



2-1-1954

Judicial Protection against Abusive Practices: Trends in Judicial Relief for Legislative Witnesses

George Morris Fay

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

George M. Fay, *Judicial Protection against Abusive Practices: Trends in Judicial Relief for Legislative Witnesses*, 29 Notre Dame L. Rev. 225 (1954).

Available at: <http://scholarship.law.nd.edu/ndlr/vol29/iss2/7>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

LEGISLATIVE INVESTIGATIONS: SAFEGUARDS FOR WITNESSES:
JUDICIAL PROTECTION AGAINST ABUSIVE PRACTICES:
TRENDS IN JUDICIAL RELIEF FOR
LEGISLATIVE WITNESSES

As a conclusion to its decision, one court had this to say concerning congressional committee investigations:¹

. . . we think it may not be amiss to say that, notwithstanding the pronouncements of the committee chairman as to intended fairness, the courts of the United States could not emulate the committee's example and maintain even a semblance of fair and dispassionate conduct of trials in criminal cases.

Despite the enjoyment by millions of spectators and auditors of the exhibitions by television of the confusion and writhings of widely known malefactors and criminals, when sharply questioned as to their nefarious activities, we are unable to give judicial sanction, in the teeth of the Fifth Amendment, to the employment by a committee of the United States Senate of methods of examination of witnesses constituting a triple threat: answer truly and you have given evidence leading to your conviction for a violation of federal law; answer falsely and you will be convicted of perjury; refuse to answer and you will be found guilty of criminal contempt and punished by fine and imprisonment. In our humble judgment, to place a person not even on trial for a specified crime in such predicament is not only not a manifestation of fair play, but is in direct violation of the Fifth Amendment to our national Constitution.

This evidence of concern on the part of the court is a possible answer to questions such as "Why do they [the courts] intrude. . .?"² They intrude because the legislature is not omnipotent and the courts are not impotent in dealing with the individual. It is no new phenomenon that they should do so. True, the possibility of intrusion shrank steadily from *Kilbourn v. Thompson*³ to *Journey v. McCracken*.⁴ If it were

¹ *Aiuppa v. United States*, 201 F.2d 287 (6th Cir. 1952).

² Morgan, *Congressional Investigations and Judicial Review*, 37 CAL. L. REV. 556, 558 (1949).

³ 103 U.S. 168 (1880).

⁴ 294 U.S. 125 (1935).

true that power always breeds responsibility we should expect grave and courteous treatment of witnesses from legislators, for the courts relentlessly closed door after door to the witness after *Kilbourn v. Thompson* in 1880 through *Journey v. McCracken* in 1935.

But times change and man with them. Apparently power may occasionally breed responsibility. Florid over-statement may yield to sober conservatism when the critic is required to sit in judgment. In 1924 Professor Frankfurter wrote "Hands Off Investigations,"⁵ but in 1953 Mr. Justice Frankfurter wrote in *United States v. Rumley*:⁶

. . . we would have to be that "blind" Court against which Mr. Chief Justice Taft admonished in a famous passage, *Child Labor Tax Case*, 259 U.S. 20, 37, that does not see what "(a)ll others can see and understand" not to know that there is wide concern, both in and out of Congress, over some aspects of the exercise of the congressional power of investigation.

Now that the courts have established the power of the legislature to deal with its legitimate problems, they may be willing to establish some definite boundaries. Recent cases point that way.

The proper constitutional functions of Congress must be pursued with a minimum of interference. This, all concede. Such judicial functions of Congress as the express powers of impeachment and regulation of the conduct and qualifications of its own members imply the power of investigation and of compelling the attendance and testimony of witnesses.⁷ The express power of enacting legislation is the normal preoccupation of Congress. Intelligent legislating requires informed legislators. A generous interpretation of this express power concedes the power of investigation, upon which may be superimposed a further implied power to compel the attend-

⁵ Frankfurter, *Hands Off Investigations*, 38 NEW REPUBLIC 329 (May 29, 1924).

⁶ 345 U.S. 41, 44 (1953).

