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# Constitutional Law -- Congressional Investigations: Limitations on the Implied Power of Inquiry

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## NOTES

### *Constitutional Law*

#### CONGRESSIONAL INVESTIGATIONS: LIMITATIONS ON THE IMPLIED POWER OF INQUIRY

The statements of legal writers from 1925 to 1940 attest to the fact that the problem of abuses in legislative inquiries is not a distinctive feature of the post World War II period.<sup>1</sup> Dean Wigmore's statement that these investigations were weapons of political warfare dredging the depths of "municipal dunghills" might appear to have been extracted from an editorial in today's newspaper.<sup>2</sup> In reality, he was referring to congressional investigations made during the winter of 1923-24. No doubt, other commentators, at other times, have held and expressed similar ideas regarding such investigations. However, when the fog of political partisanship is dispersed it becomes apparent that such objectives offer no aid to one seeking to solve the problem. Though they may well be true, and the evils real, the constitutionality of congressional investigations is not thereby affected.<sup>3</sup> Despite the fact that it may be made the handy tool of political opportunists, and the means for engaging in political "witch-hunts," the power remains.<sup>4</sup>

#### I

Except for surprisingly few cases, it has been assumed from our nation's political origin that the Congress may conduct investigations in aid of its legislative function.<sup>5</sup> As has been frequently pointed out, this power is not expressed in the Constitution,<sup>6</sup> but rather it is to be implied as necessary for the performance of those functions delegated by that instrument.<sup>7</sup> Exercise of the powers expressly granted to Congress

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<sup>1</sup> Coudert, *Congressional Inquisition v. Individual Liberty*, 15 VA. L. REV. 537 (1929); Cousens, *The Purposes and Scope of Investigations Under Legislative Authority*, 26 GEO. L. J. 905 (1938); Hamilton, *The Inquisitorial Power of Congress*, 23 A.B.A.J. 511 (1937); Gose, *The Limits of Congressional Investigating Power*, 10 WASH. L. REV. 61 (1935); Herwitz and Mulligan, *The Legislative Investigating Committee*, 33 COL. L. REV. 1 (1933); Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153 (1926).

<sup>2</sup> Wigmore, Comment, *Evidence — Legislative Power to Compel Testimonial Disclosure*, 19 ILL. L. REV. 452, 453 (1925). While supporting the power to investigate, he criticized the manner in which the named investigation was conducted.

<sup>3</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927); *Morford v. United States*, 176 F.(2d) 54, 58 (D.C. Cir. 1949), *rev'd on other grounds*, 339 U.S. 258 (1950).

<sup>4</sup> See *Barsky v. United States*, 167 F.(2d) 241, 250 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948).

<sup>5</sup> Landis, *op. cit. supra* note 1.

<sup>6</sup> *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

<sup>7</sup> *Id.* at 175.

necessarily involves the ascertainment of facts and the attendance of witnesses. In a debate over a resolution to commit a witness who had refused to testify before a Senate committee investigating the raid on Harper's Ferry, it was said: <sup>8</sup>

. . . proposing to legislate, we want information. We have it not ourselves. It is not to be presumed that we know everything; and if anybody does presume it, it is a very great mistake, as we know by experience.

Intelligent legislation requires a knowledge of the facts. This has been so well recognized throughout the history of legislative bodies that it has become a traditional concept,<sup>9</sup> which may perhaps explain the dearth of litigation on the point.

## II

Accepting the proposition that Congress needs information if it is to discharge its legislative duties, the question arises as to the means by which knowledge is to be obtained. Obviously, Congress must ask for it. But the person questioned might refuse to answer — what then? When the Constitution established a legislature, the framers understood well that such bodies had the power to inquire and to compel answers to their inquiries.<sup>10</sup> It is reasonable to assume, then, that though they did not expressly grant those powers, it was implied that they would be exercised.<sup>11</sup> Without the power to require a response, the power to inquire would be nugatory.

The cases involving the investigatory function reach the courts because of an objection to the use of the power to hold in contempt. Two problems have faced the courts: can commitments for contempt of a legislative body be looked into by the judiciary; is the power to cite for contempt a judicial power or is it a tool available to legislative as well as judicial bodies? A third problem, the extent of the legislative authority to punish, will be considered later in this paper.

In *Ex parte Nugent*,<sup>12</sup> Congress was held to be the sole judge of its contempts. However, beginning with *Kilbourn v. Thompson*,<sup>13</sup> courts have retreated from that extreme view and now, as a matter of course, review contempt citations to ascertain whether the citing body was acting within its authority.

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<sup>8</sup> CONG. GLOBE, 36th Cong., 1st Sess. 1102 (1860).

<sup>9</sup> Evidence of this is the statement of Chief Justice Marshall in *Anderson v. Dunn*, 6 Wheat. 204, 232 (U.S. 1821): ". . . the constitution was formed in and for an advanced state of society, and rests at every point on received opinions and fixed ideas. It is not a new creation, but a combination of existing materials, whose properties and attributes were familiarly understood, and had been determined by reiterated experiments."

<sup>10</sup> *Id.* at 225.

