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Problem in Historical Perspective: The Grand Inquest of the Nation 1792-1948

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knowledge that this nation throughout its long history has been committed preeminently to the high ideal of government by law, and dedicated to the rights and privileges of the individual human being as the focus of that law. Now, as in the past, the legal profession will fulfill its responsibility to lead the way toward reason and justice.

William T. Gossett

LEGISLATIVE INVESTIGATIONS: SAFEGUARDS FOR WITNESSES:

THE PROBLEM IN HISTORICAL PERSPECTIVE:

THE GRAND INQUEST OF THE NATION
1792-1948

The relation of the citizen to the legislative investigation has often involved grave questions of liberty which are sometimes overlooked or ignored. The problems of this relationship which concern personal liberty are posed by the power to compel disclosures, orally or by "search and seizure," and the legislative immunity from punishment for inflicting verbal injury upon private citizens.

I

The roots of the power and immunity extend far back into the history of western society. In considering the earliest aspects of the subject it is impossible to separate the legislative powers and immunities from executive or judicial procedures, because there was no branch-theory of government in the English tradition from which our rules were taken and modified. The English Parliament was not a self-conscious

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legislature until the seventeenth century. Hence, in looking at the earliest practices medieval government must be seen as a whole.

The medieval government had power to compel disclosures. This power is found as far back as the earliest written records. German popular courts, from which Anglo-Saxon custom came, used sworn witnesses when the oaths of the principals of a suit were contradictory. The witnesses were not to give testimony but to swear only to a fact in dispute. This system of the sworn inquest for public purposes was found elsewhere on the continent as early as the eighth century, and was used by the Norman conquerors of England who made tax assessments based on the sworn testimony of local inhabitants. It was also Anglo-Saxon practice to use sworn witnesses to report the character of accused persons. The medieval Parliament, as High Court, administered oaths in the trials of its own members, and imposed oaths on its kings and their heirs.

The power to compel disclosure implies the power to punish for refusal to testify, which is to punish for contempt. The first instance of a parliamentary punishment for contempt occurred about 1548, and the power has been used intermittently ever since. Today each House of Parliament can punish "... to protect its freedom, dignity, and authority against insult, disregard or violence by resort to its own process and not to ordinary courts of law and without having its process interfered with by those courts." The authors of standard treatises on the modern British government show

2 1 Stubbs, The Constitutional History of England, in Its Origin and Development 653-54 (6th ed. 1903). An ancient remedy — not now in existence or advocated — allowed the disgruntled loser of this battle of oaths to challenge the members of the court to trial by combat.
3 Id. at 298-99.
4 Id. at 427.
5 2 Id. at 250 (4th ed. 1906).
7 Contempt of Court, 6 Encyclopedia Britannica 328-29 (14th ed. 1938).
LEGISLATIVE INVESTIGATIONS

no concern for the status of the witness before legislative committees, which have the usual power to send for persons and papers. It is a fact that the treatment of witnesses has not been a problem in modern English history.

Legislative inquiry in England takes several forms. Most frequently, questions are asked of the Government by Members of the Commons. Another type of inquiry is the "debate on adjournment," which provides, almost instantaneously, for full debate on a pressing public issue. The Parliament also employs standing committees which have a limited power to amend bills but which rarely call witnesses, since the ministries supply the necessary expert knowledge. Questions in the House, "debate on adjournment," and the standing committees, taken together, provide continuous scrutiny of the kinds of public problems which often set American investigating committees in motion. The Parliament is gentle with the executive officers. The reason is clear — the ministers are Members of Parliament. It is not so clear why the Parliament in its committee activities is equally gentle with private persons. Perhaps, in contrast to American concepts, it is because the Member of Parliament owes his election more to his party's record than to his own reputation.

Since the accession of the Tudor dynasty in 1485 English witnesses have had much more difficulty with executive officers than with the Parliament. The phrase "Star Chamber proceeding" is still a synonym for unfair hearing. The difficulties are even more clearly shown by the history of the "oath ex officio," which was the practice of questioning suspected heretics under oath. This was standard practice in England from the thirteenth to the seventeenth century, and reached its highest refinement in the Court of High Com-

8 Jennings, Parliament 331 (1939).
10 Id. at 569-70.
11 Shils, The Legislator and His Environment, 18 U. of Chi. L. Rev. 571, 572 (1951), explains the individualism of the American Congressman.
mission under Queen Elizabeth I. The Court of High Commission used a set list of questions which were deliberately phrased so as to incriminate the witness and his fellow offenders, if possible. The practice was abolished during the English Civil War. An opponent of the Court of High Commission said in the Parliament that: "... theire Courte shall never want worke as long as a Promoter hath an ill tongue, or a Knave can slander an honest man...." The prohibition of compulsory self-incrimination was firmly fixed in English law by the end of the seventeenth century, and led directly to the writing and ratification of the Fifth Amendment to the United States Constitution.\(^{12}\)

Outside of Great Britain, but in the same legal tradition, there is an Australian precedent relevant to the limits of legislative inquiry and compulsory disclosure. The Privy Council of Great Britain, in 1914, denied the power of the Australian Parliament "to compel disclosures of matters not within the scope of existing federal power to pass binding laws." Perhaps this hints that the Tenth Amendment to the United States Constitution bars compulsion to disclose purely local matters which are reserved to the states or to the people.\(^{13}\)

The use of committees by the Parliament dates certainly from the 14th century, and was well established by the 16th century.\(^{14}\) The growth of the system parallels the growth of Parliamentary privilege. In the 16th century the Parliament assumed the work of judging the elections of its own members through a committee of privilege, thus taking the judgment of elections out of the royal courts. In the 17th century other committees were provided in order to weaken the power of the Speaker and of such Privy Councillors as might be


\(^{14}\) 3 Stubbs, *op. cit. supra* note 2, at 484, 492 (5th ed. 1903).
Today the Parliament uses the Committee of the Whole House, standing committees, and select committees. Only the select committees regularly call witnesses. Select committees of the Parliament are more powerful than congressional committees in the matter of compulsory disclosure, since British witnesses have no "Fifth Amendment" which would be enforced by a court of law to protect them against self-incrimination. And the select committees issue no minority reports. It is plain that they could bully and abuse witnesses, but the fact is that they never do. Furthermore, select committees do not have professional staffs to predigest the material for them; such a practice would not fit the British notion of the constitutional responsibility of the Members.

