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Proposed Remedial Legislation: Protection for Witnesses in Congressional Investigations

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dedicated. There is no place in this heroic mission for personal glorification. Indeed, there is never a place in our national life for personal glorification by the degradation of others.

I am confident that we shall successfully complete this undertaking. But we must do it with the instruments and in the spirit of our democracy — not with the techniques of dictators or tyrants. We must meet and defeat the aggressions of Communism without violating our own principles or traditions. And we must serve this high purpose with truth and justice, with fairness and decency.

Abe Fortas

Legislative Investigations: Safeguards for Witnesses:

Proposed Remedial Legislation:

Protection for Witnesses in Congressional Investigations

My assigned part in this discussion of congressional investigations concerns the extent to which the two Houses of Congress can and should take steps to meet the criticisms of the investigative process for themselves. This puts me somewhat in the position of describing the cat in the famous conference of mice where the solution ultimately agreed upon was a good loud bell. Of course it is not fair to describe the relationship between congressional committees and their witnesses as a perfect analogy to the feud between cats and mice. But I do believe that the problem we are talking about centers in Congress itself, and nowhere else. And I think it would be a mistake to turn toward any power outside the legislative branch for a solution.

It goes without saying that I do not ratify or condone any abuses that may have been described to you in this sympos-
ium. As a matter of fact, we who are serving in Congress are probably more sensitive than anyone else to the bad public reactions stirred up by a few of our committees, whether justifiably or not. Most of us will readily admit that there have at times been abuses which need correction. Unquestionably witnesses who testify are in need of definite protection and vindication of their rights.

But there is another side of the coin to be kept in view: Congress also has important rights in the investigative process. This is what makes me tend to be very conservative about imposing external limitations on the work of congressional committees. It is my belief that Congress has both the plenary power and the manifest will to clear up this situation by its own action.

All the lawmaking authority vested in Congress channels through only five words in the Constitution: Article I, Section 1, refers to "All legislative Powers herein granted," which are conferred without limitation on the legislative arm of the Government. From these words the investigative power has been developed by interpretation and implication, and I think the rationale underlying it is perfectly sound. The power to legislate necessarily implies the power to inquire. No lawmaking body could discharge its obligations wisely without free access to facts about the subjects it is called upon to consider.

Furthermore, under the great principle of separation of powers, our federal legislature is responsible for keeping a watchdog eye on the way existing laws are being administered by the executive arm. In this latter capacity, also, it seems imperative that Congress should be able to conduct inquiries without limitation. When things go wrong in the vast machinery of our Government, it is up to the legislators, who are the only directly elected spokesmen for the people, to step in and call for a full accounting. Indeed, this symposium is post-
ulated on the thesis that the investigating power of Congress is essential to the proper functioning of our government.

So the problem is not at all to hobble the investigating committee or curtail its functions. What must be worked out is a delicate balance between the implied but substantial rights of Congress on the one hand, and the rights of individuals, on the other.

I

But before examining this balance, which is largely a matter of give and take in the realm of procedure, let me stress one guide which I think the lawmakers themselves must always keep in view: the rights of Congress are no broader than the legitimate objects from which they have been implied. And I believe those objects are only the two referred to a moment ago: (1) to gather facts about proposed legislation, and (2) to inquire into the workings of existing federal laws. There lies the first and perhaps the only important substantive restraint which Congress must impose upon itself. No congressional investigation is justified unless it can be directly related to the lawmaking process in one of these ways. In other fields, investigations are proper and often necessary, but not by Congress.

It follows that I disagree strongly with those who argue that Congress is also responsible for informing and educating the public by looking into anything which may happen to catch the popular fancy of the moment. This notion accounts for much of the sensationalism which has surrounded a few of our congressional investigations. Mere headline making, per se, should be left strictly to newsmen and to public agencies charged with the detection of wrongdoing and the prosecution of individual offenders. To restate this cardinal rule of self-restraint: congressional committees should never intervene in the first place except where new federal legisla-
tion may be required, or where the working of some existing federal law is involved.

To digress slightly, I think it is proper to note here a perfectly honest reason for the tendencies toward headline seeking which are sometimes related to this activity. Anyone who is holding an elective office must keep "alive" in the eyes of his constituents. That is simply a fact of political life. In the last few decades, as the sessions of Congress have grown longer and longer and the routine work in Washington has increased many fold, it has become increasingly difficult for legislators to get away from the Capitol and to go home to take care of their political "fence-mending."

