight years from its passage, was subsequently re-enacted, so that Maitland remarked, "... I suppose that we must regard it as having become in fact a permanent part of the constitution."⁴⁹ In the United States, agitation apparently commencing in 1882 resulted in the enactment during 1888 of secret ballot laws, similar to the Australian act, in Massachusetts and Kentucky, the latter law being confined to municipal elections in Louisville. In New York, a law passed in the same year was vetoed by the governor.⁵⁰ Today, the system is in almost universal use throughout the United States and was in use at least until recent years, throughout western Europe.⁵¹

⁴⁶ EVANS, A HISTORY OF THE AUSTRALIAN BALLOT IN THE UNITED STATES 17 (1917).

⁴⁷ Id. 27-35; Dana, "The Practical Working of the Australian System of Voting in Massachusetts," 2 ANNALS 733, 736 (1892). See generally, McCrary, LAW OF ELECTIONS, 4th ed., c. 22 (1897).

⁴⁸ 35 & 36 Vict., c. 33. See WIGMORE, THE AUSTRALIAN BALLOT SYSTEM 14 (1889); EVANS, A HISTORY OF THE AUSTRALIAN BALLOT IN THE UNITED STATES 17, 18 (1917); I LOWELL, THE GOVERNMENT OF ENGLAND 219 et seq. (1912).

⁴⁹ MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND 370 (1909).

⁵⁰ EVANS, A HISTORY OF THE AUSTRALIAN BALLOT IN THE UNITED STATES 18-20 (1917).

⁵¹ See LUDINGTON, AMERICAN BALLOT LAWS, 1888-1910 (1911) for a collection of the state laws. It is said that all but three states (South Carolina, Georgia and Delaware) have now adopted the Australian system. Gosnell, Article on the Ballot, 2 ENCYC. SOC. SCI. 410 (1930). It appears that two of these, Georgia and Delaware, have joined the majority. Ga. Ann. Code (Park, 1936) tit. 34, §§ 1901 et seq.; Del. Rev. Code (1935) c. 60. The Georgia law, however, is not operative in any county until its adoption has been recommended by two consecutive grand juries of such county.

C. Secrecy after the Ballot has been Cast

In addition to the principle of ballot voting previously established, the widespread legislative action referred to in the preceding section established the further principle that compulsory secrecy in the casting of votes is an essential element of the process of popular election. The element of secrecy is also preserved after the ballot has been cast. Cases involving the legality of elections raise the problem and delineate the extent of the protection accorded.

Even before the advent of the Australian system, judicial decisions in the United States had established the rule that, where elections were conducted by ballot, legal voters could not be compelled to reveal their votes. Perhaps the earliest case is that of *Johnston v. Charleston*,⁵² decided in 1795. There, in an election contest involving rival claimants to a municipal office, the contention was made that the city council should swear the voters and compel them to state for whom they had voted. The court refused to follow this argument, stating, according to the reporter,

"That with respect to swearing the voters or compelling them to declare for whom they gave their votes, it was a kind of inquisitorial power, unknown to the principles of our government and constitution, and might be highly injurious to the suffrage of a free people. . . ." ⁵³

The same result was reached by the Michigan court in the case of *People v. Cicott*, previously referred to; ⁵⁴ and in *People v. Pease*,⁵⁵ a New York case, the privilege of the voter to remain silent if questioned as to his vote was recognized by clear implication. Cases from various other jurisdictions have reached the same conclusion ⁵⁶ and the practice of legislative committees seems in general to have followed the rule adopted by the courts.⁵⁷

Rather general recognition of the privilege is also found in statutes establishing the Australian system. The original South Australian

⁵² 1 Bay (S.C.) 441 (1795).

⁵³ Id. at 442.

⁵⁴ Supra, note 37.

⁵⁵ 27 N.Y. 45 (1863). The court stated that the voter might be asked for whom he had voted but if he refuses to say, his vote might be shown by circumstantial evidence.

⁵⁶ See 90 A.L.R. 1362 (1934). Most of the cases cited appear to have been decided before the adoption of the Australian system in the respective states. No case has been found which denies the privilege to a legal voter.

⁵⁷ "When the voting is by ballot, a voter is not compellable to disclose the character of his vote, or to testify for whom he voted, on a given occasion." CUSHING, LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES, 9th ed., 73 (1899).

Ballot law⁵⁸ has no specific provision dealing with the problem, although the existence of the privilege seems to be implied necessarily by the statutory language. The British Act of 1872 expressly provides that no person who has voted at an election shall, in any legal proceeding, be required to state for whom he has voted.⁵⁹ In Canada, the Dominion Elections Act of 1920 substantially adopts the language of the British Act⁶⁰ as does a law of Ontario.⁶¹ The pattern in the United States is somewhat different. A number of states have recognized the privilege by implication through provisions that, if it is determined that a person has voted *illegally*, he may be questioned as to the candidate for whom his ballot was cast.⁶²

The last sentence indicates that legislation on the subject has confined the privilege to the legal voter. In this respect, the statutes follow the case law which, even in the absence of legislation, has developed the rule that only legal voters are protected,⁶³ subject, of course, to the privilege against self-incrimination.⁶⁴ Such a qualification of the privilege seems clearly justified. Protection of the legal voter is necessary in order to insure honest elections, free from intimidation, bribery and other forms of corrupt influence. However, if a person not qualified to vote has succeeded in doing so, an inquiry into his action is necessary if dishonesty at the polls is to be discovered and punished. A much more doubtful limitation of the privilege of non-disclosure is found in the practice of legislative bodies, followed by some courts, of permitting the introduction of circumstantial evidence indicating how qualified voters have exercised the franchise.⁶⁵ Apart

⁵⁸ See EVANS, A HISTORY OF THE AUSTRALIAN BALLOT IN THE UNITED STATES, Appendix A (1917). Section 45 of the act states that the court created for deciding election contests shall have power to inquire "simply into the identity of the persons, and whether their votes were improperly admitted or rejected, assuming the roll to be correct."

⁵⁹ 35 & 36 Vict., c. 33, § 12.

⁶⁰ Laws of Canada, 10 & 11 Geo. 5, c. 46 (1920).

⁶¹ Ont. Rev. Stat. (1937) c. 8, § 164.

⁶² Alabama Code Ann. (1940) tit. 17, § 233; Idaho Code Ann. (1932) § 33-1717; Kan. Gen. Stat. Ann. (1935) § 25-1426; Neb. Rev. Stat. Ann. (1943) § 32-1028; New Jersey Rev. Stat. (1937) § 19:29-7; N.C. Gen. Stat. Ann. (Michie, 1943) § 120-11.

⁶³ The cases are collected in 90 A.L.R. 1362 (1934).

⁶⁴ See 8 WIGMORE, EVIDENCE, 3d ed., § 2214 (1940). With the exception of the New Jersey law, the statutes cited *supra*, note 62, provide for immunity for those required to testify.

⁶⁵ See CUSHING, LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES, 9th ed., 73 (1899); McCRARY, LAW OF ELECTIONS, 4th ed., 363 (1897); *People v. Pease*, 27 N.Y. 45 (1863); *People v. Teague*, 106 N.C. 576, 11 S.E. 665 (1890); COOLEY, CONSTITUTIONAL LIMITATIONS, 7th ed., 913 (1903).

from the unreliability of such evidence, it would seem to lessen the protection which should be accorded the voter without a sufficient compensating advantage to the public in the prevention of corrupt practices. However, as Wigmore states,⁶⁶ the matter seems to be of little practical importance.

In view of the principle of compulsory secrecy introduced by the adoption of the Australian system it is somewhat surprising to note that the cases have almost uniformly held the privilege of nondisclosure to be one which may be waived by the voter.⁶⁷ In this respect it differs, for example, from the duty of secrecy which is placed upon a member of a grand jury. It has been argued that from the standpoint of public policy, the secrecy of the ballot is so important that its waiver by an individual voter should not be permitted.⁶⁸ However, the counter argument which justifiably has had more weight with the courts is that it should be possible through voluntary action on the part of witnesses, to bring to light and punish dishonest practices. Secrecy, after all, is but a means of securing honest elections. As McCrary states:

"It would be a strange perversion of the rule which preserves the secrecy of the ballot for the purpose of encouraging free and independent voting, to make it serve to shield the fraud and corruption of those who would, by tampering with or changing ballots after they are cast, altogether deprive the majority of the electors of their choice."⁶⁹

The fact that the voter is permitted to waive his privilege might, at first impression, lead to the conclusion that secrecy is accorded solely in the individual interest of the voter himself. Some evidence exists in support of this notion. In colonial Rhode Island, as has previously been stated,⁷⁰ the requirement of secrecy was reintroduced in order to save the electors from embarrassment. The language of the cases cited above⁷¹ tends to indicate that the privilege exists in order to prevent

⁶⁶ 8 WIGMORE, EVIDENCE, 3d ed., § 2214 (1940).

⁶⁷ 90 A.L.R. 1362 at 1365 (1934).

⁶⁸ Thus, the Ontario Court of Appeals has held, in interpreting the statute referred to *supra*, note 61, that the policy of the law requires the complete exclusion of the testimony of the voter. In *re Lincoln Election Petition*, 4 Ont. App. Rep. 206 (1879). A lower court in Pennsylvania reached the same conclusion under a Pennsylvania law which allowed the questioning of illegal voters. *Fowler v. Feltholl*, (Pa. Com. Pl. Schuylkill Co. 1877) 1 Leg. Rec. Rep. 145, 152. In *Major v. Barker*, 99 Ky. 305, 35 S.W. 543 (1896), the Kentucky court stated that the general policy of secrecy prevented the voluntary disclosure by the voter of how his vote was cast.

⁶⁹ LAW OF ELECTIONS, 4th ed., 362 (1897).

⁷⁰ *Supra*, p. 182.