⁷ *In re Chapman*, 166 U.S. 661 (1897); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929).

ance and testimony of witnesses where consistent with other express provisions of the Constitution and the Bill of Rights.⁸

Political scientists and practical politicians, however, unite in urging additional and wholly distinct functions on the legislature. They state that the legislature should "inform" and "educate" the electorate. Woodrow Wilson urged that the "informative" function is paramount in importance over that of legislating.⁹ Others are of like mind. Some call it the "ventilating" function. Ethical restraints on the choice of objects to be "ventilated" vary with the individual or group toying with this interesting notion. Legislators avow that in their committee they are holding "the greatest open court in the Country," "the grand jury of America." It has been stated openly that one purpose of the investigation may be to drive the objects of the Committee's wrath from gainful employment. A committee may state, and has done so, that it intends "to focus the spotlight of publicity"¹⁰ upon the activities of persons and groups under investigation. This "spotlight focusing" may be carried out in regard to beliefs and activities with which Congress has no express power to deal. Persons may be summoned as witnesses for the primary purpose of inducing them to commit perjury or contempt. Thus can be fastened on them punishment which the legislator believes they deserve and will otherwise escape either because their misconduct is so remote as to be protected by the Statute of Limitations or is actually in a field of purely local jurisdiction and not amenable to the laws of the federal government.

On a slightly higher plane have been avowed purposes of inducing the public to accept existing laws or to be favorably disposed toward new laws. In connection with one notable recent investigation, it was repeatedly affirmed by the committee that it hoped to raise the moral standards of the public

⁸ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

⁹ WOODROW WILSON, *WILSON CONGRESSIONAL GOVERNMENT* 303 (1900).

¹⁰ H.R. REP. No. 2, 76th Cong., 1st Sess. 13 (1939).

in its attitude toward gambling. It is not possible to dispute that public opinion is moulded by such means. One interesting example is observed in the law of defamation. Twenty years ago a charge of "Communism" was defamatory only on proof of special damage. In recent years it has become established that it is defamatory *per se*.¹¹ The courts have universally recognized the change in public opinion toward such a charge, a change effected almost entirely by legislative exposure. In this are ominous implications. It is frequently true that the choice of groups or supposed evil conditions which are to be exposed and demeaned in the public eye, is not even made by the entire legislature, but solely by day-to-day decisions of a committee or even a single legislator. It is hardly tolerable that such decisions should be made by legislators motivated by personal considerations.

In the face of such vigorous employment of the legislative investigation for informative, educational and ventilating purposes, what has been the position of the courts? Have they blandly upheld the power to compel testimony by assuming an ultimate purpose is legislation? Unfortunately, motives of investigations are conveniently intermingled. This has enabled the judiciary to avoid the responsibility of deciding what to do should the question be squarely presented. To date the courts have almost uniformly honored a presumption of legislation. Significant progress will be made when they begin to differentiate between investigation in aid of constitutional functions and investigation to advance informative and educational functions. The power to compel the appearance and testimony of witnesses is merely implied, even in aid of express powers.¹² Informative functions, if at all legitimate, are themselves merely implied. It is doubtful that the courts are willing to recognize a power of compelling testimony in aid of such a marginal function of Congress.

¹¹ *Mencher v. Chelsey*, 297 N.Y. 94, 75 N.E.2d 257 (1947).

¹² See note 7 *supra* and accompanying text.

The Supreme Court has never acknowledged that Congress can legitimately pursue investigations for informative or educational purposes. It has repeatedly denounced intrusion into private affairs. In *Kilbourn v. Thompson* it held invalid an investigation into nefarious financial transactions, even though an incidental result of them was the loss of United States Treasury deposits. Many potential ramifications of Jay Cook's operations were of concern to the federal government. Had the Court conceived of an informative purpose to be served by such exposures it would not have dealt so severely with the supposed intrusion into private affairs. The decision in *United States v. Rumely* can hardly be reconciled with a power of "educating" the public to be aware of propaganda devices. In *Sinclair v. United States*¹³ the Court gratuitously devoted three pages to reiterate that a witness is entitled to be free from harassment, and left the door open by holding Sinclair had not demonstrated that the investigation was not in aid of legislation. More specifically in *McGrain v. Daugherty*¹⁴ the Court acknowledged that, other than legislation, there would be "no other action in the matter which would be within the power of the Senate," and "the only legitimate object the Senate could have in ordering the investigation was to aid it in legislating." Relevant dictum is also found in the recent case of *United States v. Kleinman*, where it is stated: ¹⁵

It may be that a congressional committee does not even have to have a legislative purpose but may conduct hearings solely to inform the public. So far as I am aware, no court has ever held that a congressional committee may compel the attendance of witnesses without having a legislative purpose. But that question I need not and do not decide in these cases.

