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(5) Since the courts have been reluctant to scrutinize the activities of legislative committees, the Congress, in practical effect, is the grand inquest of the nation, and the law of the Congress is known only to itself.

Marshall Smelser

LEGISLATIVE INVESTIGATIONS: SAFEGUARDS FOR WITNESSES:

ABUSIVE PRACTICES OF INVESTIGATING COMMITTEES:

METHODS OF COMMITTEES INVESTIGATING
SUBVERSION — A CRITIQUE

The chairman of one of the committees of the Congress investigating subversion recently quoted from a speech delivered by Abraham Lincoln in 1838.¹ The Senator quoted the speech as a warning that if danger should imperil this nation, it will come from our own people and not from abroad. "[I]f it ever reach us," Lincoln said, "it must spring up amongst us."²

Lincoln's speech, however, has a different point. His remarks were occasioned by outbreaks of mob violence in the nation. His speech was a plea for restraint, for due process, for the rule of law. It was a stern condemnation of those who, like some of our congressional investigators, seek to take into their own hands the lawful functions of the courts and the duties of our law enforcement officials. In a portion of his speech which the Senator did not quote, Lincoln said:³

¹ The Washington Post, Nov. 28, 1953, p. 11, col. 6; The Washington Star, Nov. 25, 1953, p. A-6, col. 2. The speech quoted from was *Address Before the Young Men's Lyceum of Springfield, Illinois, January 27, 1838* in 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 108 (1953).

² 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *op. cit. supra* note 1, at 109.

³ *Ibid.*

I hope I am over wary; but if I am not, there is, even now, something of ill-omen amongst us. I mean the increasing disregard for law which pervades the country; the growing disposition to substitute the wild and furious passions, in lieu of the sober judgment of courts; and the worse than savage mobs, for the executive ministers of justice.

We, too, are faced with a dangerous trend towards circumvention of the courts and the executive processes of government. Our danger does not come from mob violence. It comes from a few investigating committees of the Congress, or more accurately, their chairmen. The result of these practices is not only to injure and intimidate many blameless persons; it is also to imperil our public service and our national reputation, and to endanger the effectiveness of our police and intelligence work.

I

There can be no doubt of the general proposition that the Congress may investigate subversion, and that it may conduct such investigation through committees.⁴ There can now be no reasonable doubt, I think, that there were grounds for the investigations successively authorized by the Congress, beginning in 1938. But I suggest that there is considerable room for doubt that the Congress has done the job either wisely or well.

In 1938, a committee of the House of Representatives, headed by Congressman Martin Dies, began the first of a series of probes.⁵ It is now clear that behind the fabulous amount of smoke raised by this committee there was some fire. But the committee did not effectively expose the fire or extinguish it.

⁴ See *Barsky v. United States*, 167 F.2d 241, 246 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948); *United States v. Josephson*, 165 F.2d 82 (2d Cir. 1947), *cert denied*, 333 U.S. 838 (1948).

⁵ CARR, *THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 1945-1950* 17-18 (1952); OGDEN, *THE DIES COMMITTEE* (2d ed. 1945).

Indeed, I think it is fair to say that the activities of the committee were essentially harmful to the very cause which it purported to serve: to alert the people of this country to the dangers of Communist espionage and domestic disloyalty; and to expose individuals, including government officials, who were serving the interests of international Communism and the Soviet Union.

There is no doubt that the Dies committee largely failed to accomplish these purposes. It did not succeed in alerting the responsible people of the nation. On the contrary, many of them, including practically all of the chief officials of government, were induced by the committee's activities to dismiss its warnings of danger and to reject all of its accusations.

In large part, I think that this result was due to the reckless and irresponsible methods of the committee. The accusations of the Dies committee, more often than not, were wild, indiscriminate and without foundation. The committee's buckshot indiscriminately wounded the obviously innocent as well as the guilty or questionable. Each week brought a flood of denunciations of trusted and trustworthy officials on patently absurd grounds. To credit these fantastic, enraged assaults would have been indecent and in the real sense un-American. The net effect was to set up in thoughtful people a strong resistance to the charge of Communist affiliation; to induce them to discount such charges; and to discourage any serious, sober and methodical investigation.