<sup>11</sup> *Ibid.*

<sup>12</sup> 18 Fed. Cas. 471, No. 10,375 (C.C.D.C. 1848).

<sup>13</sup> 103 U.S. 168 (1881).

The confusion surrounding the nature of the power to hold in contempt stems from what might be an erroneous theory as to its source. It is considered by many to be a peculiarly judicial device, but there are authorities who argue that it is a neutral tool which both the legislature and the judiciary may use to secure efficient operation and to enforce respect for their dignity.<sup>14</sup> One writer<sup>15</sup> contends that the semi-judicial nature of the English House of Commons was not the source of the power of legislative bodies to bring contempt proceedings, but that the power first came into use only after Parliament ceased to function as a court. Another student of the subject questions even the thesis that the House of Commons was a judicial body.<sup>16</sup>

### III

In our time the very philosophies which men possess have become the subject of congressional inquiry. It is important then to re-examine the principles which determine the scope of these legislative investigations. A flurry of articles followed the decisions in *Kilbourn v. Thompson*, and *McGrain v. Daugherty*,<sup>17</sup> but until recently, there has been little writing on the subject since that initial outpouring.<sup>18</sup> In contrast, litigation has increased yearly. We propose to examine the law as developed by the leading cases, to analyze the recent cases in their relation to those landmark opinions, and to summarize the current state of the law.

Even at this late date in our judicial history, the boundaries cannot be said to be clearly marked since only in one instance has the Supreme Court found that the limit was exceeded.<sup>19</sup>

These cases, *Kilbourn v. Thompson*, and *McGrain v. Daugherty* together with *Anderson v. Dunn*,<sup>20</sup> *In re Chapman*,<sup>21</sup> and *Sinclair v. United States*<sup>22</sup> are the leading decisions on this subject. In *Anderson v. Dunn*, the Supreme Court for the first time squarely faced the question whether Congress had the power to hold in contempt. The Court apparently assumed the authority to investigate because the decision dealt solely with the question of the power to compel. It recognized that there was no express grant of this power in the Constitution and that it was therefore necessary to reason to such a power by implication. The Court argued that the power to compel was necessary for the efficient exercise

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<sup>14</sup> Landis, *op. cit. supra* note 1, at 159-60; Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. of PA. L. REV. 691, 692-9 (1926).

<sup>15</sup> Landis, *op. cit. supra* note 1, at 159-60.

<sup>16</sup> Potts, *op. cit. supra* note 14, at 692-99.

<sup>17</sup> 273 U.S. 135 (1927).

<sup>18</sup> For a cross-section of current opinion, see 18 U. OF CHI. L. REV. 421 *et seq.* (1951).

<sup>19</sup> *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

<sup>20</sup> 6 Wheat. 204 (U.S. 1821).

<sup>21</sup> 166 U.S. 661 (1897).

<sup>22</sup> 279 U.S. 263 (1929).

of the legislative function, and affirmed the contempt citation.<sup>23</sup> No clear limitations were suggested and nothing but a broad recognition of the power of Congress to conduct contempt proceeding against a contumacious witness can be gleaned from the case.<sup>24</sup>

The next Supreme Court decision involving the investigatory power of Congress, *Kilbourn v. Thompson*, stringently narrowed its scope. It arose from an investigation by Congress into a real estate pool in which Jay Cooke & Co. was interested. As a result of this speculation the company became bankrupt and, government money on deposit with it was lost. The Court took the position that the inquiry by Congress was an attempt to determine the right of the parties and thus to supercede the jurisdiction of the courts. Because no specific legislative measures were suggested in the resolution authorizing the investigation it was determined that Congress was attempting to exercise a judicial function. The Court considered the functions of Congress which might be labeled judicial — the power to impeach and the power to police the election of its members — and ruled that this investigation did not concern either of those matters. Therefore, the investigation was held to be beyond the power of Congress; and a “fruitless investigation into . . . personal affairs.”<sup>25</sup> The Court reserved the question whether a person could be punished for contumacy when Congress was engaging in a legislative activity.<sup>26</sup> There is a clear implication in the case that some specific bill should be spelled out in the resolution authorizing the investigation in order to qualify it as “an investigation in aid of a legislative function.”<sup>27</sup> It was also pointed out that even if it were assumed that legislative body had the power to punish for contempt, the power was limited.<sup>28</sup>

The Court's statements that the congressional power of inquiry is limited; that the congressional power to compel testimony does not extend to the exercise of purely judicial functions;<sup>29</sup> and that the courts have the power to review commitments for contempt of Congress,<sup>30</sup> have received subsequent judicial approval.<sup>31</sup> However, other opinions and several writers have criticized its definition of “an investigation in aid of

<sup>23</sup> Note the identity of the arguments supporting the contempt and investigatory powers.

<sup>24</sup> However, the Court did express concern over the sweeping authority it had just recognized, and theorized that the punishment should not exceed “*the least possible power adequate to the end proposed.*” *Anderson v. Dunn*, 6 Wheat. 204, 231 (U.S. 1821). Since this is dictum, and an extraordinary vague admonition at that, it has had little effect.

