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LIMITATIONS ON CONGRESSIONAL INVESTIGATION

*George Meader**

I. USEFULNESS OF THE INVESTIGATORY FUNCTION

Increasingly, federal laws embodying far-reaching national policies are being couched in broad and general terms. The effect of this type of legislation is to place wide discretionary powers in administrative officials and to throw upon the courts an immense burden of interpretation in applying general principles to specific factual situations. There have been sensational instances of hasty passage of corrective legislation made necessary by court decisions interpreting a poorly worded law in a way Congress did not intend, such as the portal-to-portal¹ and over-time-on-overtime² decisions. Meanwhile, the practicing lawyer is at a loss to advise his clients of the effect of such legislation upon their lives and businesses until the attitude of the administrative officials and the courts becomes known. Even then, there is no assurance that such attitudes will remain fixed.

The administrative tribunal exercising legislative, administrative and judicial functions in derogation of our doctrine of separation of governmental powers has evolved and flourished in the last few decades largely because Congress has been unable to do more than to state a broad policy in general terms and create a commission to carry it out.

This situation has developed because our national economy has grown rapidly in size, organization and complexity while Congress has remained static. Until Congress equips itself with a sizable and competent staff, it will not be able to write its legislation in clear and specific terms and recall to itself the legislative power it has lost in the last few decades.

The foregoing should not be construed to mean that quasi-legislative powers should not be vested in administrative agencies. The question is one of degree. For example, the decision of the Federal Trade Commission relating to the basing point pricing system in the cement industry, recently upheld by the Supreme Court,³ involves a basic na-

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¹ *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187 (1946).

² *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 68 S.Ct. 1186 (1948).

³ *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793 (1948).

tional economic policy of an order that should be determined by the elected representatives of the people, rather than by an appointive commission acting under a broad delegation of authority.

Congress must be strengthened if the balance of separate governmental powers is to be restored. That strengthening may best be brought about by the development and effective use of the Congressional investigative function.

August 7, 1944, President (then Senator) Truman, in announcing on the floor of the United States Senate his resignation as Chairman of the Special Committee Investigating the National Defense Program, said:

"In my opinion, the power of investigation is one of the most important powers of the Congress. The manner in which that power is exercised will largely determine the position and prestige of the Congress in the future. An informed Congress is a wise Congress; an uninformed Congress surely will forfeit a large portion of the respect and confidence of the people.

"The days when Webster, Clay, and Calhoun personally could familiarize themselves with all the major matters with respect to which they were called upon to legislate are gone forever. No Senator or Representative, no matter how able or diligent, can himself hope to master all the facts necessary to legislate wisely.

"The accomplishments of the Truman committee—and I am referring now to the other members of the committee and its staff, rather than to myself—present an example of the results that can be obtained by making a factual investigation with a good staff. Similar accomplishments can be made by other special committees, as well as the standing committees of the Congress, and I particularly urge upon the Senate that it be liberal in providing ample funds for the prosecution of proper investigations. The cost of a good investigation is negligible when compared with the results which can be obtained."⁴

No reference to the investigative power of Congress can be found in the Constitution, yet its existence is well established. Before our nation was born, the English Parliament and the colonial legislatures exercised investigative powers.⁵ The power of Congress to "send for persons and papers" is said to be a necessary adjunct to legislative power,

⁴ 90 CONG. REC. 6747 (Aug. 7, 1944).

⁵ Landis, "Congressional Power of Investigation," 40 HARV. L. REV. 153 at 159 (1946).

since it enables Congress to inform and enlighten itself before enacting laws.⁶

The basis for implying the existence of the investigative power of Congress furnishes the guide to its proper exercise as well as the direction of its development into a more useful instrument of a democratic system of government. In our modern, complex national economy, with its intricate and multitudinous interrelationships, regulations and controls can no longer be adopted by simple, broad generalities but must be based upon thorough knowledge of the detailed facts, the conflicting special interests and the general public interest. The effects of proposed legislative action may thus be intelligently calculated, wise policies decided upon, and enactments stated in clear and unambiguous terms.