⁷¹ *Supra*, notes 54, 55, 56.

reprisals against recalcitrant voters. However, further consideration shows that the primary interest safeguarded is a social rather than an individual one. The almost universal requirement of the secret ballot, as exemplified by the Australian system, came into existence, as has been stated, because of the need to preserve the honesty and freedom of elections. It was but one of a number of devices created for the purpose of outlawing corrupt and illegal practices.

For the purposes of this discussion corrupt practice legislation need not be considered to any great extent. In order to fit our problem into its context, however, certain observations should be made. The extension of the system of popular suffrage created opportunities for corruption which raised serious questions as to its effectiveness as a means of expressing the true will of the electorate. Violence, bribery, fraud and intimidation were common. Huge sums of money were used for the purpose of buying votes. Voters were intimidated by landlords, employers and others having special interests in the outcome of elections. Corporations contributed heavily to political parties in the expectation of future favors. Blocks of votes were delivered *en masse* by political bosses. Ballot boxes were stuffed, fraudulent ballots were circulated and many enthusiasts carried out very literally the injunction to "vote early and often."⁷²

Because of these conditions, a growing demand for reform resulted in the enactment of elaborate legislative schemes to regulate election practices. Many of the provisions are parts of general laws which impose compulsory secrecy on voters and elections officials. In the main, in addition to prohibiting bribery and similar offenses, such legislation involves limitation of expenditures for campaign purposes, regulation of contributions and disbursements, proper designation of campaign literature and provision for publicity in connection with political contributions.⁷³ Every state in the union has enacted legislation on this subject, as has the federal government.⁷⁴ Similar laws have been adopted in Great Britain⁷⁵ and in the British Commonwealth of Nations.⁷⁶

⁷² See generally, WIGMORE, *THE AUSTRALIAN BALLOT* 12-14 (1889); EVANS, *A HISTORY OF THE AUSTRALIAN BALLOT IN THE UNITED STATES* 6-16 (1917); I LOWELL, *THE GOVERNMENT OF ENGLAND* 219-223 (1912).

⁷³ BEST, *CORRUPT PRACTICES AT ELECTIONS* iii (1937).

⁷⁴ The laws are collected in BEST, *CORRUPT PRACTICES AT ELECTIONS* (1937).

⁷⁵ Corrupt and Illegal Practices Act, 1883, 46 & 47 Vict., c. 51.

⁷⁶ For example, Canada, Dominion Elections Act, 1920, Rev. Stat. of Canada, c. 53 (1927); Australia, Commonwealth Electoral Act, 1927, 1 Commonwealth Acts, 1901-1935 (1936) 842; New Zealand, Electoral Act, 1927, New Zealand Laws, 18 Geo. 5, No. 44 (1927).

Obviously, then, the social interest in honest elections is of the greatest importance. One of the means by which that interest can be protected is through the secrecy of the ballot which, in turn, is accomplished by requiring secrecy from the individual voter at the time the ballot is cast and by according him the privilege of secrecy thereafter. But the extent of the privilege depends primarily on considerations of social utility rather than on the convenience of the individual. In a sense, protection is always granted to individual interests for social reasons, but here it would seem that, unlike, for example, situations involving the privilege against self-incrimination or the right of free speech, the social interest is relatively more immediate and direct than is that of the individual.

*D. Extent of Protection of Secrecy of the Ballot under the
United States Constitution*

The evidence presented in the foregoing pages establishes the fact that secrecy in voting both at the time the ballot is cast and thereafter, unless the voter chooses to waive his privilege, is now accorded almost universal recognition by the constitutions, statutes or case law of the various American and British jurisdictions. It now remains to discover, if possible, the extent to which this principle is given protection by the Constitution of the United States.

To begin with, Congress unquestionably may protect the secrecy of the ballot by appropriate legislation, not only against governmental intrusions, but against individual action as well, as far as elections to membership in that body are concerned. Article I, section 4 of the Constitution clearly indicates this in connection with members of the House of Representatives,⁷⁷ and the Seventeenth Amendment, providing for popular election of senators, implies a similar result with respect to such election.⁷⁸ The power of Congress also extends to the process by which presidential electors are chosen, at least to the extent necessary to maintain the secrecy of the ballot and hence, the honesty of elections.⁷⁹

⁷⁷ Paragraph 1 of this section is as follows: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the places of choosing Senators." In 1870 a law dealing extensively with corrupt practices in Congressional elections was enacted. 16 Stat. L. 144 (1870). See *United States v. Gradwell*, 243 U.S. 476 at 482, 37 S.Ct. 407 (1917).

⁷⁸ This amendment does not expressly authorize Congressional regulation but since, as is pointed out in the text, a constitutional right is created, it seems evident that the power to protect the exercise of that right must exist. The Federal Corrupt Practices Act, 2 U.S.C. (1946) § 241 et seq., covers senatorial elections. See *infra*, note 79.

⁷⁹ *Burroughs and Cannon v. United States*, 290 U.S. 534, 54 S.Ct. 102 (1934).

Basically, the legal justification of federal control over Congressional elections is that the right of electors qualified by state law to vote in such elections is derived directly from the Constitution itself and not from the states. Although, as just indicated, the enjoyment of the right is limited to those who are qualified as electors of the most numerous branch of the state legislature,⁸⁰ this circumstance does not affect its fundamental character.⁸¹ The right being thus established, Congress clearly has the power to provide for its protection.⁸² In the case of presidential electors, the rationalization is somewhat different. Here, the power of the federal government to protect the election of its chief executive from corruption seems to derive not from any specific constitutional grant but rather from a general, perhaps a "natural law," principle that any government has an inherent power to take measures necessary for self protection.⁸³ If, as the case of *Burroughs and Cannon*⁸⁴ established, Congress may validly regulate campaign contributions in connection with such elections, it seems obvious that provisions requiring secrecy in voting may also be enacted.

Although, as far as has been discovered, the point has not been directly decided, existing legislation in itself probably would protect against both governmental and individual interference with the secret ballot in federal elections.⁸⁵ In this connection it is necessary to consider the character of the right established by the Constitution. Obviously, more is involved than the mere placing of a marked ballot in a box. The right to vote includes the right to have the vote counted⁸⁶ and also the right to vote *freely*, that is, without being subjected to coercion or undue influence. This is particularly important because not only is the interest of the individual involved but also the social interest in the selection of governmental officials by honest methods. As Justice Miller stated in *Ex Parte Yarbrough*:

"This duty [of protection of the voter by the government] does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall

⁸⁰ Const., Art. I, § 2.

⁸¹ *Ex parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152 (1884).

⁸² *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617 (1892).

⁸³ *Burroughs and Cannon v. United States*, 290 U.S. 534, 54 S.Ct. 102 (1934).

⁸⁴ *Ibid.*

⁸⁵ Section 19 of the Criminal Code, 18 U.S.C. (1946) § 51, in substance penalizes interference with any citizen "in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."

⁸⁶ *United States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904 (1915).

be free from the adverse influence of force and fraud practised on its agents, and that the votes by which its members of Congress and its President are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.”⁸⁷

If, as has been suggested, the almost universal experience of the states and, indeed, of the English speaking world has been that freedom in the exercise of the franchise, as well as fairness in elections, can be attained only through preserving the principle of secret voting, it follows that the right to vote freely, as established by the Constitution, means the right to vote secretly. Hence, interference with secret voting in federal elections, at least, would be interference with a constitutional right and would also constitute violation of existing civil rights legislation.

The conclusion just stated has an important bearing on the most difficult problem involved in this aspect of the discussion. To what extent does the Constitution of the United States protect the secrecy of the ballot in state elections? At the outset, it must be observed that under the Constitution the states are left free to determine the qualifications of electors, except for the limitations as to race and sex imposed by the Fifteenth and Nineteenth Amendments. Literacy tests, property requirements and other conditions to voting have been imposed by the states and are valid unless used as means of violating the amendments just mentioned.⁸⁸ Possibly a state might even abolish the popular election of state officers entirely without running afoul of any judicially enforceable constitutional provision.⁸⁹ All of this makes difficult the conclusion that state elections can be regarded as subject to constitutional protection except in the specific situations named.

However, reasonable grounds exist to support the conclusion that all those who are regarded by the state as being qualified electors are constitutionally entitled as against the state to vote secretly and to refuse to reveal how they have voted. Secret voting (including the privilege of nondisclosure) may be regarded as a “liberty” protected

⁸⁷ 110 U.S. 651 at 662, 4 S.Ct. 152 (1884).

⁸⁸ *Breedlove v. Suttles*, 302 U.S. 277, 58 S.Ct. 205 (1937); *Pope v. Williams*, 193 U.S. 621, 24 S.Ct. 573 (1904). See *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926 (1915).