A conscientious Senator or Representative sometimes finds himself buried for weeks and months at a time, doing the plain hard work expected of him. He risks being forgotten, for the public fails to realize how important the day-to-day problems of running the Government really are. One alternative to this honorable oblivion — and its grave political risks — is to gain national recognition in the news media, in connection with a popular investigation. I am not defending the tactic as such, but I think it is a significant part of the total problem we are talking about.

Beyond a need for self-restraint in choosing the subject matter of investigations at the outset,¹ I submit that Congress should have an unlimited fact finding power, supported by such aids as the subpoena, compulsory testimony under oath, ancillary arrest,² and contempt processes.³

¹ The authorizing resolution is all-important in this respect. It should be clear, and should give the precise limits of the authority it confers. See United States v. Rumley, 345 U.S. 41 (1953).

² Persons ignoring subpoenas are subject to apprehension by the sergeants at arms of the two houses, but these officers can only invoke the aid of other federal agencies when authorized to do so by special resolution. See, S. Res. 65, 82d Cong., 1st Sess. (1951). A bill to permit such aid in all cases died in the 82d Congress and has not been reintroduced. S. 2058, 82d Cong., 1st Sess. (1951).

³ For a proposed improvement in the enforcement processes available to committees, see note 16 infra and accompanying text.
The rights on the other side, the rights of individuals when they are called upon to give information to a congressional committee, are the main focal point of this discussion, and my principal subject matter. This is where I think the cat should be encouraged, and can be expected, to bell itself.

In each of the last three Congresses I have sponsored a resolution before the House of Representatives which would establish rules of procedure to be observed by all House investigating committees. During the recent Department of Justice investigation, which was launched under the chairmanship of my esteemed colleague Representative Chelf, of Kentucky, whom I succeeded as Chairman, we developed and tested a full set of formal rules for the conduct of our hearings. At present, a singularly able subcommittee of the House Committee on Rules, under the chairmanship of Representative Hugh Scott, of Pennsylvania, is addressing itself to the preparation of uniform rules for our committees. The subject has been of major interest and concern to me for a long time, and I think it can be fairly reported that many of my colleagues are as anxious as I to do something constructive about it, and soon.

In this paper I am going to touch on some of the problems and principles that should be considered in developing a good set of rules for the protection of witnesses, rather than offer you my own specific proposals or others which have been developed to date. Congress has unlimited rule-making power with respect to the activities of its own committees, and this, as I have noted, is where the solutions to our problems should be sought.

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Rules, as the word implies, are determinants of procedure rather than substance. The great safeguards which exist under our system of government for the benefit of individuals are clearly set forth in the Constitution and its interpretation by the courts. They need nothing added; what we must do is simply to make them work in this context, though I do not think it can be too strongly emphasized that procedure is fully as important as substance here. To be effective, the principles enumerated hereafter must be reduced to precise, understandable, working statements, with the t's crossed and the i's dotted, so that both the witness and his interrogators will know the specific rights of each. The principles I consider most important are the following:

1. *Majority control over the subject of each hearing.*

I have already observed that, in my view, no investigation should be authorized by Congress unless it is directly related to the lawmaking process. I see no way, however, of formally restricting the decisions of Congress as to the subject matter of investigations, beyond exhorting self-restraint. But once an investigation has been authorized there is much leeway as to the course it will take, and here I think the principle of majority control should be firmly laid down. Logically the chairman should have the authority to direct the staff in preliminary studies and exploration, but before any phase of an investigation is brought to the hearing stage it should be submitted to the committee and formally approved by a majority.

Along this same line, it is my opinion that other important decisions — apart from the selection of subject matter — should also be made by the committee rather than by the chairman or any individual member. Power delegated to investigating committees is almost always conferred on a balanced bipartisan group; no single member should ever be allowed to usurp it.
2. **Clear public announcements of the subject to be considered in each phase of the investigation.**

Although I think it is deceptive always to equate congressional hearings with judicial proceedings, some of the analogies are close and helpful. In the matter of notice, for instance, witnesses and their counsel — as well as the committee — should be informed in advance, as they are by the pleadings in a lawsuit, as to the issues to which each inquiry is addressed. Failing this, some of the other protections become meaningless; no respect can be accorded the principle of germaneness, witnesses are exposed to the dangers of trickery and surprise, and the functions of counsel are apt to be seriously impaired.