<sup>25</sup> *Kilbourn v. Thompson*, 103 U.S. 168, 195-6 (1881).

<sup>26</sup> *Id.* at 189.

<sup>27</sup> *Id.* at 194-5.

<sup>28</sup> *Id.* at 197, 199.

<sup>29</sup> *Id.* at 193-4.

<sup>30</sup> *Id.* at 199-200.

<sup>31</sup> *McGrain v. Daugherty*, 273 U.S. 135, 173 (1927); *Jurney v. MacCracken*, 294 U.S. 125, 148 (1935).

a legislative function,"<sup>32</sup> and its broad statement concerning the power to investigate into private affairs.<sup>33</sup>

Despite strong criticism the case may still be regarded as authority for the proposition that Congress cannot hold in contempt when it infringes on the judiciary. Although there are a large number of cases on this general subject, it is the only Supreme Court case which directly so holds.

A more proper definition of legislative function was given in *In re Chapman*. Chapman had been imprisoned for refusing to answer questions put to him by a Senate Committee, investigating charges that certain senators were yielding to corrupt influences in the consideration of tariff legislation. The petitioner was a member of a stock brokerage firm dealing heavily in stocks which would be affected by the proposed legislation. He was asked about dealings in this stock for the benefit of senators, and he refused to answer. Chapman contended that this was an investigation into his private affairs; that the resolution authorizing inquiry did not propose definite legislation; and that the questions asked of him were not pertinent to a proper legislative function. Thus, he placed himself completely behind the ramparts of *Kilbourn v. Thompson*. The Court reasoned, however, that since the Senate is granted the express power to try impeachments, judge its own elections, and the qualifications of its own members, to determine the rules of its proceedings and punish its members for disorderly behavior, and that it necessarily possesses the inherent power of self-protection, it had jurisdiction of the subject matter of the inquiry it directed, and the power to compel the attendance of witnesses and to require them to answer any pertinent questions.<sup>34</sup> The contention that this was an investigation into private affairs was dismissed by the Court on the ground that the inquiry was delving into an affair of the Senate, and not into the general conduct of the petitioner's business. For that reason the inquiry was held to be proper.<sup>35</sup> Although the resolution authorizing the investigation proposed no definite legislation, the Court said that the Senate was, nonetheless, acting within its right. It held that it is not necessary that the resolution indicate beforehand what the Senate "meditated" doing when the investigation was concluded.<sup>36</sup>

The most complete and clear statement of the problems with which we are concerned is found in *McGrain v. Daugherty*. In 1924, the Senate began an investigation into the office of the Attorney General for alleged misfeasance and nonfeasance during the tenure of the former Attorney General, Harry M. Daugherty. In pursuit of the investigation, the

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<sup>32</sup> See *In re Chapman*, 166 U.S. 661, 670 (1897); Landis, *op. cit. supra* note 1, at 214; Cousens, *op. cit. supra* note 1, at 917.

<sup>33</sup> *Sinclair v. United States*, 279 U.S. 263, 294 (1929).

<sup>34</sup> *In re Chapman*, 166 U.S. 661, 668-9 (1897).

<sup>35</sup> *Ibid.*

<sup>36</sup> *Id.* at 669-70.

Senate issued two subpoenas against Mally S. Daugherty, brother of Harry M. Daugherty. The second subpoena commanded him to appear for the "purpose of giving testimony relating to the subject under consideration." His refusal to respond to the subpoenas resulted in the issuance of a warrant for his arrest. He was released from custody upon a writ of habeas corpus and an appeal was made directly to the Supreme Court by the Senate deputy Sergeant-at-Arms. The appellee raised several issues, but only two are germane to this discussion. He maintained that neither House had the power to compel a private person to come before it or one of its committees in aid of legislative action. He also argued that this was not an investigation in furtherance of a legislative function.<sup>37</sup>

The Court gave consideration to historical precedents — federal and state — in support of the congressional power to investigate and compel the attendance of witnesses. It referred to the investigation into the St. Clair expedition,<sup>38</sup> and to the concurrence, in the resolution authorizing it, of Madison and several of his associates who had aided in the drafting of the Constitution. In deciding the case, the Court stated that:<sup>39</sup>

. . . the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history. . . . [This is] a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.

The Court pointed out that the framers of the Constitution intended that inquiry and compulsion would be employed. They intended to have Congress legislate and to use means necessary to do so. Experience evidences that mere requests for needed information do not always secure what is sought. At best only volunteered statements would be forthcoming, and they cannot always be relied upon.<sup>40</sup> In answer to the contention that abuses might flow from the recognition of this power, it was said that the possibility of abuse was no argument, for any power could be abused and further, if there should be an abuse, remedies would be available.<sup>41</sup>

The resolution specified that the information was sought so that "legislative and other actions as the Senate may deem necessary and proper" could be taken. Daugherty contended that the phrase "and other actions" made the entire proceeding improper as it showed that the Senate contemplated other than legislative action as an aftermath of its investigation. This argument was dismissed and the resolution was held

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<sup>37</sup> *McGrain v. Daugherty*, 273 U.S. 135, 154 (1927).