⁸⁹ Although it might be argued that popular election of major state officials is included in the concept of a “republican form of government” guaranteed by Article IV, § 4 of the Constitution, this would appear to be a political question which the courts would not decide. See *Luther v. Borden*, 7 How. (48 U.S.) 1 (1849).

against state invasion by the Fourteenth Amendment and by civil rights legislation enacted thereunder.⁹⁰

Probably the most useful analogy which can be offered in support of this conclusion is to be found in the cases protecting persons accused of crime from state action lacking the elements of "fair trial." Although the development of the fair trial rule by the Supreme Court of the United States has been criticized by its members⁹¹ as well as by others,⁹² it is sufficiently well established to serve as a basis for solving the problem now under discussion. Various formulations of the rule have been made, but for present purposes it may be summarized as follows: Due process of law in the trial of criminal cases does not require a state to observe each of the requirements of the federal bill of rights, but it does require a state to conduct the trial in accordance with "those canons of decency and fairness which express the notions of justice of English speaking peoples."⁹³ As Justice Frankfurter has said, in discussing the rule,

"It [the due process clause] expresses a demand for civilized standards of law. It is thus not a stagnant formulation of what has been achieved in the past but a standard for judgment in the progressive evolution of the institutions of a free society."⁹⁴

Examples of the rule's application are numerous. Perhaps the most pertinent have to do with the institution of trial by jury. Although a state may, apparently, deny an accused person a jury trial entirely, if a jury trial is granted, the selection of the jury must be conducted in a manner calculated to secure an impartial body from which no class of persons has been arbitrarily excluded. Furthermore, the jury must be

⁹⁰ It has apparently been established that the general right to vote is not a "privilege or immunity" of citizens of the United States, this right (as distinct from the right of a qualified elector to vote for federal officials) being derived from the states and not from the Federal Constitution. *Minor v. Happersett*, 21 Wall. (88 U.S.) 162 (1875); *Breedlove v. Suttles*, 302 U.S. 277, 58 S.Ct. 205 (1937). Section 20 of the Criminal Code, 18 U.S.C. (1946) § 52, however, makes it an offense for one, under color of law, to deprive any inhabitant of a state of any right, privilege or immunity secured or *protected* by the Constitution. This would reach and punish "state action" in violation of the Fourteenth Amendment when such action is through individuals. See *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031 (1945).

⁹¹ See dissenting opinion of Black, J., in *Adamson v. California*, 332 U.S. 46 at 68, 67 S.Ct. 1672 (1947).

⁹² See Green, "The Bill of Rights, the Fourteenth Amendment and the Supreme Court," 46 MICH. L. REV. 869 (1948).

⁹³ Frankfurter, J., concurring in *Adamson v. California*, 332 U.S. 46, 59 at 67, 67 S.Ct. 1672 (1947).

⁹⁴ *Malinski v. New York*, 324 U.S. 401, 412 at 414, 65 S.Ct. 781 (1945) (concurring opinion).

free from mob domination and must be allowed to reach a verdict without being made subject to coercion.⁹⁵ In other words, trial by jury means both more and less than a ritual before twelve men in a court room. It must be characterized by the presence of those incidents which historically have been recognized as substantial rather than merely formal requisites of a fair proceeding.

On the same basis it should be concluded that even though a state may abolish or limit the institution of popular election, and even though it may determine the qualifications of electors, if it does permit elections it must, in conducting them, as in the administration of the criminal law, observe "those canons of decency and fairness which express the notions of justice of English speaking peoples."⁹⁶ If the principle of secret voting as previously described can be regarded as a fundamental attribute of popular elections, it should also be regarded as falling within the protection of the due process clause of the Fourteenth Amendment. This conclusion should follow even though serious questions may be raised as to the possibility of protecting the liberty as a practical matter in view of the fact that a state might avoid compliance simply by failing to provide machinery for an election by ballot. Although there are instances in which obedience to the mandate of the court has been refused,⁹⁷ it should not be presumed that in this day, the doctrine of nullification would be adhered to by any state.

Admittedly, as was pointed out at the beginning of the discussion,⁹⁸ secret voting is not an ancient liberty which has come to us through the traditional common law. However, the Fourteenth Amendment does not extend its protection merely to those rights and liberties which have existed for centuries. It also, to repeat the words of Justice Frankfurter, constitutes "a standard for judgment in the progressive evolution of the institutions of a free society."⁹⁹ The comparative novelty of secret voting in the sense of its universal recognition should not in itself prevent its

⁹⁵ See Nutting, "The Supreme Court, the Fourteenth Amendment and State Criminal Cases," 3 *UNIV. CHI. L. REV.* 244 at 251, 252 (1936).

⁹⁶ *Supra*, note 93.

⁹⁷ Charles Warren found that seven states (Virginia, Ohio, Georgia, Kentucky, South Carolina, California and Wisconsin) in the years between 1789 and 1860 denied the constitutional right of the Supreme Court of the United States to decide cases on writs of error to state courts. In some instances, notably that occurring in Georgia where a defendant was executed as a result of a proceeding under an unconstitutional statute, states have defied the mandate of the court. See Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-fifth Section of the Judiciary Act," 47 *AM. L. REV.* 1 (1913).

⁹⁸ *Supra*, p. 181.

⁹⁹ *Supra*, p. 198.

incorporation into the body of liberties enjoying constitutional protection. As Justice Stone said in *United States v. Classic*,

"... In determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government."¹⁰⁰

Clearly, the judgment of English speaking peoples, as expressed in their constitutions, laws and judicial decisions, throughout the last half century, at least, has been that secrecy in voting is a fundamental element of popular elections. It is secured by laws requiring such secrecy when the vote is cast and by decisions and statutes granting the voter a privilege against compulsory disclosure thereafter. To make this judgment still more effective through constitutional protection is but to recognize the Constitution as "a continuing instrument of government"¹⁰¹ and to insure true freedom in the choice of those through whom the people rule.

II

POLITICAL INTERESTS, AFFILIATIONS AND OPINIONS

A: *Protection at Common Law*

When Warren and Brandeis asserted in 1890 that the "common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others,"¹⁰² they did so on the basis that the case law, properly considered, recognized and protected, though often by indirection, a "right to privacy" which existed apart from other legally protected interests. Since the publication of their epochal article, gradual and somewhat grudging recognition has been accorded the view for which they contended. However, the attention of students in the field has been confined

¹⁰⁰ 313 U.S. 299 at 316, 61 S.Ct. 1031 (1941).

¹⁰¹ *Ibid.*

¹⁰² Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193 at 198 (1890).

very largely to a consideration of the protection of the right in question against intrusions by private persons.¹⁰³ Today, the problem of determining the extent to which the Constitution of the United States guards individuals from what Cooley has called "the prying eyes of the government"¹⁰⁴ has become equally important. The insatiable appetite—one might almost say lust—for information on the part of public agencies is evidenced by the multitude of reporting requirements imposed on business.¹⁰⁵ Legislation and legislative investigations designed to force disclosures of political interests, affiliations and, perhaps ultimately of opinions, appear to be multiplying, and these, particularly, raise serious questions as to the permissible extent of governmental power.

At the outset, one may inquire whether as against the government any "right" of privacy to the extent of affording effective protection against the compulsory disclosure of information exists at all. It is true, of course, that the Constitution protects individuals against self-incrimination and unreasonable searches and seizures. On the other hand, by granting immunity from prosecution the government may force the disclosure of otherwise incriminating evidence and the fact that one may be exposed to public contempt or ridicule or be made subject to various social and economic disadvantages is apparently regarded as immaterial.¹⁰⁶ Furthermore, in connection with judicial proceedings the government has wide powers to extort testimony from reluctant witnesses, irrespective of the inconvenience, embarrassment or even substantial detriment which they may suffer as a result.¹⁰⁷ Modern cases seem to extend a similar power to legislative investigating committees¹⁰⁸ as well as to administrative agencies exercising adjudicatory and rule-making functions.¹⁰⁹ Although the power of compulsion in

¹⁰³ See PROSSER, *TORTS* 1050 et seq. (1941) for a discussion of the problem and citations to the literature dealing with it from this point of view.

¹⁰⁴ COOLEY, *CONSTITUTIONAL LIMITATIONS*, 7th ed., 425 (1903).

¹⁰⁵ An idea of the extent of this burden is gained from the majority and dissenting opinions in *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375 (1948).

¹⁰⁶ *Counselman v. Hitchcock*, 142 U.S. 547, 12 S.Ct. 195 (1892); *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370 (1906); Corwin, "The Supreme Court's Construction of the Self-Incrimination Clause," 29 MICH. L. REV. 1, 191 (1930).

¹⁰⁷ See generally, 8 WIGMORE, *EVIDENCE*, 3d ed., § 2192 (1940).

¹⁰⁸ *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319 (1927); *Jurney v. MacCracken*, 294 U.S. 125, 55 S.Ct. 375 (1935); Landis, "Constitutional Limitations on the Congressional Power of Investigation," 40 HARV. L. REV. 153 (1926); Herwitz and Mulligan, "The Legislative Investigating Committee," 33 COL. L. REV. 4 (1933). For a more thorough discussion of this matter, see *infra*, pp. 214-217.

¹⁰⁹ *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 14 S.Ct. 1125 (1894); *Attorney General v. Brissenden*, 271 Mass. 172, 171 N.E. 82 (1930). See *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 63 S.Ct. 339 (1943).

legislative and administrative inquiries is probably limited by the requirement of pertinence¹¹⁰ this restriction seems not to apply in judicial proceedings,¹¹¹ and in any event has virtually no effect so far as safeguarding the privacy of the witness is concerned, since that which is most relevant may also be that which the witness most wishes to conceal. The limited protection given confidential communications of one sort or another may constitute recognition of the right of privacy, but the witness probably is not entitled to constitutional protection in such cases.¹¹²

Nevertheless, it is suggested that the scope of governmental inquiry may not be as wide as the statements made in the preceding paragraph would appear to indicate. Although the very obviousness of the assertion makes documentation difficult, this discussion is predicated on the proposition that normally the individual is entitled to a privilege against compulsory disclosure of any fact, belief or opinion which he chooses to conceal unless some countervailing social interest makes disclosure desirable.¹¹³ Society's need to know must be balanced against the individual's interest in keeping silent and where the former is lacking, the latter should prevail. In spite of broad language such as Wigmore's assertion: "For more than three centuries it has now been recognized as a

¹¹⁰ This is clearly true in the case of legislative investigations, in the sense that the questions asked must be reasonably pertinent to the inquiry, which, in turn, must have a reasonable connection with a matter as to which legislation may constitutionally be enacted. *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319 (1927). The same rule applies as to administrative investigations. See *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 14 S.Ct. 1125 (1894), and see *infra*, pp. 214-216.

¹¹¹ A witness in a judicial proceeding probably has no right to refuse to answer irrelevant questions. See 1 WIGMORE, EVIDENCE, 3d ed., § 7 (1940).