It must also be remembered that in the early years, beginning in 1938, we were almost completely unaware of the diabolical organization and machinations of Soviet espionage. In particular, we were unaware of the sinister use made of the apparatus of the Communist Party in this country. We were still living, we thought, in a good, decent, moral world. We knew little if anything of the "double-think" and the big lie. We had little conception that men and women could become enmeshed in an organization in which they surrendered their

moral values and their individual judgments, and prostituted their minds. We knew that in literature there are tales of men surrendering their souls and being traitors to their society, for reasons of romance or gain, idealism or venality. But those were legends. We knew vaguely that Nazis and Russians submitted to ruthless dictatorships of the mind and soul; but they were foreigners. For Americans, the prototype was not Faust, but Wild Bill Hickok in the heroic version that our President recalled in a recent speech.⁶

It is also important to recall that in the 1930's the supposed theory of communism exerted a magnetic appeal for some of our young people and intellectuals. During the dark years of the depression, when our own form of government appeared to some people to be incapable of dealing with widespread misery — with the problem of “bursting bins and hungry people” as it has been called — these people joined Communist study groups or Communist youth organizations. Their influence upon national attitudes was far greater than their number would indicate, because they were extremely active. They participated vigorously in humanitarian causes and political affairs; they were writers and speakers. This was also the period of the united front when Communist policy carefully obscured the basic conflicts between communism and democracy; when there was wide acceptance of the proposition that there was no real difference of tactics or objectives between Communists and liberal Americans; and when people could associate themselves with Communist organizations in the sincere belief that there was nothing in such association inconsistent with complete loyalty to the United States.

During much of this period of the 1930's, there was also great sympathy for the Soviet Union because of its apparently resolute stand against the foul depredations and aggres-

⁶ The Washington Post, Nov. 24, 1953, p. 1, col. 1.

sions of the Nazis under Hitler. Without doubt, this fact, sharply contrasted with the abject surrender of the British and French at Munich, was largely responsible for considerable good will in this country towards the Soviet government.⁷

This feeling, however, was rudely shattered in August, 1939, when the Soviet Union and the Nazis suddenly entered into a mutual assistance pact. The signing of the pact was accompanied by a sharp change in the Communist Party line in this country to conform with the about-face of Soviet policy. Few of the young people who joined Communist organizations in those early years ever became associated with the inner or conspiratorial circle of the Party. Most of them, in fact, left the organization shortly after joining, as disillusion, disagreement or just boredom set in. Someone has aptly said that in those years Party organizations were a revolving door. Many more left the Party organizations as a result of the pact.

The pact clearly illuminated the fact that the Soviet Union was willing to ally itself with the ugly evil of Hitlerism and that it was by no means a steadfast defender of mankind. The pact also disclosed, to all but the fanatically blinded, the hidden fact that the Communist Party in this country was merely a puppet of the Soviet Union, dancing to the Soviet tune.

This period of relative clarification, however, was short. In June of 1941, the Nazi armies invaded the Soviet Union. The Soviet Union then became our ally in fact; and after we entered the war in December, we became brothers-in-arms. This, of course, was of surpassing importance. Our first consideration of national policy was to retain the complete cooperation of the Soviets; to avoid any danger of provoking the Soviets into a separate peace with Germany; and to keep

⁷ See COOKE, *A GENERATION ON TRIAL* 3-41 (1950).

them in the fight until Japan as well as the Nazis were subdued. Even after the surrender of Japan in August, 1945, there was a period of a year or a year and a half — until perhaps early 1947 — in which we continued to hope that the Soviet Union and the Western World would be able to live and work together. There is evidence in the chronicles of the time that this objective guided our foreign policy. It also profoundly affected the attitude and reaction of our people and our government towards the accusations of Communist or Soviet associations which the Dies Committee and others were making during those years.