<sup>38</sup> 3 ANNALS OF CONG. 494 (1792) (one of the first congressional investigations).

<sup>39</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

<sup>40</sup> *Id.* at 174-5.

<sup>41</sup> *Id.* at 175-6.

to be good.<sup>42</sup> While there was no express indication of the final action which might be taken, it was sufficient that the resolution indicated that the subject matter of the inquiry was within the authority of the Senate. Under the rule of *In re Chapman* it is not necessary to state the nature of the legislation which will result, before entering upon an investigation. The inquiry was proper even though no "other action" could be taken by the Senate than that which was properly legislative. The phrase gave no additional power, and the Court said that it cannot be presumed that the Senate intended anything other than legislation.<sup>43</sup>

*McGrain v. Daugherty* is valuable because: (1) it is the first and only Supreme Court decision expressly holding that Congress has the power to investigate in aid of the legislative function, (2) it restates the rule of *In re Chapman* that a resolution is valid and complete if it refers to subject matter within the constitutional power of Congress, and (3) it implies that *Kilbourn v. Thompson's* denial of congressional authority is limited to situations where the legislature is attempting to function as a judicial body.

The confusion which stemmed from the unfortunately broad statements in *Kilbourn v. Thompson* was further relieved by the decision in *Sinclair v. United States*. Sinclair was commanded to appear before the Senate Committee on Public Lands and Surveys to testify with regard to the "Teapot Dome Scandal." He appeared but refused to answer any of the questions put to him on the grounds that they related to his private affairs, and therefore represented a departure from an inquiry in aid of legislation, and were cognizable only in the court in which an action concerning the "Teapot Dome" was then pending.<sup>44</sup> The Court emphasized the solicitude which our law has shown for the preservation of the individual's right to privacy.<sup>45</sup> However, it also called attention to the government's rights in public lands. The public interest in the leases transformed them, and the transactions concerning them, into public affairs. They were no longer "merely or principally the personal or private affair of appellant."<sup>46</sup> With that statement the vague dicta of *Kilbourn* was put in its proper focus and no longer can it be cited as authority for extravagant claims of privacy.<sup>47</sup>

#### IV

The most widely used vehicle in the enforcement of the congressional investigatory power is the federal statute declaring contempts of Con-

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<sup>42</sup> *Id.* at 178-180.

<sup>43</sup> *Id.* at 178.

<sup>44</sup> *Sinclair v. United States*, 279 U.S. 263, 290 (1929).

<sup>45</sup> *Id.* at 292-4.

<sup>46</sup> *Id.* at 292.

<sup>47</sup> The power to inquire is not abridged because the information sought may also be of use in pending government suits. *Id.* at 295.

gress to be misdemeanors.<sup>48</sup> This statute makes a refusal to answer pertinent questions in the course of a legitimate congressional inquiry an offense against the United States, in addition to being a contempt of the investigating body.<sup>49</sup> It has frequently been stated by courts that neither body of Congress can imprison a contumacious witness beyond the adjournment of a session;<sup>50</sup> as a result, recourse to the statute is had in almost all of these situations.<sup>51</sup> The constitutionality of this statute was tested in *In re Chapman*. The Supreme Court held there that it was open to no constitutional objections.<sup>52</sup>

Opinions of legal writers and assorted dicta have occasionally intimated that in the absence of this statute, or one similar to it, Congress could not exercise its power to punish a private citizen for contempt, solely *qua* punishment. *Marshall v. Gordon*<sup>53</sup> seems to imply that the power of Congress to deal with contempts is remedial and coercive only. The appellant was a district attorney who was cited for contempt and arrested under the direct authority of the House of Representatives, not under the congressional contempt statute. He was charged with using unparliamentary and ill-tempered language in a letter criticizing a House of Representatives sub-committee investigating his office. The appellant was freed under a writ of habeas corpus. The Court held that the power to punish for contempt was essentially a power of self-preservation, a means to an end, and not an end in itself, and therefore the power did not extend to punishment, as such. It was characterized as a mere limited power to prevent acts which inherently obstruct the legislature in the exercise of its constitutional duties.<sup>54</sup> Under this interpretation of the power it would appear that Congress would be impotent to punish for past completed acts of contempt, and should they desire punishment, their only recourse would be to bring a criminal charge under the statute. Without the aid of the Act, the authority of con-

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<sup>48</sup> REV. STAT. § 102 (1875), as amended, 52 STAT. 942 (1938), 2 U.S.C. § 192 (1946). "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months."

<sup>49</sup> Although the contention has been raised only once, it is well to note that double jeopardy may not be interposed as a defense to the operation of the statute. *In re Chapman*, 166 U.S. 661, 672 (1897).

<sup>50</sup> *Anderson v. Dunn*, 6 Wheat. 204, 231 (U.S. 1821).

<sup>51</sup> See *Fields v. United States*, 164 F.(2d) 97, 100 (D.C. Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

<sup>52</sup> *In re Chapman*, 166 U.S. 661, 672 (1897).