¹¹² As far as state cases are concerned, it appears that even the privilege against self-incrimination may be denied without violation of the due process clause of the Fourteenth Amendment. See *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14 (1908); *Adamson v. California*, 332 U.S. 46, 67 S.Ct. 1672 (1947). *A fortiori* it would seem that privileges relating to the disclosure of confidential communications could be limited or abolished. In view of the generally admitted power of state legislatures to alter rules of evidence [see 1 WIGMORE, EVIDENCE, 3d ed., § 7 (1940)] it would appear that the Congress could, if it chose, act in a similar manner with respect to litigation in the federal courts, although in the absence of such legislation, these courts will decide such matters on the basis of common law principles. *Wolfe v. United States*, 291 U.S. 7, 54 S.Ct. 279 (1934).

¹¹³ This point of view finds its clearest expression in cases dealing with the investigatory power of the government. Thus, in *Sinclair v. United States*, 279 U.S. 263 at 292, 49 S.Ct. 471 (1928), the "right" to be exempt from unreasonable compulsion to disclose personal and private affairs is said to be of the greatest importance. See also *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 at 478, 14 S.Ct. 1125 (1894). In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 at 639, 640, 63 S.Ct. 1178 (1943), Mr. Justice Jackson, in referring to "the majestic generalities of the Bill of Rights," calls attention to the fact that the principles which

fundamental maxim that the public . . . has a right to every man's evidence"¹¹⁴ it is believed that in situations where compulsory disclosure has been upheld, a social interest in the disclosure sufficient to overcome the individual interest in silence is demonstrable.

In judicial proceedings, such as Wigmore had in mind in making the statement just quoted, the social interest in the just solution of controversies through complete disclosure of the facts is apparent. Where legislative investigations are involved, the desirability of obtaining all pertinent evidence is equally clear. On the other hand, circumstances may exist in which nondisclosure may be protected either because the social interest in the information is not sufficiently evident or because compulsion would defeat some other interest which it is more important to safeguard. An example of the latter situation is found in connection with voting for candidates for public office where, as was pointed out above, protection of the secrecy of the ballot is regarded as necessary in order to maintain the purity of elections.¹¹⁵ Whether such protection is afforded by the Constitution of the United States to other forms of political activity should now be considered. But since, for reasons to be pointed out, the protection, if it exists, is narrowly limited, it seems best to define the area by dealing first with the permissible scope of compulsory disclosure, and then determining what freedom of silence remains.

they declare "grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs." Although he states that the principle of non-interference has "withered at least as to economic affairs" the inference seems clear that it still has vitality when interference with political freedom is concerned. In the case under discussion, the right to keep silent was affirmed but here the government did not seek merely to compel the disclosure of information but rather to compel affirmation of a belief contrary to the religious principles of the persons involved. Hence, the decision cannot be regarded as direct authority for the proposition that silence is generally privileged. In *Wallace v. Georgia, C. & N. Ry.*, 94 Ga. 732, 22 S.E. 579 (1894), the Georgia Court of Appeals, in invalidating a law requiring railway companies to state in writing the grounds of discharge of employees, said (*id.* at 732): "Liberty of speech and of writing is secured by the constitution, and incident thereto is the correlative liberty of silence, not less important, nor less sacred." The writer does not suggest, however, that the two "freedoms" are completely co-extensive, for, as will appear later, disclosure may be compelled with reference to situations where speech could not be forbidden. However, there is an obvious affinity between freedom of silence and freedom of speech which would seem to justify, with respect to the former, the same refusal to permit "dubious intrusions" which is evidenced by the court where the latter freedom is involved. Cf. *Thomas v. Collins*, 323 U.S. 516 at 530, 65 S.Ct. 315 (1945).

¹¹⁴ 8 WIGMORE, EVIDENCE, 3d ed., § 2192 (1940).

¹¹⁵ *Supra*, pp. 187-188.

*B. Scope of Compulsory Disclosure in Connection
with Elections*

Perhaps the clearest cases in which disclosure may be required are found in connection with the choice of public officials. The social interest in honest elections, which justifies the constitutional protection of secret voting, may also afford the basis for compelling disclosure, since in some circumstances publicity rather than concealment is necessary in order to attain the desired result. This is particularly true in connection with campaign expenditures.

One of the usual features of corrupt practice legislation is the requirement that candidates file reports showing their campaign expenditures and indicating the sources from which contributions have been obtained.¹¹⁶ Provisions of this sort are designed to deal with the problem of limiting the size of campaign expenditures through publicity, apparently in the hope that unfavorable public reaction to excessive spending will result in reducing the amounts used to influence elections.¹¹⁷ It has also been suggested that publicity of this sort will enable voters to know the character of the influences being exerted on behalf of candidates for office.¹¹⁸ In addition, where a limitation on expenditures has been imposed, the reporting requirement serves as a means of discovering violations of the law.¹¹⁹

The constitutionality of requirements of this character seems obvious in spite of the fact that they admittedly force the disclosure of matters which the candidates and their supporters may wish to conceal. The relationship between publicity as to expenditures and honest elections can scarcely be questioned, and there seems to have been no attempt to invoke constitutional protection in this area except to the extent that state constitutional provisions involving considerations other than those here under discussion have been present.¹²⁰ Although some courts have been inclined to be less than vigorous in their enforcement of these

¹¹⁶ Requirements of this kind have been imposed by the legislatures of almost all of the states and by the federal government. See BEST, *CORRUPT PRACTICES AT ELECTIONS* (1937). The Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict., c. 51 contains similar provisions. For an account of the development of corrupt practice legislation see Hutchinson, "Corrupt Practices Acts," 27 AM. L. REV. 345 (1893).

¹¹⁷ Lederle, "Political Committee Expenditures and the Hatch Act," 44 MICH. L. REV. 294 (1945).

¹¹⁸ See *Best v. Sidebottom*, 270 Ky. 423, 109 S.W. (2d) 826 (1937); *La Belle v. Hennepin Co. Bar Assn.*, 206 Minn. 290, 288 N.W. 788 (1939).

¹¹⁹ See *Healy v. State*, 115 Md. 377, 80 A. 1074 (1911); *Maher v. Jahnel*, 73 N.D. 742, 19 N.W. (2d) 453 (1945).

¹²⁰ Thus, in *State ex rel. La Follette v. Kohler*, 200 Wis. 518, 228 N.W. 895 (1930), noted in 29 MICH. L. REV. 228 (1930), it was contended unsuccessfully that the requirement was invalid as imposing a qualification for office in addition to those

provisions¹²¹ and although the practicality of the publicity device is questionable,¹²² state litigation in the area has not raised questions of federal constitutional law,¹²³ while the power of the national government to require disclosure of such matters in connection with federal elections has been sustained.¹²⁴

Somewhat more difficulty has been encountered with another phase of the problem, however. In addition to requiring the reporting of expenditures, corrupt practice legislation rather frequently contains provisions requiring disclosures in connection with the publication of campaign literature. Typically, these provisions require that political advertisements and circulars contain the name of the candidate on whose behalf they are circulated and the names of any other persons, such as committee chairmen, who are responsible for the publication.¹²⁵ They are obviously designed to prevent the circulation of irresponsible and often defamatory comment and to identify the interests involved in the campaign. Although the most rudimentary conception of honesty would seem to call for disclosures of this character, such laws have been attacked as violative of the right of free speech, apparently on the theory that freedom will be unduly restricted unless anonymity is preserved. However, as the Ohio court has held,¹²⁶ requiring disclosures of the sort under consideration cannot properly be regarded as unduly restricting freedom of speech but is rather to be viewed as a device to fix responsibility for the abuse of the right. In addition, it may be said that the public is entitled to know the identity of those who disseminate political literature so that the weight

enumerated in the state constitution. In *Creech v. Fields*, 276 Ky. 359, 124 S.W. (2d) 503 (1939), a provision that the office should be awarded to the non-guilty candidate receiving the next highest number of votes if the winning candidate had been guilty of failure to file a statement of expenses was held unconstitutional as applied to general elections (although not to primaries) in view of the requirement that elections should be determined by the plurality vote of the people.

¹²¹ Most courts have taken the position that substantial compliance with the statutory requirement is sufficient and appear to have been quite lenient in determining that substantial compliance existed. See *Land v. Clark*, 132 Cal. 673, 64 P. 1071 (1901); *Englebert v. Tuttle*, 185 Minn. 608, 242 N.W. 425 (1932); *State ex rel. Pelishek v. Washburn*, 223 Wis. 595, 270 N.W. 541 (1937); *Effertz v. Schimelpfenig*, 207 Minn. 324, 291 N.W. 286 (1940).

¹²² See Lederle, "Political Committee Expenditures and the Hatch Act," 44 MICH. L. REV. 294 (1945).

¹²³ An examination of the cases, including those cited *supra*, notes 18 and 19 fails to reveal any claim that the due process clause of the Fourteenth Amendment or any other provision of the Federal Constitution is violated by state legislation requiring the filing of statements of campaign expenditures.

¹²⁴ *Burroughs v. United States*, 290 U.S. 534, 54 S.Ct. 287 (1934).

¹²⁵ Twenty-two states appear to have enacted such provisions. See BEST, CORRUPT PRACTICES AT ELECTIONS (1937).