II

In this setting, it is not strange that the Dies Committee failed to call us to arms against the Communist menace. Success in this objective would have been difficult in any event, because the overwhelming fact of the times was the Nazi aggressions and the threat to our own survival that the Nazis presented. Just as today we are so absorbed with the Soviet threat that cries of warning about the suppression of civil liberties sound feeble and remote, so then we were so concerned with Hitlerism that we paid little heed to the Communist menace. If we were to be alerted to it, clear and convincing evidence would have been required.

It may well be that if, during the years from 1938 to 1945, congressional investigating committees had proceeded with care and precision to make the case that there were persons at work in this country who were serving the interests of the Soviet Union, history might have been different. If there had been produced a well-documented, authoritative disclosure of individual government officials or defense workers who were engaged in passing secret information to Soviet agents, informed and responsible public opinion would probably have been profoundly altered. This did not occur. Instead, the bedlam of charges continued. Congressman Dies and his

associates in the enterprise continued during the years from 1938 their reckless fusillade.⁸ The result was that the people were not marshalled to battle the invader. Rather, most of them were induced to lock their doors to keep out the wild clamor and uproar of this dubious Paul Revere.

It is this, I suggest, that will provide history's basic indictment of the activity of congressional committees in those days: That it was so badly and recklessly carried on that it profoundly influenced responsible people and officials to resist or reject the thought that there might be any traitor in our midst.

The same type of carelessness and indifference to fact has, in differing degrees at different times, marked the major congressional committees investigating subversion since Mr. Dies was relieved of the leading role. In evaluating the work of these committees, it is important to acknowledge that the criticisms are usually directed against the actions of their chairmen. The excesses of these investigations mostly occur when the committee's affairs are dominated by a single individual. The House Un-American Activities Committee illustrates this point. After Mr. Dies and Mr. Parnell Thomas were retired from the chairmanship of that committee, its members began to assert themselves, and today they are exercising noticeable, although not uniformly effective, restraint upon their present chairman. Similarly, there appears to be some decline in the excesses of the Senate Internal Security Subcommittee since the forceful Senator McCarran was succeeded by Senator Jenner. By contrast, Senator McCarthy is unfettered; the Democrats on his subcommittee resigned;⁹ the Republican members are inactive partners, entirely without function.

When we consider the reasons for recklessness, then, we must largely blame the motives of the individual chairmen.

⁸ See OGDEN, *op. cit. supra* note 5.

⁹ N.Y. Times, July 11, 1953, p. 1, col. 3.

Certainly these include the desire for publicity; for political rewards; and for personal power, including, apparently, the power to obtain patronage and other official benefits.¹⁰ These seem to grow in proportion to the number and spectacular nature of the accusations.

I do not doubt that these chairmen are also motivated by the conviction that the means they use serve the end they seek — that is, that the methods which they employ are suited to the job of destroying Communism in the United States and thwarting the Soviet Union's efforts to obtain important information. We need not question the sincerity of these men. We may assume that they believe in their mission and their method. But there is no justification for ignoring the fact that they have often yielded to the lure of sensationalism at the expense of prudence and fact.

We are warranted in appraising the work of these committees with three propositions in mind:

First, the people of this nation have a right to an objective and not a distorted view of the present and past magnitude of the problem of subversion and espionage. We are entitled to the truth. We are entitled to demand that exaggerated, sensational or distorted reports be avoided. We do not wish to be misled either as to particular individuals who are accused or as to the general problem of disloyalty or subversion.

Second, we have a right to insist that the problems of espionage and subversion are too important to be used for partisan political purposes or for personal power or glory. We are also entitled to demand that the most effective and powerful means available to us under the law should be used, not merely to expose espionage and sabotage, but to eliminate them. We are entitled to demand that the FBI and our

¹⁰ The factors which tend to produce abuse by legislators have been analysed by Shils, *The Legislator and His Environment*, 18 U. OF CHI. L. REV. 571 (1951).

other intelligence agencies should aggressively and effectively undertake this problem, and that investigating committees should not disrupt their work.