For the sort of work usually done by an American investigating committee the Parliament usually relies upon a Royal Commission or a Tribunal of Inquiry. The Royal Commission is an executive body appointed for the investigation. It has no legal counsel, no publicly paid detectives, its witnesses appear voluntarily, and it rarely has the power to compel testimony. It relies on oral testimony, on staff research, and upon questionnaires. Royal Commissions place no witnesses in moral dilemmas. The closest American approximation would be a presidential study-commission.

The Tribunal of Inquiry is used to investigate suspicion of doing public harm "short of crime and criminal intent." Its purpose is to have the study made by skilled minds who are outside the arena of politics. A motion to establish a Tribunal of Inquiry must pass both Houses. The Tribunal is usually composed of distinguished judges and lawyers. Its work is

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16 Jennings, op. cit. supra note 8, at 264-79.
17 Finer, supra note 9, at 538-53.
18 Id. at 549-50 n.39.
19 Id. at 554-61.
20 Id. at 561-68.
not to prosecute but to search for facts. It accepts evidence which would not be accepted in court but it draws no conclusions about the conduct of persons except from the kind of evidence which is admissible in court.21

In its committee work the Parliament protects itself from irresponsible Members by punishing for contempt any Member who tells something which a committee wishes to keep secret. Furthermore, according to the rules of the House of Commons, the Speaker will rule out of order any Member who tries to discuss a committee's work before the committee reports to the House.22 It is plain that the theoretically unchecked Parliament shows more self-restraint than the Congress of the United States. Probably the best explanation of this is that the work of the House of Commons is the continuous open investigation of the state of the realm by a body of legislators which chooses the responsible executives from its own majority.23 A study of British practices is therefore not of much help in judging American practices by way of comparison.24 The American and British methods have common roots, but the plants have grown in different directions since the eighteenth century.

II

The Congress of the United States has probably conducted about six hundred special investigations since 1792.25 Most of the great American political issues are reflected in the records of investigating committees.26 Although much of the information the Congress actually uses comes from the work

21 Id. at 568-69.
23 Finer, supra note 9, at 522, 524.
24 Luce, The Committee System in the House of Representatives, (from his Congress, an Explanation) in Readings in American Government 184 (Rankin ed. 1939).
of sub-committees of the appropriations committees,\textsuperscript{27} such standing committees have shown little interest in "penetrating investigations."\textsuperscript{28} The motives for the typical special investigations are mixed. Some are for the scrutiny of the executive branch, specifically arising out of the purse power. Others are conducted to determine whether legislation is needed. Some seek only to influence public opinion.\textsuperscript{29} Sometimes members have voted an investigation merely to gratify a friend who wished to head an investigation. Investigations are initiated to get revenge against personal enemies or unfriendly governmental agencies.\textsuperscript{30} A possible psychological reason for the strong reliance on investigations is that most people learn a subject more easily from oral testimony than by reading staff research papers. Finally, it must be admitted that the direction of a spectacular investigation has been for some men the shortest road to glory, as we are reminded by the names of Charles Evans Hughes, Hugo Black, Thomas E. Dewey, Harry S. Truman, and Richard Nixon.

Early investigations were deliberately given to special rather than to standing committees, partly because it was thought that the standing committees might be too closely related to the executive agencies which were most often the subjects of investigation.\textsuperscript{31} Examples of the earliest investigations were inquiries into the defeat, in 1792, of General Arthur St. Clair's army by the Indians of Ohio, the investigation into Alexander Hamilton's financial affairs in the same year, and the conduct of the Seminole War, in 1818.\textsuperscript{32}

The Hamilton investigation was the first which discovered anything disgraceful to the subject of an investigation. Its

\textsuperscript{27} Marx, \textit{Significance for the Administrative Process}, 18 U. of Chi. L. Rev. 503, 508 (1951).
\textsuperscript{29} McGeary, \textit{supra} note 25, at 430.
\textsuperscript{31} McGeary, \textit{supra} note 25, at 431-32.
\textsuperscript{32} Dilliard, \textit{The Role of the Press}, 18 U. of Chi. L. Rev. 585-86 (1951).
procedure was strikingly different from the procedure of some more recent committees which have found themselves in the same position. It had been accidentally discovered that Secretary of the Treasury Hamilton had been giving money to a disreputable character for purposes unknown. There was a suspicion that the man was acting as Hamilton's agent, and was speculating in doubtful claims against the United States on the basis of inside knowledge of Treasury affairs. Accordingly, a joint Senate-House Committee of Three, the Speaker of the House, a Senator, and a Representative, called on Hamilton privately and at night. Hamilton "cleared himself" — as it would be said today — by telling the Committee that he was paying blackmail to the husband of a "friend." The Committee kept the details of the sordid business to itself and merely reported to the Congress that the suspicions of speculation were groundless. They managed to keep the secret for five years.  