II. SPECIAL INVESTIGATING COMMITTEES

Although the Legislative Reorganization Act of 1946⁷ did not abolish special Congressional investigating committees by its terms, the 80th Congress did not create new special committees and the Senate drastically reduced the powers of an outstanding special committee, the Special Senate Committee Investigating the National Defense Program (the former Truman Committee). The Senate of the 81st Congress has allowed another special committee to expire, the Special Committee to Study the Problems of Small Business. The theory of the Legislative Reorganization Act was that standing legislative committees should do the investigative work of the Congress.⁸ Senate committees were given the subpoena power to that end.⁹ However, it is not alone the power of a committee but the ability and energy of its chairman and its members in exercising that power which determine the extent and vigor of Congressional investigating activity.

The history of Congressional investigations shows that, for reasons unnecessary to discuss here, standing legislative committees have not demonstrated great interest in conducting penetrating investigations. The practical effect, therefore, of stifling the creation of special investigating committees is to weaken, not to strengthen and expand, the investigative function of the Congress.

⁶ *McGrain v. Dougherty*, 273 U.S. 135, 47 S.Ct. 319 (1927).

⁷ 60 Stat. L. 812 (1946).

⁸ See S. REP. 1400 on S. 2177, 79th Cong., 2d sess., pp. 1-5 (May 31, 1946); S. 2177, 79th Cong., 2d sess., §126 (1946).

⁹ 60 Stat. L. 812, c. 753, §134(a) (1946).

III. PROPOSED LEGISLATION

A further limitation of the investigative function of Congress is contained in proposals now before Congress to establish procedural rules for Congressional committees designed to prevent abuses to witnesses and others in committee hearings and reports.

On January 5, 1949, Senator Lucas, majority leader of the Senate, introduced Senate Concurrent Resolution 2¹⁰ to establish certain procedural rules for Congressional committees. This resolution is identical with Senate Concurrent Resolution 44, introduced by Senator Lucas on February 25, 1948.¹¹

Companion resolutions to Senate Concurrent Resolution 2 were introduced in the House of Representatives on January 3, 1949, by Representative McCormack, majority leader of the House of Representatives,¹² and on February 2, 1949, by Representative Sabath, chairman of the Rules Committee of the House of Representatives.¹³

Similar resolutions and bills have been introduced by Representatives Holifield¹⁴ and Buchanan.¹⁵

For present purposes, it is sufficient to discuss the rules contained in Senate Concurrent Resolution 2, which is set forth in full in the appendix to this article.

IV. PROCEDURAL RULES FOR COMMITTEES

The gist of Senate Concurrent Resolution 2 is to give certain "rights" to any individual considering himself defamed by evidence presented to Congressional committees, to give certain "rights" to witnesses, and to impose certain limitations upon committees, their members and employees.

Any person who believes that evidence given in a public hearing of a committee defames him or otherwise adversely affects his reputation may: (1) file a sworn statement for the record; (2) testify personally in his own behalf; (3) require the committee to produce up to four wit-

¹⁰ S. Con. Res. 2, 81st Cong., 1st sess., 95 CONG. REC. 51 (Jan. 5, 1949). See appendix, *infra*, page 785, for text.

¹¹ S. Con. Res. 44, 80th Cong., 2d sess.; 94 CONG. REC. 1675 (Feb. 25, 1948).

¹² H. Con. Res. 3, 81st Cong., 1st sess. (Jan. 3, 1949).

¹³ H. Con. Res. 24, 81st Cong., 1st sess. (Feb. 2, 1949).

¹⁴ H. Con. Res. 4, 81st Cong., 1st sess. (Jan. 3, 1949); H.R. 74, 81st Cong., 1st sess. (Jan. 3, 1949); H.R. 191, 81st Cong., 1st sess. (Jan. 3, 1949).