¹²⁶ *State v. Babst*, 104 Ohio 167, 135 N.E. 525 (1922).

to be given the statements contained in it may be judged in the light of the interest of the persons making them. The reasonable character of the requirement in view of the public interest involved when balanced against the relatively trivial character of the restriction should obviate any possibility of successful attack under the due process clause of the Fourteenth Amendment.¹²⁷

As a part of the general legislative campaign to "outlaw" or curtail the activities of the Communist Party and so-called communist-front or foreign-controlled organizations¹²⁸ attempts to force the disclosure of the identity of individuals engaging in political activity through groups of this nature have been made. Aside from the requirement that such organizations register with a public authority and, as a part of the registration, disclose the names of their officers and members, a California law has provided that literature emanating from the organizations shall be identified by the name of the organization together with the names and addresses of its officers.¹²⁹ The Subversive Activities Control Bill, passed by the United States House of Representatives on May 19, 1948, contains a registration requirement applicable to "communist organizations" as defined in the bill, and also provides that literature disseminated through the instrumentalities of interstate commerce by such groups must bear the name of the group and the statement that it is a "communist organization."¹³⁰

In general, it would seem to be within the power of the states and the federal government to require disclosures of this nature. As far as the latter government is concerned, the legislation in part appears to fall within the principle recognized in connection with the Public Utility Holding Company Act¹³¹ that the use of the mails and other instrumen-

¹²⁷ The result may be different when the peculiar provisions of state constitutions are considered. In *Ex parte Harrison*, 212 Mo. 88, 110 S.W. 709 (1908), a requirement that civic leagues, in making reports on candidates, publish the facts on which the reports were based as well as the names and addresses of persons furnishing the information, was held to constitute an "impairment" of free speech violative of the Missouri Constitution since compliance with the requirement occasioned additional expense. Certain provisions of the Pennsylvania Constitution were held to be violated by a statute relating to the anonymous publication of defamatory matter in connection with elections in *Commonwealth v. Rentschler*, (Berks Co. 1901) 26 Pa. C.C. 39.

¹²⁸ See Groner, "State Control of Subversive Activities in the United States," 9 F.B.A.J. 61 (1947); 96 UNIV. PA. L. REV. 381 (1948).

¹²⁹ California Subversive Organization Registration Law, Cal. Penal Code (Deering, 1947 Supp.) Appx., p. 179, enacted in 1947.

¹³⁰ H.R. 5852, 80th Cong., 2d sess. (1948).

¹³¹ Public Utility Holding Company Act of 1935, Tit. I, § 5, 49 Stat. L. 803 at 812 (1935), 15 U.S.C. (1946) § 79e.

talities of interstate commerce can be conditioned upon the disclosure of relevant information when desirable in the public interest.¹³² Further than this, the precedent of the Foreign Agents Registration Act of 1938, as amended, would seem to be applicable if the organizations subject to the registration requirement can be said to be foreign controlled.¹³³ In the case of state legislation, the requirement would appear to be consistent with due process if applied to all political literature for the reasons indicated in the foregoing discussion of political advertisements and circulars. The public interest may clearly be served by requiring full information as to the identity of those seeking to influence political action in order that their connections and probable motives may be revealed.

However, the fact that the Communist Party and organizations said to be allied with it are singled out for special treatment in this connection may raise a problem, as to state legislation, under the equal protection clause of the Fourteenth Amendment. Here, the question as to whether the legislative classification is appropriate must be decided by the courts. If the legislature has created and clearly defined a "real class," that is, if it has acted in a situation where there are sufficient factual distinctions to make the selection and regulation of organizations of this kind reasonable, the requirements of equal protection have been satisfied.¹³⁴ Some indication as to whether or not this is the case may be gained from what the legislature has said. The California act contains a statement that the law "is enacted in the exercise of the police power of this State for the protection of the public peace and safety. . . ."¹³⁵ Legislative declarations of policy and findings of fact are often entitled to considerable weight.¹³⁶ However, since the exercise of civil rights is at least indirectly

¹³² *Electric Bond and Share Co. v. Securities Exchange Commission*, 303 U.S. 419, 58 S.Ct. 678 (1938).

¹³³ Foreign Agents Registration Act of 1938, 52 Stat. L. 631 (1938), as amended, 53 Stat. L. 1244 (1939), 56 Stat. L. 251 (1942), 60 Stat. L. 1352, 22 U.S.C.A. (Supp. 1947) § 611 et seq.

¹³⁴ *Radice v. New York*, 264 U.S. 292, 44 S.Ct. 325 (1924); *Tigner v. Texas*, 310 U.S. 141, 60 S.Ct. 879 (1940); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578 (1937); *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15 (1923); *Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584 (1927). Cf. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110 (1942); *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269 (1948).

¹³⁵ Cal. Penal Code (Deering, 1941) Appx., p. 179, § 35,000 (1947).

¹³⁶ See *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505 (1934); *Mulford v. Smith*, 307 U.S. 38, 59 S.Ct. 648 (1939); *United States v. Rock-Royal Cooperative*, 307 U.S. 533, 59 S.Ct. 993 (1939); *Dayton-Goose Creek R. Co. v. United States*, 263 U.S. 456, 44 S.Ct. 169 (1924); *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458 (1921); HORACK, CASES AND MATERIALS ON LEGISLATION 667 (1940).

involved, it is probable that the Supreme Court of the United States will wish to determine the appropriateness of the classification independently in any case which may come before it.¹³⁷ The sketchy and formal character of the declaration by the California legislature is not, in any event, particularly helpful in furnishing a factual justification for the measure. Whether or not the activities of the groups in question present a sufficiently serious threat to the safety of the government to justify special treatment may be a debatable matter.¹³⁸ The validity of legislation of the type in question being peculiarly dependent on a full consideration of the facts involved,¹³⁹ speculation as to the result in advance of a decision is of no particular value.

Since the Fifth Amendment contains no equal protection clause¹⁴⁰ the validity of federal legislation on the subject would not be susceptible to precisely the same type of attack. The only question would seem to

¹³⁷ The Supreme Court, in language equally applicable to free speech, has clearly indicated this where restraints on freedom of religion raising questions under the due process clause were involved. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178 (1943). In scrutinizing state criminal procedure, the court has formed its independent judgment in deciding whether due process has been denied by the action of state courts, and here also, the language is applicable to cases involving the denial of any "federal right." *Moore v. Dempsey*, 261 U.S. 86, 43 S.Ct. 265 (1923); *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579 (1935).

¹³⁸ In *Schneiderman v. United States*, 320 U.S. 118, 63 S.Ct. 1333 (1943), a denaturalization proceeding, the majority of the court took the position that the government had not offered sufficiently convincing proof that the Communist Party advocated the violent overthrow of government. This, of course, does not amount to a decision that such proof cannot be advanced. However, formal statements of the Communist Party of the United States, for what they are worth, specifically forbid action by party members directed toward the use of violence. See 48 *Col. L. Rev.* 253 at 261 (1948). Thus, if the contrary conclusion is to be reached, it must be through evidence of a more indirect character.

¹³⁹ Cf. *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 55 S.Ct. 187 (1934); *Borden's Farm Products Co. v. Ten Eyck*, 297 U.S. 251, 56 S.Ct. 453 (1936); Wilson, "Consideration of Facts in Constitutional Cases," 17 *So. Cal. L. Rev.* 335 (1944).

¹⁴⁰ Whether or not the absence of such a clause makes any practical difference is doubtful. Although it was stated in *Truax v. Corrigan*, 257 U.S. 312, 42 S.Ct. 124 (1921), that the protections offered by the equal protection and due process clauses are not "co-terminous" it would seem that unreasonable discrimination would be violative of both clauses of the Fourteenth, and hence also violative of the Fifth, Amendment. Although no cases have been found in which federal legislation has been invalidated by the Supreme Court because of unreasonable classification, there are some intimations that the court might do so if it were found to exist. See *United Public Workers v. Mitchell*, 330 U.S. 75 at 99-101, 67 S.Ct. 556 (1947); *Currin v. Wallace*, 306 U.S. 1 at 14, 59 S.Ct. 379 (1939).

be one of due process. However, even here, the reasonableness of selecting particular organizations for the purpose of imposing the registration and designation requirements would be relevant and subject to the same general considerations as those just stated. In this connection it should be noted that the Subversive Activities Control Bill contains a carefully drawn statement of legislative findings which would be of assistance to the court in sustaining the registration and related requirements if other more questionable portions of the measure are upheld.¹⁴¹

C. Compulsory Disclosure in Connection with Lobbying

The matters previously discussed relate principally, although not exclusively, to situations involving the choice of representatives through the process of popular election. Similar problems arise in connection with activities designed to influence legislative action on particular measures. Under the American system of representative government, particularly in modern times, legislation is frequently the product of organized influence exerted by pressure groups acting either *en masse*, through letters, telegrams, picketing or similar devices, or through spokesmen unflatteringly designated as lobbyists. Bentley has said:

" . . . We find in countries like the United States a limitless number of reform organizations and special-interest organizations of unending variety. They will range all the way from those which claim to be purely motivated by public spirit to those which do not even attempt to disguise rank selfishness, but each and every one of them is an interest organization of a representative character."¹⁴²

Whether this state of affairs is regarded with horror,¹⁴³ complacency¹⁴⁴ or resignation¹⁴⁵ it must still be viewed as an inevitable part

¹⁴¹ A discussion of other features of the bill is beyond the scope of this paper. However, the vagueness of the statutory definitions and the wide discretion of the Attorney General in connection with the designation of communist front organizations offer interesting possibilities for attack if the measure should become law.

¹⁴² BENTLEY, *THE PROCESS OF GOVERNMENT*, Principia Press ed., 431 (1935).

¹⁴³ In speaking of the activities of the Public Utility lobby, Representative Rankin said: "Officials have been corrupted, elections bought or stolen, legislatures have been dominated, Governors have been controlled, Senators have been influenced, Congressmen intimidated, and the President threatened by this consciousnessless [sic], corrupt super-government, this insatiable octopus. . . ." 79 CONG. REC. 11250 (1935).

¹⁴⁴ See Bellows, "In Defense of Lobbying," 172 *HARPER'S MAGAZINE* 96 (1935).