<sup>53</sup> 243 U.S. 521 (1917).

<sup>54</sup> *Id.* at 542.

gressional bodies to hold in contempt would be limited to its civil character, namely for purposes of coercion.<sup>55</sup>

The unfortunate circumstances which could result from so narrowing the enforcing power of Congress reached the stage of concrete example in *Journey v. MacCracken*.<sup>56</sup> MacCracken was subpoenaed by a special Senate committee and ordered to appear and testify regarding ocean and air mail contracts, and to bring certain pertinent documents with him. A client obtained and destroyed some of these papers without his knowledge, resulting in his arrest pursuant to a Senate resolution reciting the destruction of the papers after service of the subpoena. The resolution demanded that he show cause why he should not be punished for contempt. MacCracken insisted, citing *Marshall v. Gordon*, that the Senate was without power to arrest him for the purpose of punishment since the act complained of was completed and could no longer affect congressional proceedings. In other words, he was perfectly willing to comply with the subpoena *duces tecum*, but due to the destruction of the papers he was unfortunately unable to comply. Under civil contempt principles, action against MacCracken would have been impossible. For past completed acts the administering of punishment as such is criminal in character rather than civil.<sup>57</sup> Under the facts of the case, imprisonment would have had no remedial effects, since compliance by MacCracken was impossible.

The Court, however, expressly limited the statements made in *Marshall v. Gordon* to the "particular" facts of that case,<sup>58</sup> and said: <sup>59</sup>

. . . where the offending act *was* of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance. [Emphasis added.]

It pointed out that such action on the part of Congress was not an extension of the recognized power to compel testimony in aid of the legislative function, but rather constituted a vindication of the established and essential privilege of requiring the production of evidence. The power to punish for past contempt was held to be an appropriate means.<sup>60</sup>

The Court also answered the objection that the direct power to punish was precluded by the statute making refusal to answer or produce papers a misdemeanor. Punishment, *qua* punishment, through contempt

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<sup>55</sup> See *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 441-4 (1911).

<sup>56</sup> 294 U.S. 125 (1935).

<sup>57</sup> See *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 441-3 (1911).

<sup>58</sup> *Journey v. MacCracken*, 294 U.S. 125, 149 (1935).

<sup>59</sup> *Id.* at 148.

<sup>60</sup> *Id.* at 150.

proceedings instituted by Congress was not precluded merely because punishment might also be inflicted for the same act as a violation of the statute.<sup>61</sup>

It is apparent, therefore, that even without the statute the power of Congress to deal with contempts of its investigatory functions remains. Indeed, it has been said that Congress could not divest itself of the implied power.<sup>62</sup> Essentially, the statute only provides a streamlined method of enforcement. It is a complementing sanction added to the conceded power of Congress, the enforcement of which, prior to the statute's enactment, involved a cumbersome and inefficient procedure.<sup>63</sup> Both methods of punishing the contumacious are still being used as co-existing powers,<sup>64</sup> but a proceeding under the statute is preferred because under the non statutory procedure, incarceration cannot be continued after the punishing body adjourns its session.

In a number of recent cases,<sup>65</sup> an attempt has been made to reopen an old argument by interjecting a "good faith" plea in defense of the operation of the statute.

The essence of these recent contentions is that the word "willfully" as used in the statute, necessarily requires an "evil or bad" reason for refusing to speak.<sup>66</sup> Such an interpretation would take from Congress and the courts the power to determine what is pertinent, and place that determination in the hands of the individual witness.<sup>67</sup> A universal application of that contention would emasculate the implied power of Congress to conduct inquiries. The *Sinclair* case had earlier held that a defense of good faith was without merit. The refusal to answer pertinent questions was the offense, regardless of moral turpitude.<sup>68</sup> The reason or purpose for failing or refusing to comply has been consistently dismissed as immaterial, so long as the refusal or failure was deliberate and intentional.<sup>69</sup> It is up to the witness to estimate correctly. As Justice Holmes aptly remarked: <sup>70</sup>

<sup>61</sup> *Id.* at 151. *Accord, In re Chapman*, 166 U.S. 661 (1897).

<sup>62</sup> *In re Chapman*, 166 U.S. 661, 671-2 (1897).

<sup>63</sup> See *Fields v. United States*, 164 F.(2d) 97, 100 (D.C. Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

<sup>64</sup> *United States v. Costello*, 198 F.(2d) 200, 205 (2d Cir.), *cert. denied*, 344 U.S. 874, 73 S. Ct. 166 (1952).

<sup>65</sup> *Dennis v. United States*, 171 F.(2d) 986, 990-1 (D.C. Cir. 1948), *aff'd*, 339 U.S. 162 (1950); *Eisler v. United States*, 170 F.(2d) 273, 280 (D.C. Cir.), *cert. granted*, 335 U.S. 857 (1948), *dismissed*, 338 U.S. 883 (1949); *Fields v. United States*, 164 F.(2d) 97 (D.C. Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

<sup>66</sup> See *Fields v. United States*, 164 F.(2d) 97, 100 (D.C. Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

<sup>67</sup> See *Marshall v. United States*, 176 F.(2d) 473, 474-5 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 933 (1950).