Although there were many colonial precedents for punishing contempt of a legislature, one of the first known congressional punishments did not occur until 1812. In 1821 the Supreme Court refused to consider a presumption that the House of Representatives might have acted improperly in jailing a witness for contempt. The absolute power of the Congress to jail for contempt was supported again in 1848 when a court said it had no jurisdiction of the causes why the Congress jailed for contempt.


34 Ehrmann, The Duty of Disclosure in Parliamentary Investigation; A Comparative Study, 11 U. of Chi. L. Rev. 1, 7n. 29 (1943). In 1800 William Duane, editor of the Philadelphia Aurora, published details and a denunciation of a bill then being considered by the Senate in closed session. He was summoned to the bar of the Senate but refused to appear because, he claimed, no lawyer would appear as his counsel because the Senate barred any effective defense. He was taken into custody by the Sergeant at Arms but it does not appear that he was further punished by the Senate. Miller, Crisis in Freedom 199-202 (1951).


The view of the federal courts has been that the power of the Congress to punish for contempt is an implied common law power. Until 1857 the Congress punished contempt by bringing the offender to the bar of the House and there trying him. If he was voted guilty the offended House ordered its Sergeant at Arms to imprison him. In 1857 a law was enacted to define contempt of the Congress, not so much to clarify it as to make it a statutory offense which could be prosecuted by the Department of Justice. In that year the witness was completely immunized from criminal prosecution, with the unhappy result that all the rascals in the government hastily arranged to testify in return for pardon and absolution. An amendment of 1862 limited the immunity to prohibiting the use of the actual testimony. This is still the law. It does not compel testimony but protects the witness from having his actual words used against him, although it still leaves plenty of room for prosecution on evidence discovered in leads from his testimony.

Doubts of the propriety of the behavior of the Congress were stated very early. The Seventeenth Congress (1821-1823) was criticized for using the investigative power to collect campaign material. This has been a fairly continuous complaint ever since. Until 1827 no committee was given power to compel disclosures for legislative purposes, as dis-

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40 18 U.S.C. § 3486 (Supp. 1952). See Note [1953] Wash. U.L.Q. 313-16. The 1857 immunizing statute protected from criminal prosecution "... for any fact or act touching which he shall be required to testify..." The Supreme Court invalidated a law, similar to the act of 1862, which gave a limited immunity in judicial proceedings. The Court ruled that the act violated the Fifth Amendment, because the immunity granted must be as broad as the privilege. Counselman v. Hitchcock, 142 U.S. 547 (1892).
tintuished from scrutiny of the executive, or inquiry into elections and qualifications of members. When the power to compel disclosures for legislative purposes was granted to a House committee in that year it only carried by a vote of 102 to 88 after a very warm debate. The Senate committees got along without this "indispensable" power until 1859.\(^{43}\) In 1832 John Quincy Adams raised the question whether Congress could rightly inquire into private political beliefs.\(^{44}\) Story, in his *Commentaries on the Constitution* said it would be "truly alarming" if "the common law did not regulate, interpret, and control the powers and duties of the court of impeachment. . . ."\(^{45}\) As far as one can tell today there is no way to guarantee that an impeachment trial would be a fair trial, if the Congress chose to make it unfair.

Congressional investigations increased in numbers and sensationalism in the years of the Grant administration. This was partly because the subject matter was more sensational than in most earlier investigations. But it was also partly due to the great increase in newspaper circulation during the Civil War years. The wide readership was maintained after the war and furnished a market for sensational exposés and an admiring national audience for aggressive investigators.\(^{46}\) The behavior of some investigators seems familiar. For example, the behavior of Senator Ben Butler, as described by a contemporary: \(^{47}\)

To imagine a genuine case of happiness, . . . you must see General Butler let loose upon several barrels of telegrams. He is all activity. He has blank subpoenas, and sends for folks by the wholesale. Being himself familiar with speculations, his inquisitiveness is whetted to the sharpest edge.

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Investigators heard other criticism of their conduct. It was charged in 1873 that one investigating committee was established solely to provide a job for a friend of the chairman.\textsuperscript{48} But there was a popular demand for public hearings, as opposed to closed hearings, as shown by a slogan used during the presidential campaign of 1872, "Open doors! Less whitewash and more fumigation!"\textsuperscript{49}

The inquiries of the Grant period led directly into the first and greatest setback that the congressional inquest has received from the courts. That was the case of \textit{Kilbourn v. Thompson}.\textsuperscript{50} Kilbourn was a witness called to testify before a committee which was investigating the failure of the banking firm of Jay Cooke and Company. He refused to answer a question about a real estate partnership. When jailed for contempt he sued the Sergeant at Arms of the House of Representatives for false imprisonment. Two questions were considered: whether the Congress has a general power to punish for contempt, and whether the Congress may inquire into private affairs with no purpose except to expose. The Supreme Court answered "no" to both questions.\textsuperscript{51} Justice Miller, for the Court, said the English Parliament had a general power to punish for contempt because it was once a court, but the United States Congress had never been a court. The House could not invoke the Parliament's tradition to justify an inquiry into the private affairs of a citizen. Writing privately he stated that courts and grand juries are the only inquisitions into crime in this country, saying, "I do not recognize that Congress is the grand inquest of the nation."\textsuperscript{52} The Court admitted a special power to punish for contempt in the case of a witness at a hearing on the election of members, or their qualifications, or on impeachment, since these inquiries are

\textsuperscript{48} Glassie and Cooley, \textit{supra} note 46, at 353.  
\textsuperscript{49} \textit{Id.} at 362.  
\textsuperscript{50} 103 U.S. 168 (1881).  
\textsuperscript{51} See Gose, \textit{The Limits of Congressional Investigating Power}, 10 Wash. L. Rev. 61 (1935).  
\textsuperscript{52} Kilbourn v. Thompson, 103 U.S. 168, 189-90 (1881).
expressly authorized in the Constitution. But as the Jay Cooke investigation was not intended to produce legislation, the question of compelling disclosures in aid of legislation was not before the court. A critic of the Court's opinion has said that the Congress can not be sure that it can or will not legislate until it investigates, and that the Supreme Court treated the Congress as "an inferior tribunal in the judicial hierarchy." 

