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Congressional Investigations and Individual Rights

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Much has been written and many cases reported discussing the status of witnesses before Congressional investigating committees.[1] Most of the recent discussion on this subject seems to accept as an established principle of Constitutional Law the premise that the only limitation on the power of the Congress to conduct such investigations is to be found in the limitations imposed on the federal government by the Constitution.[2] And further, that the power of the federal courts to interfere in these activities of the legislative branch is severely limited by the doctrine of "separation of powers".[3] This view is fortified by the specific grant to the Congress by the Constitution of the power to "determine the rules of its own proceedings".[4] The remedy for abuses of discretion has been held to lie with the Congress, or ultimately with the people at the polls.[5]

Nevertheless, the courts are not powerless to set standards for the treatment of witnesses. The federal courts and especially the Supreme Court, under the same doctrine of "separation of powers", have as one of their primary functions the duty of safeguarding individual rights, particularly, but not exclusively,[6] those set forth in the Bill of Rights to the Constitution.[7] Whenever the courts allow these rights of the citizens to be abrogated without justification, whether by the legislature, the executive, or others, on the ground that the doctrine of "separation of powers" forbids them to interfere, they mistake their function and shirk their duty under the Constitution.

This is particularly important in the case of witnesses before Congressional investigation committees. The Congress generally resorts to judicial process to cite witnesses for contempt pursuant to Title 2, U. S. Code §192 (1946),[8] in lieu of exercising its inherent, but limited,[9] contempt power. To exercise this inherent power it is necessary to call the contumacious witness before the bar of either House of Congress, and to remand him to the custody of the Sergeant-at-Arms by way of punishment. Where the Congress resorts to the machinery of the courts, it subjects itself to the application of judicial standards to its proceedings, particularly the standard of "due process". The courts have been especially zealous in the pro-

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[1] For some late discussions of the problem see 18 U. of Chi. L. Rev. 421-685 (1951) (symposium on Congressional investigations); Dodd, *Self-Incrimination by Witnesses before Congressional Committees,* 11 F. R. D. 245 (1951); 64 Harv. L. Rev. 987 (1951).

[2] That this is in effect no limitation at all see *infra.*

[3] See *O'Donoghue v. United States,* 289 U. S. 516 (1933).

[4] Article I, Section 5, Cl. 2.

[5] *Barsky v. United States,* 167 F. 2d 241, 250 (D. C. Cir. 1948), cert. denied 334 U. S. 843 (1948).

[6] U. S. CONST., AMEND. IX.

[7] *Ibid.,* AMEND. I to X.

[8] "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 committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdeameanor, punishable by a fine of not more than $1000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months."

[9] See *Marshall v. Gordon,* 243 U. S. 521 (1917).

tection of the citizen's rights where he appears before quasi-judicial bodies such as administrative agencies[10] and grand-juries.[11] There is no good reason why the citizen should not be equally protected in the case of Congressional investigations. Even where Congress has acted pursuant to its inherent contempt power and summarily cited and punished witnesses, the federal courts have consistently entertained writs of *habeas corpus* to insure that the actions of the Congress were properly taken.[12] Where the implied grant of power is exceeded, the court has the power to order release of a person confined by the Sergeant-at-Arms of either House.

In the course of Congressional hearings there is often a clash between the committee in its desire to obtain information, and the witness who claims that he is entitled, as a matter of right, to withhold certain information. The rights asserted are generally the folowing:

A. *Privilege against self-incrimination*—While many witnesses before Congressional committees may lose their right not to incriminate themselves by failing to claim it properly[13] or seasonably,[14] current practice in the Congress and in the federal courts indicates a liberal disposition to allow any witness who makes a patently *bona fide* claim of the privilege, to refuse to testify without fear of being prosecuted under the contempt statute.[15] Only where it is obvious that the claim of privilege is a device for deliberate obstruction of the committee does prosecution generally follow.[16]

Since the decision in *Counselman v. Hitchcock*[17] dissatisfaction has been expressed with the immunity statute which provides that "No testimony given by a witness.... shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony" ....[18] The *Counselman* case stated:

> .... no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States.... In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.

This sweeping dictum has been considerably limited by subsequent cases.[19] To be within the protection of the statute, the testimony must be compelled, and

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[10] *Morgan v. United States,* 304 U. S. 1 (1938).

[11] *Blau v. United States,* 340 U. S. 159 (1950).

[12] *Jurney v. McCracken,* 294 U. S. 125 (1935); *Marshall v. Gordon,* note 9 *supra; Counselman v. Hitchcock,* 142 U. S. 547 (1892).

[13] But cf. *Hoffman v. United States,* 341 U. S. 479 (1951).

[14] *Rogers v. United States,* 340 U. S. 367 (1951); *May v. United States,* 175 F. 2d 994 (1949) cert. denied 338 U. S. 830 (1949).

[15] Note 8 *supra.*

[16] Cf. *Eisler v. United States,* 170 F. 2d 273 (D. C. Cir. 1948).

[17] Note 12 *supra.*

[18] 18 U. S. Code §3486 (Supp. 1951).

[19] E.g., *United States v. Bryan,* 339 U. S. 323 (1950), interpreted the statute to allow such testimony to be used to establish a default under provision of 2 U. S. Code §192 (1946), note 8 *supra.* This same principle undoubtedly applies to using testimony to prove refusal to answer questions under the same statute.

not voluntarily given without claim of privilege.[20] It also appears that the immunity required under the holding of the *Counselman* case is only such immunity as the sovereign is capable of giving. In spite of repeated attempt by members of Congress to have general immunity legislation enacted, the Congress seems reluctant to authorize such broad immunity for witnesses before Congressional Committees, apparently being satisfied to obtain less information rather than provide machinery which lends itself to abuse in providing immunity for criminals.