Another Judge has flatly stated exposure is not a legislative power.¹⁶

¹³ 279 U.S. 263, 291-94 (1929).

¹⁴ 273 U.S. 135, 178, 180 (1927).

¹⁵ 107 F. Supp. 407, 408 (D.D.C. 1953).

¹⁶ See dissenting opinion in *Barsky v. United States*, 167 F.2d 241, 259 (D.C. Cir. 1947), *cert. denied*, 334 U.S. 843 (1948).

It is not necessary to deny that Congress may utilize informative and educational hearings. When it does so, however, it should not possess the same coercive means of compelling witnesses to attend and testify. When individuals are not called in good faith to furnish information, but because they are the wrongdoers, when the individual is called not as a witness but because he is an object of scorn and a sacrifice to public titillation, when he is called and addressed directly as "the defendant," then he ought to enjoy some of the substantial rights of a defendant, for the committee in modern times has become an examining and often committing magistrate.

The chief of these rights undoubtedly is the right to be represented and effectively advised by counsel. This single improvement would be a considerable advance over the view frequently exhibited, that the rights of a witness, especially as to counsel, are such and no other than those the committee says he has.

My subject requires me to concentrate on the scope of judicial protection. This requires consideration of the procedural context of the issue, or in other words, how the question may arise in a judicial proceeding. We must bear in mind that Congress has power to deal with contempt. Though rather complete, this power has not been exercised by Congress since *Jurney v. McCracken* nearly twenty years ago. Referral of difficult witnesses to the courts for criminal prosecution, either on contempt or perjury charges, has been employed exclusively and frequently.

A. Let us consider briefly the scope of judicial scrutiny if Congress chooses to exercise its own power of coercing and punishing difficult witnesses.

1. The fundamental power of Congress to deal with the subject-matter will, of course, be reviewed. In *Kilbourn v. Thompson* this issue was presented in the medium of a suit

for false arrest and imprisonment by a witness arrested by the Sergeant at Arms. Habeas corpus would be more effective from the standpoint of speedy relief, and was successfully employed in *Marshall v. Gordon*.¹⁷

2. The resolution will be reviewed not only to determine its technical sufficiency, but to ascertain the scope of the inquiry power delegated to the committee. This enables the court to establish criteria for judging the validity of subpoenas to produce as well as the validity of a given line of questioning. While "pertinency" as a test of a given inquiry is not imposed by any constitutional or statutory language, it has been made clear that it is nevertheless a limitation on the exercise by Congress of its inherent contempt powers. We must bear in mind, however, that when the recalcitrant witness is called to the bar of either house and requested to answer, "pertinency" is no longer judged by the scope of the resolution establishing the committee but by the much wider range of the full constitutional powers of Congress.¹⁸ For the latter reason it is doubtful that judicial review could be made to embrace questions of a quorum or technical qualifications and appointment of committee members.

3. "Due process" concepts doubtless would be applied in judicial review. When Congress chooses to exercise its own contempt powers it cannot be doubted that a witness is entitled to notice, opportunity to defend, and representation by counsel. Rights of confrontation and cross-examination seem implicit in the necessity of an opportunity to defend. In the absence of a completely effective immunity statute it seems equally true that the courts would enforce the right of a witness to claim his privilege against self-incrimination.

B. When the case of the difficult witness is referred to the courts for criminal prosecution of contempt or perjury, a

¹⁷ 243 U.S. 521 (1917).

¹⁸ *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929).

broader scope of judicial review is possible. Let me first note some of the more frequent and accepted points of judicial scrutiny.