In the next few years several clarifications of the power of compulsory disclosure were made by the courts. In a case concerning the compelling of testimony before the Interstate Commerce Commission it was ruled that the Fifth Amendment did not protect from public disgrace but only protected from criminal prosecution. This had no reference to the Congress, of course, but lately the Fifth Amendment has come under the close scrutiny of the Congress. In another case it was held that the prosecution of congressional contempt cases in the District of Columbia courts was not an unconstitutional delegation of congressional power but only a supplement to congressional power. It is deduced that a witness can be punished for contempt at the bar of a house and also in federal court for the same offense. These cases did not overrule Kilbourn v. Thompson because they were concerned with investigations of public business, not private life.

The Supreme Court placed one limit on the power of the Congress to punish for contempt, and allowed one remedy for an aggrieved witness or other private person, in Marshall v.

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53 Kilbourn v. Thompson, 103 U.S. 168, 190 (1881).
54 Id. at 189, 194-95.
57 In re Chapman, 166 U.S. 661, 671-72 (1897).
58 Id. at 672. See Carr, supra note 37, at 298.
59 Gose, supra note 50, at 74. In an unusual case, Harriman v. ICC, 211 U.S. 407, 419-20 (1908), the Court limited the power to compel testimony to investigations which "concern a specific breach of the law." This is no longer binding. See Davis, The Administrative Power of Investigations, 56 YALE L.J. 1111, 1112-13 (1947).
when it was ruled that there could be no punishment for contempt if the behavior of the accused did not obstruct the work of the Congress. In this case the House of Representatives tried to punish the writer of a heated, ill-tempered open letter to a committee which was inquiring into the possibility of impeaching him. This is the only case since 1881 when a "judgment" of either House has been reversed by a court of law. Its meaning seems to be that the safest remedy available to one who feels abused by the Congress is to call a press conference or to write a book.

An interesting development of methods of inquiry occurred in New York state beginning in 1907 with the institution of the "Moreland Commissioners" under the Moreland Act of that year. The law provides for inquests somewhat in the manner of the British Tribunal of Inquiry, to be conducted by commissioners who are appointed by the Governor. The inquiries carried on by the Moreland Commissioners have a very respectable history.

III

Although the congressional investigations of the period before the first World War occasionally aroused much popular interest in the testimony they brought out, not much attention was paid to the investigative power as such until the scandals of the Harding administration. Interest in the power itself has been continuous since then.

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60 243 U.S. 521 (1917).
61 Gose, supra note 50, at 74.
62 Morgan, supra note 55, at 559.
63 Rogers, supra note 22, at 471-72. Two cases which do not follow the main line of judicial thought are of interest here. A Georgia court in Wallace v. Georgia C. & N. Ry., 94 Ga. 732, 22 S.E. 579 (1894), held that freedom of speech includes the freedom of silence. The other case, People v. Most, 171 N.Y. 423, 64 N.E. 175 (1902), concerned the punishment of a publisher for publishing an article advising all men to do their duty by murdering those who enforce the law. Unfortunately for the publisher, the article appeared on the very day that President McKinley was assassinated. The case is said to be the only one in American history where a court punished a person for an opinion.
64 Rogers, supra note 22, at 464-65. Since the 1920's the Senate has conducted
The key case in the Harding investigations was *McGrain v. Daugherty.* Mally S. Daugherty, brother of Attorney General Harry Daugherty, was twice subpoenaed by a Senate committee but did not appear. The Sergeant at Arms was sent after him. The matter came into federal court but, in the end, the reluctant witness was told by the Supreme Court that the Congress could compel his attendance. Justice Van Devanter, for the Court, said, "We must assume ... that neither House will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses." But if either house does exceed its limits the witness may refuse to answer "where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry." The only consolation here for the witness is that the questions asked must be pertinent. This rule is not very helpful to a recalcitrant or abused witness. It requires that he guess in advance that a federal court will later agree with him that a particular question was impertinent.

The many investigations of the 1920's were conducted vigorously. Witnesses and absent citizens were treated much as they have been treated in recent years. Their treatment was protested in familiar language. Calvin Coolidge, in a message to the Senate in 1924, said the investigators were capable of "unwarranted intrusion" which breaks down the citizen's immunity against "unwarranted search and seizure."
The government, in effect, charges criminal action without grand jury presentment, the rules of evidence for the protection of the innocent are ignored, "and instead of a government of law we have a government of lawlessness." 69

Newspapers attacked the investigators. The New York Tribune called Senators Burton K. Wheeler and Thomas Walsh "the Montana scandalmongers," the New York Post said the investigators were "mudgunners," and the New York Times referred to them as "assassins of character." Other papers joined in: "Democratic lynching-bee," "poison-tongued partisanship, pure malice, and twittering hysteria," "in plain words, contemptible and disgusting." 70

J. H. Wigmore, the great authority on the law of evidence, said the Teapot Dome inquiry should have used "the constitutional, manly, fair procedure of impeachment" but "flung self-respect and fairness to the winds" and "fell rather in popular estimate to the level of professional searchers of the municipal dunghills." 71