¹⁵ H.R. 824, 81st Cong., 1st sess. (Jan. 5, 1949).

nesses in his behalf; (4) examine such witnesses, either personally or by counsel; (5) require the committee to procure the appearance of adverse witnesses; and (6) cross-examine adverse witnesses, personally or by counsel, but for not more than one hour as to each such witness.

Persons granted these rights may file a petition with the committee, whereupon it is mandatory for the committee, within 10 days, to fix a time and place for a hearing to be held within 30 days after receipt of the petition.

Witnesses before committees, in either public or executive hearings, are given the right to be accompanied by counsel and to have a copy of the transcript of their testimony.

A committee is prohibited from: (1) receiving evidence not relevant to the subject of the hearing; (2) publishing reports except after majority approval at a meeting called upon proper notice, and (3) publishing a statement or a report alleging misconduct or containing other adverse comment regarding any person without advance notice to such person.

Committee members and employees are prohibited from speaking or writing about the committee for compensation.

“Committee” is defined to include a standing or select committee of either house of Congress, joint committees and all subcommittees.

Senator Lucas, in discussing the introduction of Senate Concurrent Resolution 44, announced on the floor of the Senate his support of the proper exercise of the investigative function of Congress. He contended, however, that the Senate War Investigating Committee’s investigation of Howard Hughes had brought that committee and the Senate into disrepute and cited a number of editorials in support of that contention. He argued that requiring committees and their members and employees to be fair would enhance public respect for Congressional investigations, thus strengthening them.¹⁶

It can be conceded that the strength and value of a Congressional committee is derived from its public acceptance and prestige and that unfairness of Congressional investigators detracts from the reputation of a committee and the Congress. However, it is doubtful that the provisions of Senate Concurrent Resolution 2 will succeed in preventing abusive action by legislators. On the other hand, the proposed rules will seriously impair both the investigative and legislative work of Congress.

¹⁶ 94 CONG. REC. 1672 (Feb. 25, 1948).

V. COMMENT

Senate Concurrent Resolution 2 seeks to give persons claiming to be defamed their "day in court." A legislative committee is not a court and cannot effectively discharge its investigative and policy-making duties operating as a court, with pleadings, motions, arguments and rules of evidence. Furthermore, Senate Concurrent Resolution 2 gives persons claiming to be defamed more than a day in court. No court in which allegedly defamatory testimony might be received would halt the trial of the case to permit the aggrieved person to intervene and offer evidence as to the damaging remark.

Courts retain control of their proceedings at all times. The discretion of the judge is the final authority in his court, subject only to appeal. A legislative committee, however, under Senate Concurrent Resolution 2 would have no discretion whatever as to whether a hearing should be held, who should be called as witnesses, the propriety of questions asked upon examination or cross-examination, or the contents of statements to be filed with the committee as a part of its record.

If the committee sought to exercise such discretion, it would be subject to the charge that it was not sincere in its purpose to give a fair and complete hearing. If the committee does retain such discretion, the rules have little meaning because a majority of a committee can now insist upon "fairness" if they can agree on what is fair.

The fees and travel expenses of witnesses, stenographic and printing expense, and other costs incident to holding such a hearing would be borne by the committee out of its appropriation. In a court, litigants must bear the costs of litigation. This acts as a deterrent to excessive litigiousness.

The effect of the rules proposed in Senate Concurrent Resolution 2 will be to take the control of its proceedings away from Congress and place it in the hands of individual citizens. Senate Concurrent Resolution 2 would provide a means for spotlight seekers to indulge their proclivities in Congressional hearings almost without limit.

The testimony or evidence considered by a person to be defamatory might consist of an irrelevant, gratuitous remark made by a witness before a committee, which the committee could not anticipate or prevent. Nevertheless, under Senate Concurrent Resolution 2, the committee would be required to sit and hear a petitioner's statement and the statements of four witnesses called in his behalf and a cross-examination of

the alleged defamer or defamers for hours, if not days. It is likely that the petitioner in replying to his defamer might give testimony leading the latter to believe he had been defamed; whereupon another petition would be filed, requiring a further hearing by the committee. This could continue indefinitely.