¹⁴⁵ See BLAISDELL, *ECONOMIC POWER AND POLITICAL PRESSURES*, T.N.E.C. Monograph No. 26, 48 (1941), where it is said that President Franklin Roosevelt referred to the sum of all interest groups as "what we mean by American Democracy."

of the legislative process in the light of the present scope and function of law making.¹⁴⁶

However, recognition of this fact does not involve acceptance of the abuses which may accompany the activities of special interest groups. To the extent that they involve corruption in its crasser forms, such as bribery and blackmail, they are clearly subject to restraint. But modern practice is not characterized by such crudity. More insidious means of influencing legislative action are today much more common and much more dangerous than those used by the "Black Horse Cavalry" of an earlier era.¹⁴⁷ In part, at least, these methods involve the concealment of the true interest of those who attempt to secure the enactment of favorable laws through personal influence and secret solicitation.

It is for this reason that the publicity device has come to be the means most commonly used to control lobbying. In one form or another twenty-two states¹⁴⁸ and the federal government¹⁴⁹ have attempted to bring to light the interests and connections of the lobbyist. Typically, laws of the type in question require lobbyists, that is, persons hired to influence legislation, to register with a designated official and to state the names of their employers as well as to indicate the legislation which they have been retained to promote or to oppose. Employers of lobbyists also are often required to register. In many instances, the filing of expense accounts stating the amount of money spent and naming those who received it is required.

Such legislation, it will be noted, does not attempt to distinguish between "good" and "bad" lobbying. It is of course true that the lobbyist, whether professional or amateur, may be a useful adjunct to the legislative process, since he may help members of the legislature to learn the facts in controversy or to become better informed of the views of their constituents. In situations of this sort, the lobbyist occupies a position not unlike that of the lawyer in presenting a case before a court. He is obviously not impartial but his efforts may be of real assistance in the development of wise laws. Be this as it may, such considerations have

¹⁴⁶ See Beutel, "The Pressure of Organized Interests as a Factor in Shaping Legislation," 3 So. CAL. L. REV. 10 (1929); *passim*, 179 ANNALS (1935), containing a collection of articles on the organization and techniques of pressure groups.

¹⁴⁷ The differences are pointed out in an article on the Lobby, N.Y. TIMES, January 28, 1934.

¹⁴⁸ The legislation is collected in 47 COL. L. REV. 98 at 99-102 (1947).

¹⁴⁹ Title III of the Legislative Reorganization Act of 1946, 60 Stat. L. 839 et seq., 2 U.S.C.A. (1946) § 261 et seq.

not generally induced the law makers to discriminate as far as registration requirements are concerned.

The problem, then, is whether any lobbyist, "good" or "bad" is constitutionally entitled to freedom of silence when he is required to reveal the nature of his interest in pending legislation and to show what he has received and spent in support of his cause. Basically, the question raised is whether or not the forcing of such disclosures can be regarded as violative of due process as constituting a substantial interference with the right of every citizen to speak on political questions or to petition the legislature for a redress of grievances.

The constitutionality of existing acts controlling lobbying through the registration device seems not to have been questioned and for this reason no direct authority can be cited which bears on the matter. However, certain problems are suggested when the question is considered in the light of what has been said in the foregoing discussion. If it be granted that, in general, silence is privileged, the requirement of disclosure here, as in other cases, must be justified on the basis of the social interest involved. Clearly, the right to speak on political questions and the allied right to petition, both of which are protected by the First and Fourteenth Amendments, are basic under the traditional American view of constitutional government.¹⁵⁰ Legislation curtailing the exercise of these rights or affecting allied interests is consequently suspect.

On the other hand, as has been indicated, protection of the elective and legislative processes from corruption has been recognized as legitimate and necessary. It would seem equally clear that in the carrying out of legislative functions the lawmakers should be permitted to obtain information which is needed for the purpose of according proper weight to the views of those seeking or opposing the enactment of particular measures. To require disclosures sufficient for the purpose seems consistent with even the most zealous desire to protect free speech.

Regulatory legislation in this field has generally been confined to those situations in which compulsory disclosures are clearly related to the possible corruption of legislators through bribery or secret influence.¹⁵¹

¹⁵⁰ Although the Supreme Court has indicated this to be true on numerous occasions, one of the clearest expositions of the fundamental character of such liberties is found in Mr. Justice Jackson's opinion in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178 (1943). Freedom of religion was the liberty directly involved, but the statement of principle is equally applicable to freedom of speech. See *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315 (1945).

¹⁵¹ Generally, as has been stated, the legislation deals with the hired lobbyist and, to some extent, with his employer. See 47 COL. L. REV. 98 (1947).

The right to speak has been conditioned upon compliance with registration requirements, the filing of expense accounts, and in some instances upon observance of restrictions as to the places in which lobbying may be carried on. To the extent that the legislation is so limited it seems clearly to fall within the principles relied upon to sustain corrupt practice legislation in general.¹⁵²

However, conventional anti-lobbying legislation does not reach the heart of the problem. The most significant activities of pressure groups today involve not personal solicitation but rather indirect types of influence through publicity campaigns and synthetic demonstrations of one sort or another. Telegrams and letters to congressmen, marches on Washington and inspired newspaper comment are the tools of the modern trade.¹⁵³ The use of these devices is practically unaffected by laws currently in force. Whether it is constitutionally permissible to impose restrictions of any sort on the activities just mentioned requires further consideration.

To state the problem is to emphasize the difficulty of its solution. If legislation were adopted which would substantially curtail the right of addressing Congress or state legislatures, it would almost certainly be regarded as violative of the First and Fourteenth Amendments and would also constitute an undesirable interference with the channels of communication between legislators and their constituents. Furthermore restrictions in this area would lack the basis which has been suggested for sustaining the usual anti-lobbying laws since the corruption of legislators would not be involved.

It would seem, however, that any measures designed simply to identify those who seek to influence legislation through the use of pressure would constitute lawful conditions upon the rights of free speech and petition. The disclosures required would aid rather than retard the legislative process and would tend to promote law making more fully in accord with the public interest. The only effect so far as the individual is concerned would be to deprive him of an anonymity of which, from the standpoint of good government, he should not be entitled. Thus, it would seem appropriate to require that petitions or other communications addressed to the legislature bear the correct names and addresses of the signers and that persons soliciting others to send communications be required to state as a matter of public record that they have done so,

¹⁵² *Supra*, pp. 204-205.

¹⁵³ See BLAISDELL, *ECONOMIC POWER AND POLITICAL PRESSURES*, T.N.E.C. Monograph No. 26, p. 48 (1941).

perhaps also indicating the amount of money expended in connection with the activity.¹⁵⁴ Legislation of this sort, coupled with that which has been enacted, if properly drawn and appropriately enforced, would deal with the problem of pressure groups in a realistic but not unduly restrictive manner.¹⁵⁵

Thus far the discussion has, it is believed, established the following conclusions: Governmental intrusions upon freedom of silence through requiring compulsory disclosures *may* be permissible when they amount in substance to conditions imposed upon political activity in connection with the elective or the legislative process.¹⁵⁶ However, such intrusions must be reasonable and in addition must be reasonably calculated to advance a demonstrable social interest in the field in which they are imposed. Such an interest exists in the prevention of corruption and other forms of dishonesty in connection with elections and legislation. It may also be found in measures designed to secure for legislators full information as to the interest and affiliations of persons attempting to influence legislation.¹⁵⁷ Laws compelling disclosures in such circumstances must, however, be sufficiently nondiscriminatory to satisfy the constitutional requirements of equal protection and due process.

D. Scope of Compulsory Disclosure Before Congressional Investigating Committees

Probably the most difficult and also the most controversial questions involving freedom of silence in political affairs are connected with the work of congressional investigating committees. The Un-American

¹⁵⁴ Id. 194. Some attempt has been made to require newspaper publishers to report the receipt of money paid for the purpose of printing articles advocating or opposing pending legislation. Ind. Stat. Ann. (Burns, 1933) § 34-306; Wis. Stat. (1945) § 346.295. The federal act states that it applies to persons who receive money to be used principally to aid in the passage or defeat of legislation by Congress or to influence the defeat or passage of such legislation. 60 Stat. L. 841 (1946), 2 U.S.C.A. (1947) § 266.

¹⁵⁵ This is substantially the course advocated by the President's Committee on Civil Rights; see the report of that Committee at p. 164 (1947).

¹⁵⁶ The term "legislative process" as here used would include at least the rule making activities of administrative agencies. See 49 Stat. L. 803 at 823 (1935), 15 U.S.C. (1946) § 791(i); 49 Stat. L. 1985 at 2014 (1936), 52 Stat. L. 553 at 963 (1938), 46 U.S.C. (1946) § 1225, imposing registration and accounting requirements on certain lobbyists appearing before the Securities Exchange Commission and the Maritime Commission, respectively. See also, 47 Col. L. Rev. 98 at 103 (1947).

¹⁵⁷ A related problem, which is outside the scope of the present discussion, has to do with the so-called "Non-Communist Affidavit" provision of § 9 (h) of the Taft-Hartley Act, 61 Stat. L. 143 (1947), 29 U.S.C. (Supp. 1947) § 159 (h). This

Activities Committee of the House of Representatives¹⁵⁸ has, during the course of its investigations,¹⁵⁹ created issues of paramount importance in the area of conflict between individual demands for privacy and governmental insistence upon disclosure. A dispassionate attempt to describe the extent of the investigatory power to compel revelations of political affiliations and beliefs is thus of both current and permanent importance.

To assert that legislative investigating committees, like other agencies of the government, are subject to the rule of law is to state a conclusion which, though obvious, may not be entirely true. Of course, as is evidenced by many cases, the activities of such groups are subject to judicial review¹⁶⁰ but the effectiveness of this process in terms of affording protection to individual citizens may well be subject to question. The legislative power to investigate and by necessary implication to punish persons called as witnesses for contumacious refusal to testify is beyond dispute.¹⁶¹ However, it is also apparent that there are certain ostensible limitations on the power, the character of which it is necessary to consider.