Third, we have a right to insist that witnesses called by these committees should be given an opportunity to defend and vindicate themselves; and that the evidence concerning them should be fairly represented, not only in committee reports, but also in publicity statements. We are entitled to demand this objective reporting because it is obviously necessary as a matter of fairness to the individual concerned and to us all. We are also entitled to insist upon it because, without it, we are misled.

The committees investigating subversion, or more properly their chairmen, have fallen far short of these standards. The extent, degree and nature of their deviations from appropriate standards vary greatly from committee to committee and chairman to chairman. They have also varied from time to time. For example, in the recent report of the Internal Security Subcommittee under Senator Jenner, entitled *Subversive Influence in the Educational Process*,¹¹ the committee claims to have observed a number of commendable principles. The committee made the following assertions: ¹²

1. That "its norm of subversion" was present membership in the Communist Party.
2. That even where a witness had belonged to as many as 30 or 40 Communist front organizations (an incredible number even for an habitual joiner), the committee excused him from testifying in public session if he denied Communist Party membership.
3. That where a recanted Communist was unwilling to identify former associates, the committee would not press

¹¹ *Committee Print of the Report by the Senate Subcommittee to Investigate the Administration of the Internal Security Act and Other Laws on Subversive Influence in the Educational Process*, 83d Cong., 1st Sess. (1953).

¹² *Id.* at 3-5.

for names if convinced of the genuineness of the witness's conversion.

4. That where a witness denied present membership in the Communist Party, but refused to answer questions as to past membership, claiming his immunity against self-incrimination under the Fifth Amendment, the committee did not immediately compel his public testimony if it felt that his refusal to testify was due to fear or bad advice.

These announced policies are in sharp contrast with the past conduct of this committee itself and of other committees and their chairmen. It is particularly in extreme contrast with the techniques employed by the Senate Permanent Investigations Sub-committee.

The practices which, in my opinion, have caused the greatest damage to the public interest, to individual witnesses and to the reputation of the committees themselves may be summarized as follows (I emphasize that not all of these may be charged to all committees or to a particular committee at all times):

1. *The Daisy-Chain Technique, or Guilt by Mere Association.* In its extreme form, this has reached the point of public denunciation of a person because he worked or was acquainted with an accused. At times, the relationship has been in the second or third degree.¹³ There is no doubt that association with subversives may at times be a reasonable factor to be taken into account in evaluating a person's loyalty; but association alone does not justify accusation or insinuation of disloyalty, or exposure to the ordeal of public hearing.¹⁴

¹³ See Marder, *Reading One's Way Into Guilt by Association Is New Chapter*, The Washington Post, Nov. 11, 1953, p. 1. col. 6; Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 HARV. L. REV. 1193, 1217-24 (1947).

¹⁴ See Commager, *Guilt — and Innocence — by Association*, N.Y. Times Magazine, Nov. 8, 1953, p. 13.

2. *Guilt by Confusion.* This is the practice of publicly naming a person as to whom there is no substantial evidence, along with a list of other persons who are known Communists or Soviet agents, American or foreign. The victim may have no connection with such persons; but the mere fact of reiterating his name in association with theirs brands him in the public mind as subversive.