1. The basic power of Congress to deal with the subject-matter will, of course, be a subject of review. Quorum questions may be relevant and subject to judicial scrutiny if it is necessary to establish that the committee was a "competent tribunal" as it is in the case of a perjury prosecution.¹⁹ In contempt prosecutions, however, the question of a quorum has been held irrelevant when first raised on appeal.²⁰ It remains to be seen whether this would be true if the witness should raise the quorum question before a committee itself, which the parties in the decided cases failed to do.

2. The privilege against self-incrimination has provided the most sensational recent application. Though basically nothing new has been developed, the exasperation of committee members indicates that they wish tests to be made in the case of witnesses who claim the privilege "improperly." As is well known, many legislators regard any claim of privilege as "improper." There may be relatively little legal interest in the matter. Some scope for refinement may, however, exist in the case of a witness who refuses not only to answer the question but to answer a further question, whether or not a truthful answer to the second question would incriminate him, or who claims the privilege simply because he foresees that if he does not and puts his own sworn denials in opposition to the statement of committee informants he will inevitably provoke a perjury prosecution. As the privilege against self-incrimination is thoroughly developed in legal discussion, it will be noted here only by reference to the recent holding of the Third Circuit that no further "background" of incriminating possibilities need be shown by the

¹⁹ *Christoffel v. United States*, 338 U.S. 84 (1949).

²⁰ *United States v. Fleishman*, 339 U.S. 349 (1950); *Bryan v. United States*, 339 U.S. 323 (1950).

witness other than such possibilities of incrimination as can be conjured up by “ingenious” legal argument.²¹

3. The scope of the resolution will continue to be a very significant subject of judicial scrutiny. It determines the “materiality” of a question for purposes of perjury prosecution, and “pertinency” for purposes of a contempt prosecution. In addition, it limits the validity of a subpoena to produce, which subpoena is invalid if even partially beyond the scope of the resolution.²² “Pertinency” is a statutory requirement for a contempt conviction and must be proven beyond a reasonable doubt in each case.²³

4. It may be noted that review of committee action may come before the court also in criminal prosecutions not formally designated as perjury or contempt. For example, the committee may “make” a case of gambling conspiracy and call it to the attention of the prosecutor. Evidence seized by the committee will be subject to the prohibition of unreasonable search and seizure if offered by the prosecution. Thus, in *Nelson v. United States*²⁴ the court held inadmissible records taken from the defendant’s home by committee investigators after the defendant’s “consent” was procured by threat of prosecution for contempt. The court noted the frank prosecutive bias which motivates so much of current congressional inquiry with the following words:²⁵

If there is anything to suggest that a congressional committee hearing is less awesome than a police station or a district attorney’s Office, and should therefore be viewed differently, it has escaped our notice. The similarity has become more apparent as the “investigative” activities of Congress have become less distinguishable from the law enforcement activities of the Executive. . . .

²¹ *United States v. Coffey*, 198 F.2d 438, 440 (3d Cir. 1952).

²² *United States v. Patterson*, 206 F.2d 433 (D.C. Cir. 1953).

²³ *Bowers v. United States*, 202 F.2d 447 (D.C. Cir. 1953).

²⁴ 22 U.S.L. WEEK 2014 (D.C. Cir. July 14, 1953).

²⁵ *Ibid.*

The foregoing enumeration is on every prosecutor's check-list. Significant extensions of judicial scrutiny merit individual recognition. It will also be helpful to isolate, identify and consider evidence that the Judiciary would be receptive to suggestions for additional extensions of judicial scrutiny. The congressional inquiry has not hesitated to plunge into fields overlapping the Executive and the Judiciary, to visit all the realities of conviction and punishment on individuals without the substantial safeguards of criminal procedure, to "make" cases for prosecution even if it means inducing and entrapping the witness into the commission of crime, to call witnesses because they are accused of wrongdoing, and with little expectation that any information of value could be obtained from the witness. Legislative ventures unauthorized by express powers and intruding into fields reserved to other components of organized society make it imperative to bring remedial thinking abreast of realities.