A trial of Communists in New York in which weeks were consumed examining the jury selection system in federal courts¹⁷ should furnish convincing proof that there is a real likelihood that advantage would be taken of the procedural provisions of Senate Concurrent Resolution 2 as suggested above.

The time of legislators is now inadequate for intensive study of problems of legislation. The forum of a legislative committee ought not to become the battling ground of vituperation and attack and counter-attack, converted from a policy-making agency into a court for trying slander and libel cases. This would not enhance the dignity and prestige of Congress and would render investigations and legislation worse—not better.

Corrupt, unintelligent or unfaithful action against the public interest might well go unexposed because of the delaying, filibuster-like procedure of Senate Concurrent Resolution 2. Any lawyer for the defense is well aware of the advantage of delay. Major General Bennett E. Meyers,¹⁸ Commander John D. Corrigan,¹⁹ former Congressman Andrew J. May, Henry and Murray Garsson,²⁰ former Congressman James M. Curley²¹ and the participants in the Teapot Dome scandal, as well as many others, would have welcomed the procedural opportunities which would have been extended to them by the provisions of Senate Concurrent Resolution 2, had it been in effect when their activities were under examination.

Senate Concurrent Resolution 2 is not confined to investigative committees ferreting out wrong-doing, but is equally applicable to all congressional committees and sub-committees. Suppose, for example, a petitioner, who is not required to be a citizen, claimed before the Senate Foreign Relations Committee that some testimony given at a committee hearing had detracted from his reputation because it implied inefficiency

¹⁷ See, e.g., N.Y. TIMES, March 8, 1949, p. 1:8.

¹⁸ Hearings, Investigation of the National Defense Program, part 43, 80th Cong., 1st sess. (1947).

¹⁹ Id. part 24, 78th Cong., 2d sess. (1944).

²⁰ Id. part 35, 79th Cong., 2d sess. (1946).

²¹ Id. part 12, 77th Cong., 1st sess. (1942).

or bad faith on his part. Under Senate Concurrent Resolution 2, he could compel the Senate Foreign Relations Committee to sit and hear him, his witnesses and cross-examination of his detractors at length. An even more interesting case would be presented if the petitioner claimed that a member or employee of the committee had been the detractor and, under Senate Concurrent Resolution 2, claimed the right to cross-examine the Senator or a member of the committee staff.

Any rules, in addition to existing parliamentary rules, should be adopted committee by committee. The Bender Sub-committee of the Committee on Expenditures in the Executive Departments of the House of Representatives, the Ferguson Sub-committee of the Committee on Expenditures in the Executive Departments of the Senate, both in the 80th Congress, and the Un-American Activities Committee of the House of Representatives of the 81st Congress, have adopted rules. Such rules, if found unworkable, can be amended by the individual committee. Rules enacted in a statute would have to be amended by statute, subject to Presidential veto. Rules adopted by concurrent resolution could be changed only by action of both houses.

In any event, any rules, whether adopted by a committee or by the entire Congress, should clearly specify that they do not give rights which would permit a successful challenge to the validity of committee or Congressional action or would constitute a defense to proceedings for punishment of a contempt of Congress. Unless this effect is specifically precluded, the whole subpoena power of Congress is undermined. Thus, a useful means of obtaining facts as a basis for the enactment of wise legislation and for observing the administration of laws will be destroyed.

Section 5 of Senate Concurrent Resolution 2 adds nothing to present practices regarding attendance of counsel except that it gives a witness a right to have counsel present at a private hearing. Since section 5 allows an attorney to do no more than observe, unless the committee permits otherwise, the question of the value of this right naturally arises; the presence of one more person makes the control of the confidential nature of an executive hearing more difficult. As a general practice the Truman-Mead Committee permitted counsel to be present in executive as well as public hearings. Situations may well arise, however, where it would be preferable not to have counsel present at executive hearings. The decision on this matter should be left in the discretion of the committee.