3. *The Distortion of the Calendar.* This phenomenon takes several forms. For example, membership in an organization like the League Against War and Fascism is established. It is then stated that this group is on the Attorney General's list of subversive organizations. There is studied disregard of the fact that the individual's membership in the particular organization was terminated in 1941 and that the Attorney General's list was not published until 1945. Another example is the recent widespread publicity by a committee chairman with respect to alleged espionage at a Signal corps establishment. The chairman sought to establish that espionage existed after the war, and he attempted to relate several witnesses to Communist activities at the plant and even to currently existing espionage. He did not disclose, however, that the witnesses had ceased to be employed at the plant in 1945 or 1948.¹⁵

4. *The Sliding Word.* This is the easy transition from evidence indicating membership in Communist front organizations to a charge of Communism, or from evidence as to Communist affiliation to a charge of espionage. It is justifiable only if it is assumed that all persons who are or were affiliated with front organizations were Communists — which clearly is not true — and that all members of the Communist Party were engaged in espionage. I do not think that this is the case. I believe the record shows that many Communists were members, for example, of study groups or

¹⁵ See The Washington Post, Nov. 26, 1953, p. 2, col. 1.

youth organizations, and that they had no connection whatever with the terrible work of espionage.

5. *The Vendetta.* This is the relentless pursuit of persons who have been accused: for example, John P. Davies and John Carter Vincent of the State Department. It will be remembered that the loyalty of Mr. Davies was attested by Under Secretary of State Bedell Smith, and that Mr. Vincent was cleared by the present Secretary of State, Mr. John Foster Dulles.¹⁶ Nevertheless, these men are continually harassed — most recently, on nation-wide radio and television networks.¹⁷ Another illustration is the relentless attack upon critics of a committee chairman, as in the case of James Wechsler, Editor of the *New York Post*.¹⁸ Again, it is to be noted that this practice currently seems to be limited to the Senate Permanent Investigations Subcommittee.

6. *The Expansion of the Implications of the Fifth Amendment Claims.* In substance, this technique involves the use of a claim of immunity under the Fifth Amendment as a species of expanding proof. It appears to work this way: A witness is asked whether he is or was a member of the Communist Party. He refuses to answer, claiming his privilege against self-incrimination. The inference in fact, although it is not permissible in law, is that the witness is or was a member of the Party. I do not object to the drawing of this inference of fact. But the matter does not rest there. The witness is then asked whether he has ever engaged in espionage; whether he engaged in espionage thirty days ago; or on the 19th day of October, and so on. He refuses to answer any of these questions, claiming his immunity. These refusals to answer as to espionage are widely publicized to create the impression that the witness was a spy. The public gets the

¹⁶ N.Y. Times, Dec. 16, 1952, p. 37, col. 1, 8; N.Y. Times, March 5, 1953, p. 1, col. 5.

¹⁷ N.Y. Times, Nov. 25, 1953, p. 5, col. 6.

¹⁸ See WECHSLER, *THE AGE OF SUSPICION* 266 *et seq.* (1953); N.Y. Times, May 8, 1953, p. 14, col. 3; N.Y. Times, Aug. 13, 1953, p. 23, col. 1.

impression that just as the refusal to answer as to Party membership indicates that the witness belonged to the Communist Party, so the refusal to answer the questions as to espionage indicates that the person has been engaged in stealing secret data.¹⁹

Now in the present situation I have little tolerance for immunity claims, or for persons who assert them. But I also intensely dislike the technique of exploiting those claims by expanding their implications beyond justifiable limits.

I do not, of course, know whether the individuals concerned do or do not have something to conceal with respect to espionage. But I know that the inference of espionage cannot reasonably or fairly be drawn in the circumstances that I have described. Every lawyer knows that a witness who has claimed the protection of the Fifth Amendment may be well advised to refuse to answer any questions whatever — whether or not he has anything to hide — with respect to any phase of alleged subversive activity. This is because his testimony on one phase of the matter may constitute a waiver of immunity for all purposes.²⁰ In other words, if he denies that he has engaged in espionage, he can then be compelled to answer the questions as to his membership in the Communist Party and all other questions relating to this matter.

This legal doctrine is undoubtedly familiar to investigating committees and their counsel. Because of it, it seems to me clear that they should not ask questions of witnesses who claim the immunity which raise an inference of espionage, unless there is independent evidence that those witnesses in fact have been engaged in this despicable activity. In the circumstances, without such evidence, these are indeed loaded

¹⁹ See Frantz and Redlich, *Does Silence Mean Guilt?*, 176 THE NATION 471, 472 (June 6, 1953).