Speculative treatment necessarily characterizes consideration of this thesis. At once, therefore, it may be permissible to attribute some such significance to a case like *United States v. DiCarlo*,²⁶ where it was held not improper for Congress to authorize an inquiry into the extent to which local criminal activities utilize interstate commerce. The investigation necessarily delves into the extent and nature of local criminal activity, even though Congress cannot regulate it per se. Nevertheless, in pushing into this field the scope of protection given the witness can be widened to include the protections he enjoyed under law at the local level. Therefore, the court held that witness could not be compelled to incriminate himself as to local offenses. In doing so the court was required to distinguish *Murdock v. United States*,²⁷ and did so on the ground that the *Murdock* case was concerned solely with matters subject to federal jurisdiction and that incidental dis-

²⁶ 102 F. Supp. 597 (N.D. Ohio 1952).

²⁷ 284 U.S. 141 (1931).

closure of local offenses was not within the privilege. Perhaps it is possible to generalize this holding that restraints on legislative inquiry vary in proportion to the distance from the exercise of express powers.

Next in order of mention is an intriguing decision which defies easy analysis, *United States v. Kleinman*.²⁸ The defendants were reputed leaders in extensive gambling operations around Cleveland. They refused to answer questions relating to their activities. No specific claim of self-incrimination was made. Refusal to answer was put on a general claim of violation of constitutional rights if they were compelled to testify in the presence of TV, newsreel cameras and other distracting apparatus. They were acquitted of contempt after a trial in which counsel for the committee candidly stated that televising and extensive publicity was considered proper to educate the public. As it is risky to choose any key quotation the opinion is given at length. The court said:²⁹

For many years, and for obvious reasons, the Congress, instead of handling the matter itself, has referred cases of contumacious witnesses to the judiciary. It has done so in this instance.

When the power of the court to punish is invoked, it necessarily follows in order properly to determine the guilt or innocence of the accused, that the court must examine the entire situation confronting the witness at the time he was called upon to testify. Only thus can it be determined whether his refusal was capricious and arbitrary and therefore a wilful, unjustified obstruction of a legitimate function of the legislature or was a justifiable disobedience of the legislative command.

The only reason for having a witness on the stand, either before a committee of Congress or before a court, is to get a thoughtful, calm, considered and, it is to be hoped, truthful disclosure of facts. That is not always accomplished, even under the best of circumstances. But at least the atmosphere of the forum should lend itself to that end.

In the cases now to be decided, the stipulation of facts discloses that there were, in close proximity to the witness, tele-

²⁸ 107 F. Supp. 407 (D.D.C. 1953).

²⁹ *Id.* at 408.

vision cameras, newsreel cameras, news photographers with their concomitant flashbulbs, radio microphones, a large and crowded hearing room with spectators standing along the walls, etc. The obdurate stand taken by these two defendants must be viewed in the context of all of these conditions. The concentration of all of these elements seems to me necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous. And the mistake could get him in trouble all over again.

It is said that these defendants are hardened criminals who were not and could not have been affected by the paraphernalia and atmosphere to which they were exposed. That may be so, but the court cannot take judicial notice that it is so. Moreover, it cannot be said that for John, who is a good man, one rule applies, but for Jack, who is not a good man, another rule applies. Such reasoning is incompatible with our theory of justice.

Under the circumstances clearly delineated here, the court holds that the refusal of the defendants to testify was justified and it is hereby adjudged that they are not guilty.

One might be tempted to explain the decision as holding that the contempt was not "wilful" because of the distracting circumstances. This is questionable because "wilfulness" is not an element of the offense which is committed by a witness who actually appears and then refuses to answer questions.³⁰ Some aspect of due process seems a more likely explanation. At all events the court decided the case in a way which tends to establish an enforceable standard of decorum and temperate atmosphere in the committee-room. The extension of this standard to condemn harassment and abuse from committee members is not difficult to visualize.

It is indeed brash to suggest that the courts are willing to stop indulging so-called "presumptions" that a congressional inquiry contemplates the exercise of an express constitutional function. One must go back to the sturdy old case of *Kilbourn v. Thompson* to find an example of willingness to focus a critical scrutiny on the real motives of the investigation. The

³⁰ *Josephson v. United States*, 165 F.2d 82 (2d Cir.), cert. denied, 333 U.S. 838 (1948).