Section 6 of Senate Concurrent Resolution 2 adds nothing to present

law since a witness may now refuse to answer any question not pertinent to the inquiry.²²

Section 7 of Senate Concurrent Resolution 2 gives witnesses at private hearings a right to a copy of the testimony. Members and employees of a committee are subject to committee control for breaking secrecy, but a witness is not. If a committee loses control of the executive character of its actions the effect is to put an end to executive hearings, a useful method of informing Congress on matters which, for one reason or another, are not appropriate for public release. The temptation to "leak" confidential information to favored sections of the press is a strong one; human curiosity about something kept secret lends a quality of news interest to the material which its substance would not justify.

Measures should be taken by Congress to prevent "leaks" of confidential material, but furnishing a record of secret testimony to witnesses is not one of them.

Section 8 adds nothing to present rules since all committee action must now be by majority vote.

Section 9, requiring committees to give advance notice of adverse comment, is unwieldy. What constitutes adverse comment is subject to a wide difference of opinion. It is difficult enough under existing practices to prepare and obtain agreement of committee members on a report. The requirement of giving advance notice to an indeterminate class of persons and allowing them a "reasonable" time to oppose the committee's findings and conclusions would slow down and make extremely difficult the issuance of reports.

The Truman-Mead Committee made it a practice to submit, on a confidential basis, a draft of a proposed report to government officials and interested private individuals for comment as to the accuracy of the facts and the soundness of committee conclusions and recommendations. This is a salutary practice. It improves the quality of committee reports. However, the practice should be discretionary with the committee, not mandatory.

Section 10, prohibiting speaking and writing for compensation by committee members and employees, raises a question of basic policy applicable to all public officials. Payment for lectures or articles may be an avenue for improperly influencing the decision of a public official. Where this exists, it can be and should be punished under existing pro-

²² *Sinclair v. United States*, 279 U.S. 263 at 296-7, 49 S.Ct. 268 (1929); 52 Stat. L. 942 (1938), 2 U.S.C. (Supp. 1948) § 192.

visions of law. However, it is in the public interest that public affairs should be widely discussed. To prohibit payment to all public officials for lectures or articles might limit the amount of information available to the public concerning national affairs. In any event, the principle would seem equally applicable to all public officials. Such a proposal should be carefully studied and adopted as a general provision of law, if it is desirable, rather than being confined to legislative committee work.

VI. CONCLUSION

It is agreed that "headline-seeking," "smear tactics" and "witch-hunting" are reprehensible activities on the part of legislators or any other public officials. It may be more difficult to find agreement upon what constitutes those activities in any given factual situation. There are existing sanctions controlling such abuses in present parliamentary rules, in adverse press and public reaction, and ultimately in the defeat of a legislator at the polls.

Recognizing that legislators naturally seek to keep their names before their constituents, it is the writer's opinion that the great majority of Congressmen and Senators do not engage in unfair conduct. It seems unwise to destroy the flexibility of operations in legislative committees in their formulation of national policies and to impose limitations upon the discretion and power of all legislators merely for the purpose of restraining abuses by a few members of Congress. Senators and Congressmen are entitled to the trust and confidence implied in their election to what, in effect, is the board of directors of the largest and most powerful institution in the world. Their responsibility is great. They ought not to be limited by inflexible, time-consuming procedures in discharging that responsibility.

A very thoughtful and judicious discussion of procedural rules for Congressional committees was written by Charles E. Wyzanski, Jr., United States District Judge of Massachusetts, in the March, 1948, record of the New York City bar association.²³ Judge Wyzanski opposes the adoption of procedural rules for Congressional committees until after further study, except that he suggests a witness should have the right (a) to have counsel present, (b) to file a written statement before the hearing is concluded, and (c) to have an accurate record kept of his own testimony.