First among these, and one which is recognized either by way of holding¹⁶² or dictum¹⁶³ in virtually all of the cases, is what may be called the limitation of pertinence. Although it has been suggested that investigating committees should be allowed free scope of inquiry merely

section is designed to force communists out of controlling positions in labor unions rather than affirmatively to require disclosure of Communist affiliations. However, the constitutionality of the provision is dependent on considerations similar to those involved in determining the validity of the Subversive Activities Control Bill, H.R. 5852, 80th Cong., 2d sess. (1948) discussed *supra*, pp. 206-209. See 48 COL. L. REV. 253 (1948).

¹⁵⁸ For a description of the history and function of the committee see 47 COL. L. REV. 416 (1947).

¹⁵⁹ The methods and practices of the committee have been subjected to strenuous attacks, among the most devastating and convincing of which is Gellhorn, "Report on a Report of the House Committee on Un-American Activities," 60 HARV. L. REV. 1193 (1947). See OGDEN, *THE DIES COMMITTEE*, 2d ed. (1945); Letter to the President by Members of the Yale Faculty of Law, 34 A.B.A.J. 15 (1948).

¹⁶⁰ See the cases cited *infra*, notes 162 and 163.

¹⁶¹ There are, of course, many decisions to this effect. The modern doctrine with respect to the power of congressional investigating committees stems from *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319 (1927). The decision in this case was probably influenced by Landis, "Constitutional Limitations on the Congressional Power of Investigation," 40 HARV. L. REV. 153 (1926). For an exhaustive consideration of the same problem with respect to the states, see Herwitz and Mulligan, "The Legislative Investigating Committee," 33 COL. L. REV. 4 (1933).

¹⁶² *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

¹⁶³ For example, *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319 (1927); *Sinclair v. United States*, 279 U.S. 263, 49 S.Ct. 268 (1929); *Journey v. MacCracken*, 294 U.S. 125, 55 S.Ct. 375 (1935).

in order to publicize events which may be of interest to the electorate,¹⁶⁴ the Supreme Court of the United States has not evinced enthusiasm for legislative field days of this character. Rather, the Court has stated:

"It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all *unauthorized, arbitrary or unreasonable inquiries* and disclosures in respect of their *personal and private affairs*."¹⁶⁵

The presence of five qualifying words in the single sentence quoted raises some doubt as to the scope of protection afforded, but somewhat more concrete information is furnished by Mr. Justice Van Devanter who, in speaking for the Court in *McGrain v. Daugherty* said: "... it is a necessary deduction from the decisions in *Kilbourn v. Thompson* and *In re Chapman* that a witness rightfully may refuse to answer where the bounds of the [investigatory] power are exceeded or the questions are not pertinent to the matter under inquiry."¹⁶⁶

That these words are of cold comfort to those wishing to avoid the duty of testifying before investigating committees is evidenced by the unanimity with which the cases decided after the *McGrain* opinion was handed down uphold the power of the committees to compel testimony. Although in theory the refusal to testify in response to questions not pertinent to possible legislation cannot be punished, there seems to be no effective way in which lack of relevance can be established. It is not necessary for Congress in creating an investigating committee to specify that particular or, indeed, any legislation is expected to result from the inquiry.¹⁶⁷ The fact that legislation has not been forthcoming as a result of previous activities of the committee appears to have no significance.¹⁶⁸

¹⁶⁴ See MCGEARY, THE DEVELOPMENT OF CONGRESSIONAL INVESTIGATIVE POWER 104 (1940); Herwitz and Mulligan, "The Legislative Investigating Committee," 33 COL. L. REV. 4 at 6 (1933). This is also apparently the view of Ehrmann, "The Duty of Disclosure in Parliamentary Investigation," 11 UNIV. CHI. L. REV. 1 (1943); id. 117 (1944). Cf. his comment (id. 153): "The European experience shows conclusively that where facts can be ascertained only by a curtailment of the citizen's individual freedom there should be no hesitation in paying that price, lest the freedom of all be endangered."

¹⁶⁵ *Sinclair v. United States*, 279 U.S. 263 at 292, 49 S.Ct. 263 (1929). Emphasis supplied.

¹⁶⁶ 273 U.S. 135 at 176, 47 S.Ct. 319 (1927).

¹⁶⁷ *McGrain v. Daugherty*, *ibid.*

¹⁶⁸ *Townsend v. United States*, (App. D.C. 1938) 95 F. (2d) 352.

The possibility that some legislation, whether constitutionally valid or not, may result seems to be sufficient to justify the investigation.¹⁶⁹ Thus there appears to be no practical way in which an unwilling witness can challenge the investigation, or, perhaps, successfully object to any particular question on the sole ground that the inquiry or the question is not pertinent to the range of the committee's power.

This is not to suggest that the cases lack a basis in reason. Clearly, it may be impossible to tell in advance whether legislation should be enacted after the facts have been discovered, much less to describe with particularity the laws which will be passed. To require specification in such detail would be to render useless the investigatory power, which is universally conceded to be a necessary adjunct to wise legislation. However, when this is said it should be realized that the so-called limitation of pertinence has been reduced to almost complete insignificance and that if any protection is to be accorded witnesses it must be placed on some other theory.

Another possible limitation is found in the constitutional privilege against self-incrimination, which is almost certainly available to witnesses before investigating committees.¹⁷⁰ But it is possible to defeat this restriction by a sufficiently broad grant of immunity¹⁷¹ even though the results of answering a question under such conditions may be disastrous to the witness involved. The protection may, however, have some practical significance since the immunity presently granted is of doubtful validity and apparently Congress is unwilling either to extend immunity to the degree which, under the doctrine of *Hale v. Henkel*¹⁷² would be neces-

¹⁶⁹ *Barsky v. United States*, (App. D.C. 1948) 167 F. (2d) 241.

¹⁷⁰ *Counselman v. Hitchcock*, 142 U.S. 547, 12 S.Ct. 195 (1892), indicated that the privilege extended to witnesses in investigations conducted under the authority of the Interstate Commerce Act, and Congress has apparently recognized that the principle expressed in the case is applicable generally to administrative rule-making proceedings. Cf. *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644 (1896). There seems to be no serious contention that the same restrictions would not apply to legislative committees, although the existing grant of immunity provided in connection with testimony before them is, perhaps, not sufficiently broad. See *infra*, note 71.

¹⁷¹ *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370 (1906).

¹⁷² *Ibid.* The present provision is to the effect that no testimony given by a witness before a congressional committee shall be "used as evidence in any criminal proceeding against him in any court." Rev. Stat. (1878) § 859, as amended 52 Stat. L. 943 (1938), 28 U.S.C.A. (Supp. 1947) § 634. It is said that uncertainty as to whether the grant of immunity is sufficiently broad has led to a practice on the part of investigating committees not to press the demand for testimony of this character. Ehrmann, "The Duty of Disclosure in Parliamentary Investigation," 11 UNIV. CHI. L. REV. 1 at 20 (1943).

sary,¹⁷³ or to test the matter in the courts. On the other hand, there are many situations in which the disclosure of matters of the sort under consideration would clearly involve no element of criminality and in such cases, of course, the privilege would offer no protection.¹⁷⁴

The constitutional prohibition of unreasonable searches and seizures has some bearing on the problem since, in cases involving the activities of administrative agencies, the issuance of unreasonably broad subpoenas duces tecum has been held to violate the provision.¹⁷⁵ This point has been raised in recent cases dealing with the production of books and records before the Un-American Activities Committee with inconclusive results. In *United States v. Josephson*¹⁷⁶ the court regarded the question of whether or not the subpoena was lawful as immaterial in view of the fact that the witness refused to be sworn or to testify at all. In *United States v. Bryan*,¹⁷⁷ which was decided on a motion to dismiss the indictments, the court declined to rule on the question of the legality of the subpoenas, holding that the matter could be determined only at a trial on the facts. The opinion indicates, however, that the subpoenas were not susceptible to attack as being violative of the Fourth Amendment.¹⁷⁸ Whether or not the subpoenas in these cases were valid, it seems clear that the problem does not involve the basic power of the committee to compel disclosure of the information sought, but rather concerns the specificity with which its demands must be stated.

¹⁷³ It has been held, however, that the statute (supra, note 172) which provides that testimony shall not be used except in prosecutions for perjury in connection with giving it does not prevent the use of such testimony in a contempt proceeding. *United States v. Barsky*, (D.C. D.C. 1947) 72 F. Supp. 165.

¹⁷⁴ *Mason v. United States*, 244 U.S. 362, 37 S.Ct. 621 (1917), holding that whether a question is incriminating is for the court and not for the witness to decide. If Communist affiliations are not criminal it would seem that the privilege would not prevent compulsory disclosure of such affiliations.

¹⁷⁵ *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 44 S.Ct. 336 (1924). See *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 at 209, 66 S.Ct. 494 (1946).

¹⁷⁶ (C.C.A. 2d, 1947) 165 F. (2d) 82.

¹⁷⁷ (D.C. D.C. 1947) 72 F. Supp. 58.

¹⁷⁸ The subpoenas involved in this case were extremely broad. One required the witness to produce "all books, records, papers and documents showing all the receipts and disbursements of money by the National Council of American-Soviet Friendship, Inc., and all correspondence, memoranda and communications with any and all persons, together with a complete list of all affiliated organizations for the year 1945." *Id.* at 60. The court said, however, that "somewhat similar subpoenas" had been held valid in other cases, which were cited. *Id.* at 64. At least one commentator has been greatly disturbed by the breadth of the subpoenas used by the committee. 14 UNIV. CHI. L. REV. 256 at 261 (1947).