²⁰ *Rogers v. United States*, 340 U.S. 367, 373-75 (1951); *Bart v. United States*, 203 F.2d 45, 51-52 (D.C. Cir. 1952); Note, *The Privilege Against Self Incrimination: The Doctrine of Waiver*, 61 YALE L.J. 105 (1952).

questions, designed not merely to implicate the witness beyond justification in the facts, but also to mislead the public as to the existence or extent of espionage in this country.

III

These abuses are, in my opinion, highly destructive. They are unjustifiable in morality or reason. They are not caused by the absence of appropriate rules of procedure.²¹ They would be impossible, whatever the committee procedures might be, if the committees and their chairmen approached their tasks with objectivity and a dedication to fact. It is by no means clear, indeed, that any rules of procedure, however fairly devised, would cure these evils. They essentially flow, I believe, from a lack of judicial temper and from a distortion of the functions of congressional investigating committees.

Now, I have no doubt that congressional committees have a proper function in respect of subversion. Their function, however, is to obtain material to inform the Congress and the public as to how existing laws are operating and what, if any, additional legislation is needed. This is the proper constitutional function of the legislature. But the legislative branch of our government has no right to undertake to execute the laws, or to usurp the functions of the courts by hearing evidence and pronouncing judgment on individuals.

Certainly, the line is difficult to draw between an investigation of a problem and a trial of individuals. The investigating committees themselves assert that they are not courts. But the time is long since past when these committees can convincingly claim that their hearings serve a legislative purpose, or any purpose beyond the denunciation of individ-

²¹ See, e.g., Rules of Procedure set out in *Hearings Before the Subcommittee of the Senate Committee on the Judiciary on Investigations of the Department of Justice under H. Res. 50*, 83d Cong., 1st Sess. 1511 (1953). Rules of Procedure, House Committee on Un-American Activities are contained in a separate pamphlet issued by the Committee, July 15, 1953. Rules of Procedure, Senate Permanent Subcommittee on Investigations are contained in a mimeograph release, Jan. 14, 1953.

uals claimed to be subversive. Whatever may have been the situation in the past, the nature of the problem is now clear. The task before our government is for the legislative to shape laws to meet it, if additional laws are needed, and for the executive vigorously, firmly and fairly to execute our laws. There is now no excuse for investigating committees to undertake the work of the FBI, the police, the intelligence agencies and the law-enforcement officials. There is no excuse now, if there ever was, for investigating committees to call individuals to the bar of public opinion and in fact to put them on trial and to inflict punishment upon them. This is a task for the courts. If our laws and law-enforcement personnel are not adequate to bring persons engaged in subversive activity before the bar of justice and to obtain convictions where merited, it is our job and the job of Congress to make them adequate.

So long, however, as congressional investigating committees continue, in fact, to accuse individuals of high crimes, to compel their testimony, to present information against them, and to pass judgment upon them, they should be subject to the basic requirements of due process.²² These are not only essential as a matter of fairness to the individual; they are needed not only so that justice, decency and morality may continue to exist in this land of the free; but they are imperative if we are to gain a true appraisal of our danger and a true statement of the facts.

In other words, the disorderly, hit-or-miss procedures of these committees are, in my opinion, a menace to the nation, apart from the individuals concerned. Their failure to present an objective and a balanced statement of facts causes many

²² Some proposed reforms to attain these ends are listed by Galloway, *Congressional Investigations: Proposed Reforms*, 18 U. OF CHI. L. REV. 478, 496 (1951); see also Javits, *Some Queensberry Rules for Congressional Investigators*, 9 THE REPORTER 23 (Sept. 1, 1953); Kefauver, *A Fair Conduct Code for Congress*, 128 NEW REPUBLIC 14 (Mar. 16, 1953); Morse, *Wanted — Fair Procedures*, 9 BULL. ATOMIC SCI. 211 (July 1953); Report of the Committee on the Bill of Rights of the Association of the Bar of New York, reproduced in 95 CONG. REC. A1363-65 (1949).

of our people to exaggerate or distort the dangers to our country. On the other hand it causes many people, who are repelled by the disorderly work of the committees, to underestimate and unduly discount the problem.