Kilbourn case is practically indefensible in its denial that any constitutionally permissible legislation could result from the investigation. Evaluated in the light of what it actually did, the decision is revealed as one instance in which the Court recognized the intent of an investigation to establish the personal guilt of individuals. A colorful analogy to the fictions by which common law courts broadened their jurisdiction shows the Court's frank recognition that an arbitrary presumption of good faith could become a sanctimonious fraud, sanctioning unlimited prying into privileged personal matters. It cannot be meaningless that the *McGrain* case cites *Kilbourn v. Thompson* as indicating the relief available should the power to investigate be abused. In the *Sinclair* case the Court rejected the contention of a non-legislative purpose, but only because the witness had not adequately substantiated his contention. An ambiguous incident in a recent District of Columbia trial may indicate that legislators' motives are not immune from scrutiny. Accused of perjury, the defendant's opening statement asserted that the question had not been asked in good faith to get information, but solely for the purpose of harassment. The defendant was acquitted.³¹ Presumably the offer of proof is based on a view that a question cannot be "material" if not asked in good faith. Progress on this point obviously requires candid revision of self-imposed limitations and presumptions in the light of open and avowed congressional indulgence in educational, informative, ventilating and "high court" functions.

A different and more optimistic type of scrutiny as to legislative motives gives evidence of vitality. This is in the insistence on the presence of something analogous to probable cause to justify legislative inquiry. So far this thought has been discussed only in connection with objections to intrusion on First Amendment rights. The thought seems to be that First Amendment rights, while premium rights, must yield

³¹ United States v. J. H. Rosenbaum, Crim. No. 1722-51 (D.D.C., Nov. 1953).

something to the necessity of legislation or constitutional amendment. But a foundation must be established for a reasonable belief that at least a problem exists meriting the attention of Congress. Thus in *Rumely v. United States*,³² the court pointed out the realistic impingement on free speech in requiring a publisher to divulge his subscription list, as there was nothing to indicate any serious legitimate concern of Congress with dissemination of political ideas through pamphleteering. Judge Prettyman, speaking for the court, felt that the resolution was invalid for want of power to deal with the subject-matter. The *Barsky* case, in which Judge Prettyman also wrote the opinion, had, however, rejected a free speech objection to a subpoena requiring production of records from a private propaganda organization. The *Barsky* case was justified on the ground that there was adequate preliminary data supplied to Congress to warrant belief in the existence of a problem, even though a potential restriction of speech was possible. This "preliminary data" requirement has often been associated with the "clear and present danger" test of Justice Holmes.³³ Such an indefensible test was rejected, however, in the *Barsky* case.

An additional protection of First Amendment rights is also indicated in the holding of *United States v. Lattimore*,³⁴ that a perjury indictment was invalid in so far as it attempted to show the falsity of a witness's denials of beliefs "sympathetic" to Communism. The holding is based on two grounds: (1) flatly on the invalidity of an inquiry into beliefs; and (2) on the practical ground of the objective impossibility of establishing such a charge. The latter ground emphasizes the vagueness of "sympathetic" attitude. A perennial hope of those interested in these problems is for the development of some sort of interlocutory judicial relief for witnesses. Thus, when the deposition of a witness is taken in connection with

³² 197 F.2d 166 (D.C. Cir. 1952), *aff'd*, 345 U.S. 41 (1953).

³³ *Schenk v. United States*, 249 U.S. 47 (1928).

³⁴ 112 F. Supp. 507, 516 (D.D.C. 1953).

litigation, he may object to certain questions and interrupt the deposition hearing to get a ruling from the court on his objection. This same protection is even available to witnesses in many types of statutory court and commission hearings. The remedies of injunction, prohibition and mandamus may be used in some cases against executive proceedings. Motions may be made to quash subpoenas as invalid or unreasonable search or seizure. There appears little nourishment for the hope of offering any analogous procedure to relieve the perplexity of a legislative witness. It is definitely out of the question that the legislature or its committee should be enjoined from acting within their own sphere. If, however, unreasonable demands are made on individuals there seems no reason to confer a celestial status on legislators. Thus injunctive relief against dragnet seizures of papers might be had within limits. The possessor of papers might be enjoined from surrendering them to the agent of the legislature,³⁵ and if judicial relief can be invoked before the seizure becomes *fait accompli*, it would doubtless be possible to enjoin even the agent of the legislature.³⁶

A valiant attempt has been made to establish some standards of certainty in resolutions. This attempt has relied on an analogy between the resolution establishing a committee and a criminal statute. The latter will be invalid if vague and ambiguous. It is argued that if the resolution is so vague as to permit inquiry into areas where Congress could not legislate then there is no standard by which to judge the pertinency of questions.³⁷ The assumption seems to be that a witness should be able to make an intelligent judgment on the spot whether or not the question is pertinent. This has the appeal of reason. Yet it is not consistent with other aspects of the pertinency requirement. Whether or not a

³⁵ *Strawn v. Western Union Telegraph Co.*, 3 U.S.L. WEEK 646 (D.D.C. 1936).