One critic, a professional super-patriot, Fred R. Marvin, probably overstated the case but used the stereotypes of the 1950's in a curious way when he said the investigations of the oil scandals were the result of "a gigantic international conspiracy . . . of the internationalists, or shall we call them socialists and communists?" 72

Angered by the aggressive, prosecution-minded investigations, Attorney General Daugherty unsuccessfully tried to work up a case by which the Department of Justice could prosecute Senator Burton K. Wheeler for some as yet un-

69 Quoted in Galloway, Proposed Reforms, 18 U. of Chi. L. Rev. 478, 479 n.2 (1951).
70 ALLEN, ONLY YESTERDAY 178 (Bantam ed. 1946).
71 Wigmore, Comment, Evidence — Legislative Power to Compel Testimonial Disclosure, 19 Ill. L. Rev. 452, 453 (1925). This critic, in 1929, thought that abuses could be curbed only by invoking congressional self-respect, and securing a higher standard of membership. In short, the problem was political, not legal. Coudert, supra note 67, at 551.
72 ALLEN, op. cit. supra note 70, at 178-79.
discovered crime. Other Senators complained that Department of Justice agents tried to blackmail them in the hope of keeping them quiet.\textsuperscript{73}

The American Civil Liberties Union and the Washington Post asked that cross-examination of witnesses be allowed. Bills for that purpose were introduced in the Congress but died. A usual argument against allowing cross-examination of witnesses at congressional hearings was that the committee were always pressed for time and cross-examination would delay their work.\textsuperscript{74}

There were supporters of the way the investigations were conducted. Felix Frankfurter wrote an article which appeared in the \textit{New Republic} in 1924 entitled "Hands Off the Investigations," in which he said those who suggest "restrictions on the procedure of future congressional investigations" do so to "divert attention and shackle the future."\textsuperscript{75}

George B. Galloway, in the \textit{American Political Science Review}\textsuperscript{76} in 1927 listed the merits and defects of the congressional inquests as he saw them. Neither the abuse of witnesses nor the defamation of absent citizens was listed as a defect. He thought the damage done by violation of privacy was "... inconsiderable compared to the evils that would result from depriving Congress of the power ... " and he warned against taking "a narrow legalistic attitude."\textsuperscript{77} Because the power protects from the arbitrary action of subordinate officials it "safeguards the rights of individuals from flagrant violation."\textsuperscript{78} He admitted that "... the itch for

\begin{itemize}
\item \textsuperscript{73} \textit{Wish, Contemporary America} 366 (1945).
\item \textsuperscript{74} Glassie and Cooley, \textit{supra} note 46, at 356-58.
\item \textsuperscript{75} 38 \textit{New Republic} 329 (May 21, 1924). See Boudin, \textit{Congressional and Agency Investigations: Their Uses and Abuses}, 35 VA. L. REV. 143, 146 (1949). Boudin, who once feared judicial power, now hoped for judicial protection of witnesses. Regarding Frankfurter's position, it is only fair to add that he joined in the call for cross-examination of committee witnesses.
\item \textsuperscript{76} Galloway, \textit{The Investigative Function of Congress}, 21 AM. POL. SCI. REV. 47, 66-69 (1927).
\item \textsuperscript{77} \textit{Id.} at 58.
\item \textsuperscript{78} \textit{Id.} at 65.
\end{itemize}
power and partisan malice . . .” have motivated congressional investigations but they have also been “. . . a salutary force in the direction of good government. . . .” It is worth noting that Mr. Galloway, twenty-four years later, wrote an article calling for reform of the procedures of congressional investigating committees.

The mood of the defenders of the committees was perhaps best represented in the words of James M. Landis, who said, “The bar of privacy . . . would make only the most superficial of examinations possible [and] require of senators that they be seers.” It can be added that the “Rule of Impertinence” of McGrain v. Daugherty required that witnesses be seers.

Samuel Seabury thought the immunity against compulsory self-incrimination “. . . should be made inapplicable to cases where the subversion of the very processes of government is involved. . . .” By “subversion” he meant bribery, but his rule would be very convenient for some investigators today.

It is plain that the so-called “liberal” and “conservative” positions on this question today were completely reversed in the 1920’s. It can be said that the effective work of undermining Kilbourn v. Thompson was done by the “liberals.” The Prophet Osee had a phrase for them — “For they shall sow wind and reap a whirlwind.”

IV

A shift in the purpose of investigation by the Congress was shown in the first two Congresses of the New Deal years.

79 Id. at 55–56.
81 Landis, supra note 6, at 220–21.
82 Seabury, The Legislative Investigating Committee: Foreword, 33 Col. L. Rev. 1, 2 (1933).
83 Boudin, supra note 75, passim. The most thorough study of the matter in the 1920’s was that of Potts, Power of Legislative Bodies to Punish for Contempt, 74 U. of Pa. L. Rev. 691, 780 (1926). After reviewing practically all of the relevant cases he concluded, “Public policy would seem to require that only in the clearest cases of want of jurisdiction and of oppression should the courts interfere with legislative investigations.” Id. at 829.
Earlier inquiries had mostly been aimed at checking or embarrassing an administration. Such investigations were often used to gain political advantage with the voters. In the 1930's investigations were often used to aid the administration. Several important and famous investigations were carefully timed to support the legislative proposals of President Franklin D. Roosevelt. Famous investigations preceded the enactment of famous New Deal statutes. On one occasion "the Senate Committee on Interstate Commerce conducted an inquiry" into railway financing "partly for the purpose of acquiring information which the Interstate Commerce Commission felt it did not have the power to obtain."  