The argument most strenuously advanced by those resisting compulsory disclosures of political affiliations is that the guaranty of free speech provided by the First Amendment is somehow being violated by such intrusions on privacy. In part, the contention seems to be based on the assumption that freedom of silence with respect to political affairs is completely correlative to freedom of speech, so that one cannot be compelled to speak with respect to matters as to which his speech cannot constitutionally be restricted. Therefore, it is argued, since political speech cannot be restrained unless it constitutes a clear and present danger to government,¹⁷⁹ it cannot be compelled unless silence creates a similar danger.¹⁸⁰

Such a mechanical interpretation of the First Amendment seems completely unjustified. Although the point was not directly ruled upon in the *Barsky* case¹⁸¹ the court pointed out that the policy exemplified by the First Amendment is one of furthering the safety (and, it might be added, orderly change) of democratic government through free discussion of doctrines of all types, which is entirely different from the policy considerations which might underlie a recognition of freedom of silence. The idea, allied with the one just expressed, that Congress cannot begin to investigate the matter of political affiliations until a clear and present danger to government exists, seems to the writer, as to Justice Prettyman, "sheer folly."¹⁸² Surely, as the Justice points out, Congress cannot determine the existence or nonexistence of a clear and present danger upon which to legislate if it cannot inquire in advance as to what the facts are.

The most sensible argument with respect to free speech, and one which finds its clearest expression in Justice Edgerton's dissent in the *Barsky* case¹⁸³ is that the inquiries of the Un-American Activities Committee, particularly in so far as they attempt to disclose Communist affiliations, do, as a matter of fact, restrict free speech, since persons are deterred from expressing their opinions on political questions for fear of being made the targets of committee charges and publicity. It is very

¹⁷⁹ It now seems clear that the Supreme Court is currently committed to the so-called "clear and present danger test" in deciding cases arising under the First Amendment and in free speech cases involving due process under the Fourteenth Amendment. See, for example, *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190 (1941); *Craig v. Harney*, 331 U.S. 367 (1947).

¹⁸⁰ See *United States v. Josephson*, (C.C.A. 2d, 1947) 165 F. (2d) 82 at 90, 91; *Barsky v. United States*, (App. D.C. 1948) 167 F. (2d) 241 at 246.

¹⁸¹ (App. D.C. 1948) 167 F. (2d) 241.

¹⁸² *Id.* at 246.

¹⁸³ *Id.* at 252.

probable that this is true, since reports of the work of the committee have undoubtedly resulted in harm to individuals branded by it with the "Communist" label. In view of this record it is reasonable to suppose that free comment may be discouraged if it happens to be critical of the government or favorable to economic systems which are not our own and that, thus, the beneficial policy of the First Amendment may be denied complete fulfillment.

It does not necessarily follow, however, that constitutional protection through judicial review is available to prevent these undesirable consequences. The privilege against self-incrimination, for example, is protected in the constitutional sense by granting immunity from prosecution no matter what incidental harm may result to the person required to testify.¹⁸⁴ As was pointed out previously,¹⁸⁵ witnesses in judicial proceedings are not protected against the social and economic effects of their testimony. In both of these situations the public interest in full disclosure is considered as outweighing the harm resulting to the individual. Here, as the court said in the *Barsky* case, "Even assuming private rights of the timid to be of the fullest weight, the problem remains whether they outweigh the public necessities in this matter."¹⁸⁶ The restriction on freedom of speech, to the extent that it exists in the situation at hand, is not direct but incidental to the exercise of a power of inquiry which in its general features must be regarded as valid. The public interest in producing facts may well be sufficient to cause the court to reject an interpretation of the First Amendment which is not literally required.¹⁸⁷

It is suggested that a more realistic approach to the problem would proceed from the assumption that freedom of silence is a "liberty" protected by the due process clause of the Fifth and Fourteenth Amendments which does not necessarily have the same content as the free speech portion of the First Amendment because of the different considerations giving rise to its recognition. This would perhaps focus attention more clearly on the true character of the issue as one involving the presence or absence of social justification for governmental intrusions. Basing what follows upon this assumption, which appears to be a valid one,¹⁸⁸ and assuming further that the activities of investigating committees are as

¹⁸⁴ *Supra*, pp. 216-217.

¹⁸⁵ *Supra*, pp. 187-188.

¹⁸⁶ (App. D.C. 1948) 167 F. (2d) 241 at 249.

¹⁸⁷ This has, of course, been the result in all of the cases which have thus far reached the courts. See notes 176, 177, 178, *supra*.

¹⁸⁸ *Supra*, note 113; *supra*, p. 218.

subject to due process requirements as is other legislative action¹⁸⁹ it would seem possible to formulate some defensible conclusions as to the permissible scope of investigatory activities in the area with which we have been concerned.

One such conclusion would appear to be that unless the resolution creating an investigating committee shows on its face that no legislation is contemplated or that no constitutional legislation can be enacted, a witness is not privileged to refuse to appear and be sworn.¹⁹⁰ This may be all that can be inferred from the denial of *certiorari* by the Supreme Court¹⁹¹ in the *Josephson* case.¹⁹² The possibility that a committee empowered to investigate in a particular field may ask questions which will invade the constitutional liberty of a witness cannot properly be held to foreclose the committee from proceeding at all, in view of the generally recognized public interest in the enactment of legislation having adequate factual support.

Furthermore, it would seem entirely proper for a committee when dealing with a person who has been engaged in political activity through acts designed to influence the elective or legislative processes to identify his interest by disclosing his connections and the sources of his support as well as the means by which his influence has been exercised. Such disclosures can clearly be compelled by legislation, as has been seen,¹⁹³ and the principle which justifies action in this manner is equally applicable to committee investigations.¹⁹⁴

On the other hand, to require the same disclosures from an individual who has not engaged in such activity would, it is believed, be an unjustifiable interference with his privilege to remain silent. The principle

¹⁸⁹ This seems to be sufficiently obvious to need no documentation. The fact that committee activities are subject to judicial review is shown by the cases cited *supra*, notes 162 and 163.

¹⁹⁰ *United States v. Josephson*, (C.C.A. 2d, 1947) 165 F. (2d) 82. There may be some question as to whether the court would be bound to accept this in view of the repeated statements of persons representing the Un-American Activities Committee that the function of the committee is simply to publicize the activities of subversive groups. See 47 COL. L. REV. 416 at 427 (1947). One of the latest is that of Representative Mundt, then acting chairman, who, as quoted in an Associated Press dispatch of August 4, 1948, said that the committee is only out to get the whole story of Soviet spying before the public. "There is nothing we can do legally or legislatively at the moment."

¹⁹¹ 333 U.S. 838, 68 S.Ct. 609 (1948).

¹⁹² (C.C.A. 2d, 1947) 165 F. (2d) 82.

¹⁹³ *Supra*, pp. 209-213.

¹⁹⁴ As a matter of fact there have been a number of congressional investigations of lobbying. See 47 COL. L. REV. 98 at 103, note 40 (1947).

announced in *Kilbourn v. Thompson*¹⁹⁵ that governmental intrusions in private affairs are not to be tolerated is still entitled to recognition although the views of the court as to what are private affairs have undoubtedly undergone considerable modification. Granted that it may be difficult to draw the line between private adherence to political organizations and public advocacy of their views,¹⁹⁶ a court which has not hesitated to define the limits of due process generally by a "gradual process of judicial inclusion and exclusion"¹⁹⁷ should not shirk the duty when the protection of a privilege of such importance is involved. Although it has been suggested that the privilege does not directly stem from the First Amendment, it is closely enough akin to freedom of speech so that the court should have no difficulty in considering the matter independently,¹⁹⁸ confining the presumption of the validity of legislative action to the exercise of the power to investigate¹⁹⁹ rather than the power to demand an answer to a particular question.

If the foregoing suggestions are accepted, it follows that an answer to the question, "Are you now or have you ever been a member of the Communist Party" may or may not be compelled, depending not upon the nature of the question itself but upon the situation of the person to whom it is addressed. If the witness can be shown to have been engaged in political activity in the sense mentioned above, the question should be regarded as a proper one; if not, the converse should be the case.

Turning to the area of belief or opinion as distinct from action, it should be concluded that the former matters are privileged against compulsory disclosure. In many circumstances it may be desirable for a legislative body to determine who a man is and what he does or has done. But unless he translates his beliefs into action, what he thinks should not concern the government. "The Devil himself knoweth not the mind of man" and Congress should not attempt to out-do his Satanic Majesty. It is impossible to demonstrate a relation, substantial enough to prevail against the individual's desire for silence, between the public interest in disclosure and privately held views as to the form and functions of government. For a court to allow the government to compel

¹⁹⁵ 103 U.S. 168 (1880).

¹⁹⁶ For example, the dissemination of communist ideology through writings and motion pictures, with no direct evidence that the influencing of political action is contemplated may be difficult to classify.

¹⁹⁷ *Davidson v. New Orleans*, 96 U.S. 97 at 104 (1878).

¹⁹⁸ *Supra*, note 35. Cf. *Thomas v. Collins*, 323 U.S. 516 at 530 (1945).

¹⁹⁹ Cf. *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319 (1927) and the cases cited *supra*, notes 66, 67, 68.

such disclosures would indeed amount to judicial approval of thought control.

Finally, as was pointed out in the first portion of this discussion, the privilege of silence should extend to the secrecy of the ballot, so that it should be considered improper for a committee to interrogate a witness as to how he has voted in a particular election. Since this principle has been generally recognized by Congress itself in connection with election contests,²⁰⁰ it is unlikely that the question will arise.

These conclusions and the premises upon which they are based seem to the writer to offer a rational solution to a most perplexing problem. Should they be adopted, adequate protection will be afforded the legitimate interests of the individual while at the same time the necessary powers of the government will be preserved.

²⁰⁰ CUSHING, *LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES*, 9th ed., § 199 (1899).