3. **Majority control over the use of executive hearings.**

The committee’s power to close its doors and take testimony in secret session is quite proper. Indeed, fair dealing often clearly dictates such a course. Thus witnesses can be encouraged to testify more freely, and persons who might otherwise be unfairly injured can be accorded protection. But the executive hearing is susceptible of abuse as an out-and-out Star Chamber process, to break the witness down and to fish for weaknesses which are later exploited in an open hearing. I do not think it would be practical to place absolute limits on the use of closed sessions; the situations in which they may be legitimately required are too varied. But in every instance they should be held only after a responsible decision by a majority of the committee.

4. **Secrecy measures with respect to executive hearings.**

The value of closed sessions is lost, of course, if their secrecy is not protected. Therefore, the rules should formalize such matters as the exclusion of unauthorized persons from
the hearing rooms, public statements by witnesses, counsel and other persons who are present, and the release of proceedings by the chairman or any individual committee member without majority approval. It should perhaps also be provided that if the testimony on any subject matter is released in part, the witness or witnesses concerned shall have the right to reveal other pertinent parts, or the testimony in toto.

5. *The right of witnesses to be advised by counsel.*

This is an issue on which the analogy to courtroom proceedings has caused confusion. There are no clearly adversary parties in a congressional hearing, and counsel's traditional role as protector is somewhat out of place. It is noteworthy that no formal right to counsel has ever been accorded witnesses before legislative bodies; they are admitted to hearings as a matter of grace. Nonetheless, I believe the prevailing practice should be recognized and that every person called upon to testify should have the absolute right to be accompanied by counsel of his own choosing. This would apply to executive as well as open hearings, except in the rare case where the attorney is himself the subject of investigation in the same proceeding.

The rules should lay down a basic standard of conduct and decorum, to permit the committee to deal with special problems such as contentious "mouthpieces" and the occasional witness who merely parrots the promptings of his attorney. Experiments with permitting counsel to examine his own

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6 D.C. Bar Committee, *supra* note 5, at 355-6 recommends that persons interviewed by staff investigators should also be accorded a formal right to counsel and permitted to rely on counsel at this stage. I am inclined to think the suggestion goes too far; investigators have no formal rogatory rights, no power to administer oaths, *etc.*

7 Since counsellors are almost always attorneys at law (though there is no such formal requirement), it might suffice to refer in this connection to the applicable Canons of Professional Ethics of the American Bar Association, *e.g.*, Canons 15, 16, 22, 26, 32.
client briefly, and to cross-examine other witnesses, orally or by written interrogatories, might well be undertaken although I am inclined to think that Congress is not yet prepared to go so far as to permit oral cross-examination.

6. The right of witnesses to submit prepared statements.

Every person who testifies should have an opportunity to offer a concise statement during the course of his interrogation. Subsequent statements in clarification or rebuttal should also be permitted. This rule would have to be so framed as to preserve some control in the committee on such matters as brevity, relevancy, etc. Probably such statements should be required to be submitted in writing, in advance of their presentation for the record.

7. Protection of non-witnesses discreditably referred to.

Persons adversely characterized in congressional hearings present a special problem. In most cases, there is no forum except the hearing room where they can make adequate answer. I believe that, subject to reasonable standards of brevity and relevancy, such persons\(^8\) should be permitted:

(a) to submit a statement for incorporation in the committee's record;
(b) to appear and testify before the committee; and
(c) to confront or interrogate their accusers, by written interrogatories or otherwise.

8. The right to call additional witnesses.

Under certain circumstances either a witness or an injured non-witness may be required, in fairness to himself, to bring

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\(^8\) The test of adverse characterization should be definitely spelled out, based, perhaps, on actionable libel or direct accusations of crime. It is noteworthy that mere disgrace or infamy is excluded by statute as a ground for refusal to testify before a congressional body. Rev. Stat. § 103 (1875), as amended, 52 Stat. 942 (1938), 2 U.S.C. § 193 (1946). Quaere, whether an analogous limitation would be too restrictive in this context.
the testimony of other persons to the attention of the committee. Here the analogy to the accused in a courtroom is somewhat tenuous, yet worthy of consideration. With adequate safeguards to prevent abuses, such a right should be available whenever the need for it is satisfactorily demonstrated to the committee.

9. All oral testimony to be given under oath.

This is a small point which should be clarified. If the rule is formally established it will apply to all alike, avoiding occasional embarrassments which are presently encountered.9

10. Availability of stenographic transcripts.

This, too, is a small matter which should be formalized. Every witness should be given the unqualified right to examine transcripts of testimony given by him, as well as the right to purchase copies if he has testified in public or if the testimony he has given in an executive hearing is released.10

Since the need for considerable flexibility — as contrasted with uncertainty — in such rules is obvious, discretion might be reserved in the committee, acting through a majority, to waive or modify any provision upon a finding that no hardship would result therefrom, or in the alternative, the rules should contain a general exhortation to liberal construction and fair and just application in all cases.11

II

Now in conclusion I shall allude briefly to several related matters that I believe should be included in any full consideration of this subject.