When lobbyists opposed New Deal bills concerning holding companies and the Tennessee Valley Authority, the Congress blunted the lobbyists' weapons by investigating lobbies. When the Townsend movement loomed large, a committee tried to discredit Dr. Francis Townsend. The power to punish for contempt of the Congress was defined by the Supreme Court as including the power to punish for past contempt, not merely for current obstruction of the legislative process. An amendment allowed the Vice President or the Speaker to certify witnesses for contempt when the Congress was not in session. In 1935 there was a finding of contempt of the Senate at the bar of the Senate, without resort to the executive prosecution of statutory contempt.

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84 McGeary, supra note 25, at 430-31.
85 McGeary, Congressional Investigations During Franklin D. Roosevelt's First Term, 31 Ark. Pol. Sci. Rev. 682, 683, 691, 694 (1937). The administrative agencies also saw their powers expanded. Subpoenas were allowed for any lawful purpose and fishing expeditions were now lawful. Intrastate activities were investigated. Courts enforced subpoenas without requiring the agencies to show "probable cause" or "probable jurisdiction." Business facts were not protected by the guarantees against unreasonable search and seizure. Davis, supra note 59, at 1153-54.
86 Jurney v. MacCracken, 294 U.S. 125 (1935), was the case involving "past contempt." The defendant was punished for the destruction of papers in his files after he received a subpoena. The punishment in no way furthered the investigation by the Congress.
The attitude toward witnesses, as in the 1920's, was often closer to prosecution than to simple interrogation. In 1936 Senator Hugo Black expressed a typical congressional view in an article on investigations. He assumed that a non-cooperative witness had something to hide. Committees, he said, "... have always been opposed by groups that seek or have special privileges ... special privilege thrives in secrecy and darkness and is destroyed by rays of pitiless publicity." 89 The criticism of the methods of the investigating committees was the same sort of criticism and from the same sort of people as in the 1920's. Governor Alfred Landon, speaking in October, 1936, attacked "a committee that is out to get the critics" as opposed to "a committee that is out to get the crooks." 90 This, it will be agreed, has a familiar ring.

The decade of the 1930's was a turning point. Since then a profound concern has been shown regarding the conflict of investigative power and constitutional right. Three major questions have been asked. Does the First Amendment prevent inquiry into belief and opinion? Does the searches and seizures clause of the Fourth Amendment limit the subpoena power? What immunity from self-incrimination does the Fifth Amendment give the witness before a congressional committee? 91 True, a few people in the 1920's had raised these questions but only sporadically. Before the 1940's the weightiest adverse criticisms had been that the investigations were used against the executive branch for partisan and personal ends, and that the committees were inefficient and incompetent at finding facts. Since the late 1930's the critics have concentrated on the invasions of personal liberty by investigators. The later critics charge that an investigation

89 Black, Inside a Senate Investigation, 172 HARPER'S 275, 286 (Feb. 1936).
90 MeGeary, Congressional Investigations During Franklin D. Roosevelt's First Term, 31 AM. POL. SCI. REV. 680 n.1 (1937).
often assumes the aspects of a trial without the safeguards which a trial gives to the innocent, or to the guilty, for that matter.

The cause of the switch in interest is easy to find. The most publicized of recent investigating committees have turned from economic to political questions. The sign at the fork of the road was the establishment of the House Committee on Un-American Activities in 1938. The mission of this Committee was so broad as to amount to this: to investigate all political propaganda. It is in this area that one must be very watchful for violations of the First Amendment.

In carrying out its assignment the Un-American Activities Committee has inquired into many things. Among them are: opposition to the American system of checks and balances, opposition to the Franco government of Spain, the advocacy of a world state, the advocacy of the dissolution of the British empire, and disagreement with the views of General MacArthur. Apparently its subject matter concerns any change anywhere in the status quo.

The Un-American Activities Committee has shown a curiously methodical bias in its treatment of witnesses. The Committee distinguishes between friendly and hostile witnesses. Friendly witnesses are allowed to tell their stories in their own way, prompted by considerately phrased questions. Hostile witnesses are often forbidden to make statements except as answers to questions. The examination of hostile witnesses is vigorous and penetrating, except when the Committee is unable to prevent its own members from asking irrational or prejudiced questions. At its most effective, com-

92 Galloway, Proposed Reforms, 18 U. of Chi. L. Rev. 478, 480 (1951). As late as 1938 a standard work on elementary political science considered the chief question concerning the conduct of investigating committees to be the question whether they hindered the executive branch. Ogg and Ray, Introduction to American Government 408 n.35, 457 n.10 (6th ed. 1938).

93 Driver, supra note 91, at 888-89.

94 See Note, 43 Ill. L. Rev. 253, 255 n.20 (1948).
mittee examination sounds like a capable cross-examination in a criminal trial, rather than a search to find information which would be useful in legislating. At its worst, the Committee has shown inefficiency, even when on the right track in a line of questioning. It has often resented the presence of counsel brought by witnesses. It does not allow cross-examination. It usually refuses to allow a reply by any person named in its testimony as "Un-American." 95

This Committee has been the committee most scrutinized in the courts. Since 1945 it has been in continuous conflict with witnesses but there has not been a single adverse court ruling on the Committee's work and methods. It is one thing for a court to review a statute — it is quite another to review the methods of legislation. Courts have shown an understandable reluctance to go into the matter. 96 Witnesses have tried to avoid testimony because of the impertinence of the questions, or because of the danger of self-incrimination, or because of the prejudicial manner in which the hearings are conducted. 97 As will be shown, only the "self-incrimination" plea has been successful.