³⁶ *Hearst v. Black*, 37 F.2d 68 (D.C. Cir. 1936).

³⁷ See dissenting opinion in *Josephson v. United States*, 165 F.2d 82, 93 (2d Cir. 1948).

question is "pertinent" must indeed be proven by the prosecution. The proof, however, may legitimately consist of background information, perhaps even confidential data known only to the committee at the time of asking the question.³⁸ It is not necessary that the witness know or be able to judge on the spot what the background data is. He declines to answer at his peril. As a practical matter, it is equally true that the witness who decides to lie under oath has no way of determining at that time whether his answer is "material" in view of other testimony and proof heard by the tribunal but not by the witness. It must be concluded that the witness has no right to be sufficiently informed on the spot whether or not the question is pertinent or material, as the case may be. He risks his future blindfolded.

In this light it seems relatively unimportant that the resolution is too vague to enable the witness to apply it as a test to the pending question. The majority in the *Josephson* case said the question of "certainty" in the resolution was not reached because the witness in that case even refused to be sworn and was therefore not called on to answer any specific question. It must, however, be borne in mind that the Supreme Court recently applied a rule of strict construction to a resolution in the *Rumely* case and thereby recognized the resolution as a restriction on "pertinency."

There has been an uncritical assumption that the legislature possesses the power to compel the appearance and testimony of witnesses if it has the power to inquire. The *Kilbourn* case expressed some uncertainty about the power to compel testimony, but in the *McGrain* case the Court dispelled any doubt as to this power when the subject-matter indicates legislation may result. The power to compel the appearance and testimony of witnesses may be a question quite separable from the power to inquire into the subject-matter. Judge

³⁸ United States v. Orman, 207 F.2d 148 (3d Cir. 1953).

Edgerton dissenting in the *Barsky* case insisted that the two questions are entirely separable and said: ³⁹

The court asks "How, except upon inquiry, would the Congress know whether the danger is clear and present?" The context shows that this means "How, except upon *congressional* inquiry . . .?" The answer is: through the Department of Justice, whose duty it is, if clear and present danger can be discovered, to enforce the law of 1940 which makes it a crime to advocate overthrow of the government by force; through the intelligence services; and through any new agency that Congress may think it useful to create. As the House Committee's history shows, no dangerous propaganda that eludes other agencies is likely to be discovered by a congressional inquiry. But a congressional inquiry, however superfluous, to discover whether there is clear and present danger, could be authorized and could be conducted without violating the First Amendment. The premise that the government must have power to protect itself by discovering whether it is in clear and present danger of overthrow by violence is sound. But it does not support the conclusion that Congress may compel men to disclose their personal opinions, to a committee and also to the world, on topics ranging from communism, however remotely and peaceably achieved, to the "American system of checks and balances," the British Empire, and the Franco government of Spain. Since the premise does not support this conclusion it has nothing to do with this case. It justifies no punitive exposure. It justifies a very different investigation from the one the House Committee conducts. The investigation the Committee conducts is unsupported by any color of necessity. As the fact that some taxation is necessary does not validate everything done in the name of taxation, the fact that some investigation is necessary does not validate everything done in the name of investigation. So far from being necessary to the safety of the government, the Committee's investigation weakens the government by effectively warning the unorthodox, some of whom are conspicuous for ability and patriotism, to avoid government service.

It is to be hoped that we will see a development by which these conflicting interests will be accommodated to each other.

Confessedly the evidence of drift in judicial attitudes consists largely of mere straws. To identify even minor currents

³⁹ *Barsky v. United States*, 167 F.2d at 259.