<sup>68</sup> *Sinclair v. United States*, 279 U.S. 263, 299 (1929).

<sup>69</sup> Cases cited note 65 *supra*. See also *Townsend v. United States*, 95 F.(2d) 352, 357-8 (D.C. Cir.), *cert. denied*, 303 U.S. 664 (1938).

<sup>70</sup> *Nash v. United States*, 229 U.S. 373, 377 (1913).

. . . the law is full of instances where a man's fate depends on his estimating rightly. . . . If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death.

## V

Courts are no longer in serious doubt as to whether Congress has power to investigate. Three major limitations on the congressional power of inquiry remain to be considered. A brief treatment will be accorded to the defenses which have been raised under the First, Fourth, and Fifth Amendments.

The First Amendment has been interposed recently by recalcitrant witnesses seeking to avoid probing of the legislative eye. The lower federal courts have repeatedly pointed out in response to such an argument that the freedom of speech guaranteed by the First Amendment is not an absolute right, but one that is subject to reasonable interference. Questioning of witnesses in the course of congressional inquiries directed toward national security has been consistently recognized as a reasonable interference.<sup>71</sup> The problem raised by these references to the First Amendment is whether Congress may properly inquire into past conversations, writings, memberships, business records, and even private beliefs, associations and philosophies, without transgressing that amendment.

In *Barsky v. United States*,<sup>72</sup> the court considered the question whether a congressional committee could ask an individual if he was or had been a member of the Communist Party, or if he believed in Communism. The opinion conceded that because of the current public feeling such a question would impinge upon the individual's freedom to speak, but pointed out the necessity of weighing the public interests against the private rights of the "timid."<sup>73</sup> Where a reasonable cause for concern exists, a power to make inquiry was said to exist also. According to the decision, this does not mean that a "clear and present danger" must be shown. There is a great distinction between the necessity required to be shown to validate an inquiry and that to make legislative action proper.<sup>74</sup> The court held that the rights guaranteed by the First Amendment are not absolute, being subordinate to the interests of the public, and to the inherent right of the government to maintain and protect itself.

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<sup>71</sup> *Lawson v. United States*, 176 F.(2d) 49 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950); *Marshall v. United States*, 176 F.(2d) 473 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 933 (1950); *Barsky v. United States*, 167 F.(2d) 241 (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); *United States v. Bryan*, 72 F. Supp. 58 (D.D.C. 1947), *aff'd on other grounds*, 339 U.S. 323 (1950), *reversing*, 174 F.(2d) 525 (D.C. Cir. 1949).

<sup>72</sup> 167 F.(2d) 241 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948).

<sup>73</sup> *Id.* at 249.

<sup>74</sup> *Id.* at 247.

The same court, just one year later, was confronted with issues similar to those which it had decided in the *Barsky* case.<sup>75</sup> It was contended that the statements made in that case regarding the First Amendment were mere obiter dicta. The court expressly reaffirmed the *Barsky* case in its holding and dismissed the argument that it had indulged in dicta. In further support of its decision, *National Maritime Union of America v. Herzog*<sup>76</sup> was cited for the proposition that reiterated holdings of the Supreme Court have shown that the right of free speech is not absolute, but rather subordinate to national interests which are justifiably thought to be of larger importance. In no instance has the Supreme Court dealt with the matter, although early this year it was presented with an opportunity to settle the question.<sup>77</sup> The majority opinion, however, declined to decide the issue on constitutional grounds, and held that the question asked was outside the scope of the House resolution authorizing an inquiry into lobbying. The concurring opinion presents an interesting, if doubtful solution to the issue. Rumely refused to disclose to the investigating committee the names of bulk purchasers of certain books of a political tenor which his organization was engaged in publishing. The concurring opinion pointed out that if the inquiry were permitted it would result in a harrassment amounting to censorship.<sup>78</sup>

Admittedly, legislative inquiry often causes great harrassment to the witness, but it seems questionable that the First Amendment requires that a line of limitation be drawn at this point. Limitation by that test would nearly vitiate the informative organ of the Congress. It is doubtful that that was the intention of the Justices.

The concurring opinion also argued that since Congress, due to the limitations of the First Amendment, could not by law regulate the matter concerning which it was seeking information, it must, for the same reason, be precluded from enforcing its demand under the investigatory power.<sup>79</sup> However, all that existing precedents require is that the inquiry be pertinent to some *possible* legislation. This can hardly be interpreted as a requirement that the subject matter of each question propounded be a proper subject of legislation. While a law may not properly be enacted which would demand the disclosure of the consumer-lists of book publishers, still it is conceivable that such lists might possibly be pertinent to some valid legislation. As such, they would undoubtedly be the proper subject of congressional inquiry. It is not necessary that Congress make known in advance what it intends doing

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<sup>75</sup> *Lawson v. United States*, 176 F.(2d) 49, 51-2 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950).

<sup>76</sup> 78 F. Supp. 146, 165 (D.D.C.), *aff'd*, 334 U.S. 854 (1948).