Since 1945 the Committee has been a standing committee. Although it is a legislative committee it has had very little to do with legislation. It did part of the work on the Mundt-Nixon Bill and wrote part of the McCarran Internal Security Act, and that is all of its direct legislative influence in fifteen years of operation. In reality it is not so much a legislative committee as it is a detective agency. Congressman Rankin has preferred to call it "the grand jury of America." It has, in a manner of speaking, "indicted" or "cleared" suspects. Its members have loosely referred to themselves as a "court." 98

97 See Comment, 26 Tulane L. Rev. 381, 382 (1952).
The temper of this Committee in dealing with a hostile witness was shown by a Chairman, J. Parnell Thomas, in November, 1948, when he told a witness, "The rights you have are the rights given you by this committee. We will determine what rights you have got and what rights you have not got before this committee." For practical purposes, Mr. Thomas's view is historically correct.

The possibility of congressional self-restraint appeared briefly in 1946 when the Legislative Reorganization Act of that year passed the Senate with the proviso that there be no select investigating committees, but that clause was taken out by the House of Representatives. In the next Congress (the eightieth) there were forty-six legislative inquiries, six of them by select committees.

Whether the courts could reform the treatment of witnesses before congressional investigating committees will be treated by other members of this symposium. However, it may be noted here that the only strong agreement with a reluctant witness stated by a judge within the time limits of this paper was a dissenting opinion of Justice Edgerton of the District of Columbia Circuit Court of Appeals. He wisely based his dissent on logical, not historical grounds. He said that the Un-American Activities Committee violates the right of free speech: "The privilege of choosing between speech that means ostracism and speech that means perjury is not freedom of speech." Again: "The First Amendment forbids Congress purposely to burden forms of expression that it may not punish." Congressional action that is either intended

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103 Id. at 254.
104 Id. at 256.
or likely to restrict expression of opinion that Congress may not prohibit violates the First Amendment.”

V

The power to compel disclosures is not an expressed but an implied power. On this matter there have been two conflicting traditions in American thinking. It has been contended that the Congress is the grand inquest of the nation with necessarily broad powers of compulsory disclosure. Conversely it has been said that the Congress is not a national inquest, and that only courts and grand juries inquire into crimes in this country. The first view has persevered and triumphed. Certainly the Congress does have the character of a court, e.g. impeachment, judgment of the elections and qualifications of its members. Whether it has the character of a court in other matters is the disputed point.

To justify the broad power to compel disclosures it is said that the complexity of the state has increased almost beyond the power of Congressmen to know. The executive has a very large staff. The legislature has a very small staff. The executive suggests legislation and the legislature enacts law in very loose terms, leaving the executive to fill in the details at discretion. It is claimed that this is not true legislation. To make the legislature more responsive and more responsible the Congress increasingly turns to the use of special legislative committees to search for information. The need may be grave, but it is certainly questionable whether the need for information by an understaffed official body can be used to excuse defamation and verbal injury.

Courts have accepted the principle that the power to compel disclosure may be used to gather facts for legislation, but

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105 Id. at 259.
have said that the questions must be pertinent. The final determination of pertinency will be made by a court, not by the witness, which makes it a very risky defense. If the question is ruled to be pertinent, the witness will be punished for contempt. The practical effect of the use of the power to compel disclosures in recent years has been to allow "intrusions into private belief by giving a blanket endorsement to inquiries into the political faiths of all men." At the same time the prohibition of the Fourth Amendment against unreasonable search and seizure has been narrowed by definition which allows "fishing expeditions" in the records of political organizations. There being no other protection of political privacy witnesses have taken to refusing to answer questions on the ground of the Fifth Amendment, that is, that an answer would incriminate. This has become the only real limit on the power to compel disclosures. It seems very likely that some witnesses have abused this right, not to prevent criminal prosecution but to protect political privacy or to avoid telling of the eccentric or unconventional (but not criminal) behavior of their best friends.

Today, of all officialdom, only a legislative committee can set up an arbitrary standard of orthodoxy and compel a citizen to tell whether he accepts it. It may be that private persons have no right to political privacy but this right has a respectable tradition of protection, since every state provides for secret balloting in general elections.

The invariable punishment of a defiant witness is imprisonment for contempt. The power to punish for contempt has


109 Driver, supra note 91, at 898.

110 Id. at 898-902.


been used against almost no other kind of offender for more than a century.\textsuperscript{113} Such contempt cases may be prosecuted in federal courts or tried at the bar of the House, at the discretion of the Congress.\textsuperscript{114} If the contempt obstructs or has obstructed the work of the Congress it is punishable,\textsuperscript{115} but there is no limit on contemptuous publication or speech which does not obstruct the work of the Congress.\textsuperscript{116}

VI

Of equal importance to this discussion is the immunity of the legislator from being questioned elsewhere for words spoken in relation to legislation. This immunity, like the power to compel disclosures, is part of our heritage of English law and custom.

The modern British ruling on the independence of Parliament is that "What is said or done within the walls of Parliament cannot be enquired into \textit{in a court of law}." This represents a victory for which Parliament contended for centuries.\textsuperscript{117}

There were half a dozen famous medieval cases of arrests of Members, but no medieval remedy except to petition the King. (There is no record of conflicts between Members and non-Members, over words spoken in the Parliament.) The original immunity of Members of Parliament came as a grant from the King at the opening of each Parliament — granted, very likely, to make service in the Parliament attractive to


\textsuperscript{114} Id. at 298-99.