Congressional investigating committees do not pretend to afford procedural due process to the accused. They frankly declare that witnesses have no procedural rights. In relatively recent months the committees have adopted rules of procedure,²³ but these rules are entirely inadequate. In substance all that these committees purport to grant to witnesses are the privilege of being accompanied by counsel, and in some instances the privilege of reading or filing prepared statements. But these privileges are of little account in actual practice. As against them the following abuses in varying degrees disfigure committee proceedings:

1. *The Denial of an Opportunity to Defend.* Investigating committees do not permit cross-examination.²⁴ They deny the accused the opportunity to call or offer witnesses in his own defense. Counsel to the accused is restricted to the function of advising the witness as to his constitutional rights: that is, all that counsel may do is to advise him to refuse to testify under his constitutional immunity. This, of course, is useful in the subversive activity hearings primarily to present or former Communists. Non-Communists are deemed to have no constitutional rights to assert. For them, the privilege of counsel as extended by these committees is largely illusory.

Counsel has no right to object to questions, however loaded or otherwise improper they may be. He may not even question his own witness to bring out the facts.

Witnesses are examined on the basis of documents, frequently written or received many years ago, which they have no previous opportunity to examine.

²³ See note 19 *supra*.

²⁴ See The Washington Post, Dec. 9, 1953, p. 2, col. 3.

2. *Denial of Notice.* Witnesses are not advised in advance of the subjects upon which they will be examined, nor are they allowed to consult documents or records to refresh their recollection.

3. *Disregard of Chronology and Context.* Witnesses are questioned in a manner that confuses dates, times and events. Questions are asked as if they related to recent events, when in reality they apply to the distant past. The context of particular activities or beliefs is ignored, so that events innocent in the context of their occurrence are given a sinister connotation.

4. *Abuse of the Private or Executive Hearing.* The executive hearing can serve a useful purpose. It should be used to screen witnesses and suspected persons so that unreliable witnesses will not be allowed to testify or to implicate blameless persons, and that the innocent will not be exposed to the disgrace and disaster of a public hearing. In fact, however, executive hearings have on occasion and by at least one committee or its chairman, been seriously abused. Testimony has been taken in secret, and purported resumés, highly inflammatory in nature, have been given to the press.²⁵ This, of course, is entirely reprehensible.

Executive hearings have been used to make certain that witnesses who will controvert the committee's thesis — for example, that espionage exists at a particular installation — will not testify in public. They have also served to entrap witnesses. For example, a witness in executive session may make statements as to events that occurred long ago, relying solely on vague recollection without the aid of documents. The committee later, in a public hearing, produces the relevant documents and dramatically contradicts the witness.

5. *Abuse of Witnesses and Counsel.* All too often, witnesses and counsel before these committees are treated with

²⁵ The Washington Post, Oct. 17, 1953, p. 1, col. 5.

considerably less than judicial restraint. The press recently reported the proud claim of a committee chairman that a witness "broke down" under questioning.²⁶ It later developed that the witness had collapsed, not because of the strain of disclosing guilty knowledge, but because of the terrifying experience of appearing before the inquisitor, added to grief over the death of his mother two days earlier.²⁷ He denied Communist connections or activities.

It is rare that counsel to witnesses have misbehaved before these committees; but lawyers have been threatened with expulsion from the counsel table or the hearing room, or with disciplinary proceedings.

As I have indicated, I believe that it is essential that the fundamental requirements of due process be observed by these committees. It is in these committees that the fight for freedom is being waged, not merely in the courtroom. It will be of limited utility if freedom is preserved in the courtroom and destroyed in the committee room.