<sup>77</sup> *United States v. Rumley*, 73 S.Ct. 543 (1953).

<sup>78</sup> *Id.*, 73 S.Ct. at 551.

<sup>79</sup> *Id.*, 73 S.Ct. at 551-2.

when the investigation is concluded.<sup>80</sup> It must not be lightly presumed that Congress will transgress the Constitution; in fact, a presumption of validity attaches to its acts.<sup>81</sup> It is almost a truism to point out that the Judiciary is not the sole guardian of the Constitution.<sup>82</sup> Probably the best answer that can be made to the concurring opinion in the *Rumely* case is found in another Supreme Court decision, *Dennis v. United States*.<sup>83</sup> In the concurring opinion, speaking of the adjustment of conflicting interests in the right of free speech, Justice Frankfurter said:<sup>84</sup>

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belong to the Congress.

Until a court either eliminates the applicability of the First Amendment or decides that it stands between the individual and the investigatory power of Congress, and to that extent further limits the power, judicial statements of the caliber found in existing decisions cannot be regarded with finality.

In recent investigations witnesses have invoked the protection of the self-incrimination clause of the Fifth Amendment. The tactic has proved successful in the Senate investigation into interstate criminal operations,<sup>85</sup> and in the House and Senate investigations into Communism, especially since the passage of the Smith Act<sup>86</sup> and the decision in the *Dennis* case.

There is no decision of the Supreme Court of the United States directly holding that the Fifth Amendment applies to a witness testifying in a Congressional investigation. However, lower courts have sanctioned resort to the amendment repeatedly, frequently stating that the proposition is well settled.<sup>87</sup> A dictum in *Counselman v. Hitchcock*<sup>88</sup> may provide the clearest reasoning behind these holdings. That case stemmed from the refusal of a witness before a grand jury to answer questions put to him. Prosecution against the witness was not contemplated. The witness' resort to the Fifth Amendment was challenged on the ground that the grand jury inquiry was not a "criminal case" and therefore the constitutional privilege did not exist.<sup>89</sup> In its opinion the Court looked

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<sup>80</sup> *In re Chapman*, 166 U.S. 661, 670 (1897); *McGrain v. Daugherty*, 273 U.S. 135, 178 (1927).

<sup>81</sup> See note 80 *supra*.

<sup>82</sup> *United States v. Bryan*, 72 F. Supp. 58, 63 (D.D.C. 1947), *aff'd on other grounds*, 339 U.S. 323 (1950), *reversing*, 174 F.(2d) 525 (D.C. Cir. 1949).

<sup>83</sup> 341 U.S. 494 (1951).

<sup>84</sup> *Id.* at 525.

<sup>85</sup> *Aiuppa v. United States*, 201 F.(2d) 287 (6th Cir. 1952); *United States v. Di Carlo*, 102 F. Supp. 597 (N.D. Ohio 1952).

<sup>86</sup> 18 U.S.C. § 2385 (Supp. 1952). See *Blau v. United States*, 340 U.S. 159 (1950).

<sup>87</sup> *United States v. Fitzpatrick*, 96 F. Supp. 491 (D.D.C. 1951); *United States v. Emspak*, 95 F. Supp. 1012 (D.D.C. 1951).

<sup>88</sup> 142 U.S. 547 (1892).

<sup>89</sup> *Id.* at 562-3.

to the object of the privilege. It declared that the amendment guaranteed to witnesses in "any investigation" [Emphasis added] the right to be free from compulsory testimony when the information sought "might tend to show that he himself had committed a crime."<sup>90</sup> The Court emphasized the broadness of the privilege by saying:<sup>91</sup>

It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him. . . .

Similar clarifying statements have been made by Wigmore. In his treatise on evidence he says:<sup>92</sup>

. . . this constitutional sanction, being merely a recognition and not a new creation, has not altered the tenor and scope of the privilege; it has merely given greater permanence to the traditional rule as handed down to us. The framers . . . did not intend to codify the various details of the rule, or to alter in any respect its known bearings, but merely to describe it sufficiently for identification as a principle. . . .

. . .

The protection . . . extends to *all manner of proceedings* in which testimony is to be taken, whether litigious or not. . . . It therefore applies . . . in investigations by a *legislature* or a body having legislative functions. . . .

Except for one significant exception, the privilege provides the same protection for a witness before a congressional committee as it does for a witness in a court. *Auippa v. United States*<sup>93</sup> exemplifies that statement. It also collects some of the questions which have been considered to be violations of the immunity. The amendment should be interpreted broadly,<sup>94</sup> and statutes granting immunity must be as broad as the privilege.<sup>95</sup> An answer which will serve as a link in a chain or proof is privileged to the same extent as that which will support conviction.<sup>96</sup> An appeal to the privilege cannot be based on fancy<sup>97</sup> nor on the ground that it will incriminate another, whether individual or corporation.<sup>98</sup> Generally, the privilege cannot be claimed until a question has been asked. However in *Marcello v. United States*,<sup>99</sup> the court held that under the circumstances and conditions at the time and place of the Senate Sub-committee hearing, the witness had been justified in a general blanket refusal to answer questions regarding himself and his associations.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> 8 WIGMORE, EVIDENCE § 2252 (3d ed. 1940).