An example of an early claim to such a position occurred in the reign of Richard II when the House of Lords of the "Merciless Parliament" tried several of the King's cronies for treason. The House insisted that the matter was too important to be bound by the rules of law and that the Parliament was the supreme judge of law. 2 \textit{Stubbs, The Constitutional History of England in Its Origin and
the Members. The King could protect himself from the abuse of the privilege by dissolving the Parliament and calling a new one. A partial equivalent protection in the United States today is the constitutional requirement of periodic elections to the Congress. In England the last direct violation of Parliamentary immunity was in Elliot’s case in 1630, when several members were convicted of seditious utterance. The mills of the law ground slowly but surely — thirty-seven years later, on writ of error, the House of Lords reversed the lower court. The immunity was written into the English Bill of Rights in 1689 and has not been attacked since. From this source it came into the United States Constitution. In a manner of speaking, Congressional immunity has no legal history since it is beyond the reach of the law. It has been justified on the ground that the legislature needs absolute freedom of speech to do its work. It is not intended for the personal benefit of the legislator but exists to protect the interest of the citizen in good legislation. Of course, to tell lies on the floor of the Congress does not promote the interest of the citizen but the loss of the privilege would, it is argued, paralyze the legislature. Therefore there is an absolute privilege of members of the Congress (and state legislators)
to inflict verbal injury, so long as the words they use are related, however remotely, to legislation.\textsuperscript{122} The immunity extends even to performances which are contrary to the rules of the House in which the words are spoken.\textsuperscript{123} Serious and respected critics have recently been concerned to see this immunity used to establish in our jurisprudence the doctrine of guilt by imputation, or more popularly, "guilt by association."\textsuperscript{124}

Woodrow Wilson, almost seventy years ago, pointed out that defamation and public disgrace protected by congressional immunity were also very inefficient tools of legislation. The Congress, he said, can not control the executive officers except by "disgracing them." This method requires "openly avowing a suspicion of malfeasance," after which the speaker "must then magnify and intensify the scandal. . . ." Usually this leads to no action whatsoever.\textsuperscript{125}

The process has become stereotyped. It has created a political rhetoric of acrimony. The strong, violent language of animosity has been developed steadily since the first years of the republic, until politicians use it as heedlessly as soldiers use profanity. It has been suggested that the crude animosity shown toward witness before the Congress stems from several psychological roots. The legislator has lost a degree of influence in the executive branch with the loss of patronage because of the expansion of the merit system. The harshness of the congressional investigator springs partly from this frustration. His manner is not sweetened when he detects an air of superiority in an administrator or scholar who has superior knowledge. There is also an old distrust of intellectuals in American politics, found in the first Federalist admin-

\textsuperscript{122} Id. at 486-87; Veeder, \textit{supra} note 120, at 134-37.
\textsuperscript{123} Veeder, \textit{supra} note 120, at 136.
\textsuperscript{124} O'Brian, \textit{Loyalty Tests and Guilt by Association}, 61 Harv. L. Rev. 592, 604 (1948).
\textsuperscript{125} Quoted in Galloway, \textit{Proposed Reforms}, 18 U. Chi. L. Rev. 478, 479 n.2 (1951).
istrations as well in those quarters where the noun “Egghead” is good usage. It was most fairly put by Roscoe Conkling when he described the Liberal Republicans of 1872 as “idealists and professors and soreheads.” The strong Calvinist strain in our American morality has the unhappy effect of making some of us very self-righteous. Self-righteousness, allied with the tradition of lawlessness which has caused two thousand lynchings in the past seventy years, makes it easy to arrange for an “intellectual lynching” behind the safeguard of congressional immunity.

Congressional immunity is a mighty fortress. Indeed, a Congressman must go to a good deal of trouble to expose himself. The only way he can leave himself open is maliciously to repeat outside — that is, in a way totally unrelated to legislation — what was privileged slander when said in relation to the process of legislation. The only sure remedy for abuse of congressional immunity is for the Congress to discipline its own members. With the possible exception of the case of Theodore Bilbo, it is unknown for the Congress to punish a member for words which injure a non-member. Thus the only sure remedy is the one which is never used. A very improbable remedy was attempted in 1906 when the Senate accepted a petition to expel a member, but the petition died in committee.

Thus it turns out that legislative immunity, first instituted to protect Members of Parliament from kings and their judges, now serves equally to protect the defamation of private citizens. As Hamilton said, “The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms

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127 Note, 18 U. of Chi. L. Rev. 591 (1951), considers at some length the privilege of publishing congressional defamation.
of impatience and disgust at the least sign of opposition from any other quarter. . . ." 129 Today the impatience and disgust is often caused by the opposition of private persons.

VII

In this short sketch of the origins and progressive clarification of the ideas of legislative inquiry and legislative immunity it can be seen that we are dealing with ideas which have become steadily more precise over a period of ten centuries. New ages raised new questions. New questions brought new clarifications. It is hoped that this discussion may have some part in bringing about further definition to meet the problems of our own time. The data of the past suggest several generalizations which might be of use in resolving this generation's uncertainties:

(1) Congressional investigations have never been separated from the heat of politics. They are so often politically motivated that it might clarify our thinking if we accept them frankly as "the legitimate function and duty of a political party." 130

(2) Reform of the treatment of witnesses is needed. It can be done jointly by "liberals" and "conservatives." They have so often been on both sides of this question that there is no permanent line separating them.

(3) It might be honestly questioned whether the legislator needs as much protection from the private citizen as he needed against, say, Queen Elizabeth I or King Charles I.

(4) Courts have shown an unwillingness "to interfere with inquiries in any way." 131

129 The Federalist, No. 71 at 466 (Mod. Lib. ed. 1937).