IV

Disloyalty and espionage may be matters of national life or death. We have a right to careful, painstaking fact-finding in these matters. We have a right to a pin-pointing of the guilty, and to their trial and punishment when warranted. We have a right to insist that the waters should not be muddied by the irresponsible and frenetic efforts of legislators, and that the discovery and elimination of disloyalty and espionage be left to competent, diligent and expert law-enforcement officials.

Indeed, if we were to take at face value the so-called exposures of espionage agents by congressional investigating committees, we would have ample cause for alarm. We would

²⁶ *Ibid.*

²⁷ The Washington Post, Nov. 11, 1953, p. 13, col. 3.

be alarmed because these agents, according to the committees, have plied their foul trade; but equally, we would be alarmed because, if these exposures are genuine, it would appear that the FBI and our other law-enforcement and intelligence agencies have been incompetent or negligent or both. It is their job to prevent and uncover espionage. Are they so inefficient or incompetent that the job must be done by a committee of the Congress?

I cannot believe that congressional committees are superior to the FBI in this task. On the contrary, there is evidence that these committees or their chairmen are positively interfering with the work of the FBI and similar agencies. For example, recently, in connection with the investigation of alleged espionage in a defense plant, a committee subpoenaed two employees who refused to testify as to Communist Party membership or as to espionage. An individual, whom I shall call Mr. T, was called to the stand. He claimed to be an FBI informer who had worked in the plant and belonged to the Communist Party for the purpose of reporting to the FBI.²⁸ He identified the two previous witnesses as members of the Party. He stated that he appeared before the committee without the knowledge or authorization of the FBI.²⁹ The case was widely heralded in the press as a major disclosure not merely of Communist activity in the plant, but of espionage. Now I suggest that this incident raises some interesting and important questions. If Mr. T was an undercover FBI agent or informer, it seems highly irresponsible for the committee to become a party to his disclosure of his activities without FBI approval. If Mr. T was not connected with the FBI, of course, the entire incident is a mammoth hoax.

Further, if we accept Mr. T's testimony, it would indicate that the FBI was maintaining counter-espionage surveillance

²⁸ N.Y. Times, Nov. 20, 1953, p. 1, col. 2; The Washington Post, Nov. 20, 1953, p. 2, col. 1.

²⁹ N.Y. Times, Nov. 20, 1953, p. 10, col. 5.

in the plant. Presumably, the FBI knew of the two persons identified at the public hearing as Communists — and charged by the committee chairman with espionage. It seems clear that the FBI would wish to keep secret the fact that it was engaged in undercover work at the plant and to conceal the identity of its agents. If this is so, was it not highly irresponsible and disruptive of the FBI's work to break the story publicly?

In short, I believe that the time has come for us to call a halt to hit-and-run investigations. This nation is entitled to protection. Its needs are not met by mere sensationalism. It is entitled to demand that its intelligence and law-enforcement agencies should do their job; and that their work should not be subject to the possibility of disruption by legislative committees or their chairmen. It is entitled to demand that congressional committees should confine themselves to the legislative function, and that they should not, to quote Lincoln, "substitute the wild and furious passions in lieu of the sober judgment of courts, and the worse than savage mobs for the executive ministers of justice."³⁰ And it is entitled to demand that where legislative committees do function, they should be guided by the high principles of reason, morality and integrity; and that they should grant to their witnesses and accused and to the people of this country, the feeling of confidence and assurance which only fair play and decent standards of conduct can convey.

This nation has effectively opposed the tide of Communism. We have led the world in bold and courageous action to halt the advance of this menace. We successfully opposed it in Greece and Korea. We have mobilized the strength of the Western World against it. We have liberally given our wealth to the free nations to enable them to stand firm. This great task is not a partisan matter. It is a task to which all of us are

³⁰ See note 3 *supra*.