<sup>93</sup> 201 F.(2d) 287 (6th Cir. 1952).

<sup>94</sup> *Counselman v. Hitchcock*, 142 U.S. 547, 562-3 (1892).

<sup>95</sup> *Id.* at 564-586.

<sup>96</sup> *United States v. Burr (In re Willie)*, 25 Fed. Cas. 38, 40, No. 14,692e (C.C.D. Va. 1807).

<sup>97</sup> *Brown v. Walker*, 161 U.S. 591, 599-600 (1896).

<sup>98</sup> *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906).

<sup>99</sup> 196 F.(2d) 437 (5th Cir. 1952).

As a general rule, witnesses before a congressional investigating committee may not claim the protection of the Fifth Amendment if the answer required would incriminate the witness as a violator only of state law and not federal statutes.<sup>100</sup> *United States v. Di Carlo*<sup>101</sup> suggests a possible limitation upon this rule however. A committee of the Senate was empowered to investigate violations of federal and state laws and to determine whether the facilities of interstate commerce were used by those engaged in criminal activities. The committee questioned the defendant concerning violations of state law. The court held that the Fifth Amendment privilege was available. The *Di Carlo* opinion distinguished *United States v. Murdock* on its facts. In the *Murdock* case a federal agency was investigating a federal question (federal income tax), a situation different from that before the court in *Di Carlo*, where a federal body was investigating state matters. After distinguishing the *Murdock* case, the court turned to *United States v. Saline Bank*,<sup>102</sup> as authority for its holding. It also looked to the fact that the State of Ohio had a constitutional provision similar in effect to the Fifth Amendment. The anomaly of compelling testimony which was privileged by both the federal and state constitutions was referred to and no doubt had an influence upon the court's decision.

The distinction made has merit, for it would indeed be monstrous to deny the privilege when both the state and federal constitutions indicate a desire to protect witnesses. It will be interesting to observe the manner in which higher courts will deal with this problem if it is ever presented to them.

The dictates of the Fourth Amendment pertaining to unreasonable searches and seizures undoubtedly apply as a limitation on legislative inquiry, but only passing mention will be made of it here since the boundaries of its operation in this field seem clearly defined by *In re Chapman*. The petitioner there argued that the inquisition amounted to an unreasonable search and seizure; that the questions were intrusions into his private affairs, and that it violated the Fourth Amendment. However, the Supreme Court took a contrary view, and decided that since the questions were pertinent to the subject matter of a valid legislative object, the Senate "obviously" had jurisdiction. Thus, any questions pertinent to the inquiry were not in violation of the Fourth Amendment.<sup>103</sup>

Following the reasoning of *In re Chapman*, the following principle appears: Whenever the question asked is pertinent to a subject matter

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<sup>100</sup> See, e.g. *United States v. Murdock*, 284 U.S. 141 (1931). The rationale of the rule is that a sovereign is concerned only with obedience to its own laws.

<sup>101</sup> 102 F. Supp. 597 (N.D. Ohio 1952)

<sup>102</sup> 1 Pet. 100 (U.S. 1828).

<sup>103</sup> *In re Chapman*, 166 U.S. 661, 668 (1897).

over which Congress has jurisdiction, it does not contravene any right guaranteed by the Fourth Amendment. It can be readily seen that this formula adds nothing to that judicial limitation of pertinency. The pertinency limitation applies whether or not the constitutional argument is interposed.

### *Conclusion*

Recently, critics of legislative investigations have bemoaned the defenselessness of witnesses before congressional investigating committees. The safeguards provided by the Sixth Amendment are not available to those witnesses, therefore there is no right to be informed of accusations; no right to confront accusers, and cross-examine them; no right to present friendly witnesses; and no right to be represented by counsel. The Sixth Amendment is not available because the witness is not being subjected to a "criminal prosecution."

Incensed by this, reformers seek to place some restraints on investigations and they turn to *Kilbourn v. Thompson*. One can join in their defense of liberty without adopting their method. The errors in the definitions of *Kilbourn* have been corrected and purged from the law, as we have seen, by the cases following it. The abusive use by individual investigators of the inquisitorial power has been the target of the attacks of these reformers, but the remedy they all too often suggest — a return to the unqualified holding in *Kilbourn v. Thompson* — strikes at the very existence of the power. Undeniably the power has often been misused, and as courts have so frequently pointed out, a witness' security depends upon the good faith and decency of the inquisitors. However, elimination does not require destruction. Those who have disavowed all connection with "star chamber" interrogations can evidence their sincerity by enacting limitations which will effectively protect the witness. Bills have been proposed introducing needed reforms, but to this day none have been passed, and neither the House nor the Senate have provided effective protection.<sup>104</sup>

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*Robert F. McCoy*

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<sup>104</sup> For a compilation of unsuccessful bills of reformation, see Galloway, *Congressional Investigations: Proposed Reforms*, 18 U. OF CHI. L. REV. 478, 499-502 (1951).