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10 It might be also wise to provide that all testimony taken under oath shall be transcribed, or must be transcribed if the witness so requests. This is universal practice but conceivably it could be dispensed with in some situations where the witness would be seriously prejudiced by its omission.
The first of these is the question of newsreel, radio and television coverage of congressional hearings. It is a wholesome thing, in my view, for the public to have direct contact with the work of Congress. I do not share the conservative view that cameras and microphones should be excluded entirely from all committee proceedings. On the other hand, coverage in these new media raises serious problems: the equipment which is required, especially the brilliant illumination for photography and television, tends to harass the witness and to disrupt the committee's work; coverage is usually partial, since the hearings cannot be timed for the cameraman or the broadcasting companies' commitments and, therefore, what the public receives is generally fragmentary and sometimes misleading; and the presence of sensitive microphones has occasionally destroyed the privacy of communication between the witness and his counsel.

I am in favor of further experimenting with these media, and believe that eventually their use will have to be governed by additional rules of general application. For the time being, I think it should be provided that when hearings are to be broadcast or televised, coverage will be permitted only with the understanding that any witness who declines to appear via these media shall be excused.

Another related problem, but one which must be met by legislation rather than by rule-making, is the extent of the immunity, if any, to be accorded witnesses who plead self-incrimination. Although Congress has had an immunity statute in force for over half a century, the courts long ago construed it to be virtually worthless. At present, therefore, there is no way for a congressional committee to overcome

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the plea of privilege on this ground. This plea has been frequently interposed in bad faith, thereby abusing the Bill of Rights. Legislation is now pending to revise the statute so that it would be effective.\textsuperscript{15}

In its present form, this new measure provides that immunity can be conferred only with approval of a majority of the committee, and only after notice to the Attorney General. I am very much in favor of these limitations, but I would go even further. The dangers of automatic immunity are self-evident; in every case where such a statute is invoked there is, in effect, a bargain in which the inquiring authority excuses some crime in return for testimony which could not otherwise be elicited. I think we must be very careful that Congress never enters such bargains lightly, and that in every case the prosecuting arm of Government, through the Attorney General, is advised of what the legislative arm proposes to do. Indeed, I would prefer to vest the authority to grant immunity with the Attorney General, who has the correlative responsibility for law enforcement.\textsuperscript{15a} At the very least, I would give him a veto power over possibly arbitrary or capricious action by a congressional committee.

Finally, I should like to direct your attention to a proposal which I am sponsoring in the present Congress,\textsuperscript{16} to give congressional committees direct recourse to the courts in enforcing their rogatory powers. This is a device which has been used successfully by a number of administrative agencies.\textsuperscript{17} When a witness defies the committee by refusing to respond


\textsuperscript{15a} H. R. 6899 recently introduced by the author, 100 Cong. Rec. 19 (Jan. 6, 1954) embodies this proposal and has received the endorsement of the Attorney General. N.Y. Times, Feb. 6, 1954, p. 6, col. 3. [Editor's note.]


to a subpoena or to give evidence, instead of the present cumbersome procedure which requires a resolution-citation for contempt and subsequent punishment under a criminal statute, the committee would apply forthwith to a court. The court order would then be enforced by the court’s own contempt powers.

From the committee’s viewpoint, this change would make it possible to compel the production of evidence, which is what is desired and needed, instead of merely inflicting a delayed punishment for the witness’ recalcitrance. From the witness’s viewpoint, it would permit the removal of contested issues promptly from the hearing room to the impartial atmosphere of a court. If the witness happened to be right in his defiance, he would be promptly and finally vindicated.

In presenting the point of view to which I have adhered in this paper, I wish to make it absolutely clear that I am implying no criticism of the colleagues with whom I have been identified in the conduct of congressional investigations. My criticisms are general; my personal experiences have been entirely gratifying.

In summary, I believe that the investigative functions of congressional committees can be satisfactorily improved by the use of Congress’ own rule-making powers; I do not think the courts should interfere extensively with these functions, and I would look for considerable reluctance from the judicial arm if it were called upon to do so. The picture is encouraging, however, for Congress is giving serious attention to this very matter, and I am sure that constructive results will soon be forthcoming.

Kenneth B. Keating

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