²³ Reprinted in 94 CONG. REC. A1592 (March 11, 1948).

The avenue for strengthening the investigative power of Congress, and thus strengthening Congress itself, does not lie along the path suggested by Senate Concurrent Resolution 2. Rather, progress toward improved legislation will result from the acquisition by Congress of a staff of able employees, primarily for its committees, to study and investigate the facts of any subject and to advise, counsel and assist committees and individual legislators in enacting legislation. Congress needs help in obtaining facts, not restrictions making it more difficult. When legislation comes to be based more upon studies of fact and less upon generalities, emotions and prejudices, our system of government by the people through elected representatives will have proved itself workable in a modern, complex society.

APPENDIX

Text of S. Con. Res. 2 (Jan. 5, 1949):

"Resolved by the Senate (the House of Representatives concurring), That the following provisions of this concurrent resolution are adopted as an exercise of the rule-making power of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of each House, respectively.

"SEC. 2. Any person who believes that testimony or other evidence given in a public hearing before any committee tends to defame him or otherwise adversely affect his reputation may file with the committee a sworn statement, concerning such testimony, which shall be made a part of the record of such hearing.

"SEC. 3. Such a person shall in addition have the right (a) to testify personally in his own behalf; (b) to have the committee secure the appearance of witnesses requested by him for the purpose of testifying in his behalf, and to examine such witnesses, either personally or by counsel, but no more than four such witnesses shall be called; and (c) to have the committee secure the appearance of witnesses whose testimony adversely affected him, and to cross-examine such witnesses, either personally or by counsel, but such cross-examination shall be limited to one hour as to any one witness.

"SEC. 4. Any person who wishes to avail himself of the rights accorded by section 3 shall, within thirty days of the receipt by the committee of the testimony complained of, file a petition with the committee requesting the fixing of a time and place for the receiving of testimony or the conduct of cross-examination and designating the witnesses to be summoned. Such a petition shall be accompanied by the sworn statement of the petitioner that the petition is not filed for the purpose of delaying or obstructing the work of the committee, but because his reputation has been unjustifiably damaged or otherwise adversely affected by false accusations or inference. The committee shall, within ten days after the receipt of such a petition, fix a time and place for the receiving of testimony or the conduct of cross-examination, which time shall not be later than thirty days after the receipt of the petition, and shall secure the appearance at such time and place of the witnesses designated in the petition.

"SEC. 5. Any witness summoned at a public or private hearing before any committee shall have the right to be accompanied by counsel. Such counsel shall be allowed to observe the hearing, but shall not be allowed to participate therein or to advise the witness while on the witness stand unless the committee, in its discretion, shall otherwise determine.

"SEC. 6. In the conduct of hearings, the evidence received shall, so far as possible, be relevant and germane to the subject of the hearing.

"SEC. 7. If the testimony of a witness at a private or public hearing before any com-

mittee is reported stenographically, such witness shall be entitled to a stenographic transcript of such testimony upon payment of the cost of the transcript.

"SEC. 8. A committee shall not publish or file any report, interim or final, unless and until a meeting of the committee has been called upon proper notice and such report has been approved by a majority of those voting at such meeting.

"SEC. 9. No committee or employee thereof shall publish or file any statement or report alleging misconduct by, or otherwise adversely commenting on, any person unless and until such person has been advised of the alleged misconduct or adverse comment and has been given a reasonable opportunity to present to the committee a sworn statement with respect thereto as provided in section 2.

"SEC. 10. No member or employee of a committee shall, for compensation, speak, lecture, or write about the committee, its purposes, procedures, accomplishments, or reports during the existence of the committee and while he is a member of the committee or in its employ.

"SEC. 11. As used in this concurrent resolution, the term "committee" includes a standing or select committee of either House of Congress, a joint committee of the two Houses, and a duly authorized subcommittee of any of the foregoing."