B. *Right of privacy*—this is a fundamental human right; a part of "life" and "liberty" as set forth in the Fifth Amendment to the Constitution and the Declaration of Independence. It has been recognized in authoritative English legal writings from the time of Blackstone.[21] It has been labelled with many names such as the "right to personal security", the "right to be left alone", and the "right not to be unduly harrassed". Difficult as it is of exact definition, and as unaware as most persons are when others are being denied it, most of us are quick to recognize it as our "birthright", "God-given right", or "natural right" when we ourselves are deprived of it. It is necessary to distinguish the tort "right of privacy", which, although it springs out of the same source, has developed into a distinct concept circumscribed by rules, decisions, and statutes. The basic human right of privacy with which we are concerned is a much broader and more inclusive concept. It operates as a general limitation on government rather than as a norm for personal interrelationships (the tort concept). Since it is a fundamental right, legislators, administrators, and courts are powerless to legally qualify it; its denial is a violation of the rights guaranteed by the Constitution. Like "freedom of speech", its exercise can be limited only when there is an overriding public interest to be served,[22] and then only to that extent which is absolutely necessary to serve that purpose and no more.

C. *Property right in reputation*—The tort law of libel and slander is founded on this right.[23] However, the person defamed during the course of a Congressional investigation has no remedy, because legislative immunity[24] operates as an absolute protection from civil suit for the legislator, no matter how irresponsible or scurrilious his remarks.[25] Defamation during the course of a Congressional investigation lends itself to many novel forms. Among the more vicious devices available to the examiner is character assassination by association. Most commonly this takes the form of linking a person to an unsavory cause or occurrence by showing that his friends or associates were connected or reputed to have been connected with it. Another, more subtle approach, might be to sandwich a witness in with a group of

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[20] *May v. United States,* note 14 *supra.*

[21] COMMENTARIES, Book I, Chapter 1.

[22] See *Schenck v. United States,* 249 U. S. 47 (1919), wherein the principle of "clear and present danger" as a restriction on the right to exercise free speech originated.

[23] Throckmorton's Cooley on Torts (1930), p. 316.

[24] U. S. CONST., Article I, Section 6.

[25] *Cochrane v. Couzens,* 42 F. 2d 783 (D. C. Cir. 1930). But cf. *Tenney v. Brandhove,* 341 U. S. 367 (1951), this case should serve to put legislators on notice that there may come a case where the abuse of the privilege is so flagrant and the motivation of the legislator so base, that his actions, even though ostensibly for a legislative purpose, will be regarded by the courts as without the legislative process. Under such a holding the legislator woud be liable civilly for an unprincipled attack on the reputation of another.

other witnesses of notorious reputation (e.g., known criminals, gangsters, or communists) to make it appear that he is one of the same class of persons. The fact that these hearings are governed by no established rules of evidence, also makes it possible for the examiner to phrase questions in such a manner that they are in effect accusations of malfeasance. The ordinary witness cannot satisfactorily answer most of these questions in a manner calculated to clear him of the implied innuendoes and resulting stigma of guilt. Since he is denied the right to call witnesses in his own behalf, or even the right to be cross-examined by his own attorney, the witness must do the best he can to reduce the damage to his reputation by "self-serving" statements to the committee or the press, neither of which are likely to be very effective in the eyes of the committee or the public *vis-a-vis* the accusations.

Another hazard to the witness' reputation in these hearings is Title 2, U. S. Code §193 (1946) which provides;

> No witness is privileged to refuse to testify to any fact, or to produce any paper.... upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

Does this mean that, where pertinent to the subject matter being investigated, even the most sordid events in the witness' personal history must be revealed to the *world at large,* or can the information properly be restricted to those who need to know—the legislators? May a witness who desires to give his information, *but exclusively to the legislators,* require that they respect his confidence where disclosure would serve no public purpose?

This leads to the inquiry as to what are the legitimate functions of the Congressional investigating committee. The federal courts have recognized only one function of a House or Senate investigation as being within the Constitutional delegation of powers—to gather information for the purpose of legislating.[26] "[N]either of these bodies possesses the general power of making inquiry into the private affairs of the citizen."[27] The requirement that the citizen divulge his private affairs to the Congress is qualified by two prerequisites, (1) the questions asked of him must be pertinent to the subject matter of the inquiry,[28] and (2) the subject matter of the inquiry must be confined in scope to a field within which the Congress is competent to legislate.[29] As thus set forth the limitations seem clear and easily applicable to restrain Congress within a proper sphere. However, two recent developments in Constitutional Law operate to confuse the picture. Most important is the gradual extension of the sovereignty of the federal government through the enlargement of its commerce power, war power, and taxing power. The federal "limited" sovereignty has for all practical purposes swallowed up the "residual" sovereignty of the states.[30] It is not surprising that the courts find great difficulty in detecting areas of legislation which are now outside the competence of

[26] *McGrain v. Daugherty,* 173 U. S. 135 (1927).
[27] *Kilbourne v. Thompson,* 103 U. S. 168, 190 (1880).
[28] *Sinclair v. United States,* 279 U. S. 263 (1929).
[29] *McGrain v. Daugherty,* note 26 *supra,* at 176.
[30] Even the last vestiges of state sovereignty, the police power in the fields of public health, safety and morals, are not immune to the "grants in aid program".

Congress. In addition, the courts have evolved the concept of "presumption of regularity"[31] or "proper purpose"[32] in questions asked by Congressional investigators to limit the traditional standard which is still applied to administrative agency investigations:

> An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. The citizen when interrogated about his private affairs, has a right before answering, to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer.[33]

No witness under the new standard need ever be apprised in what regard the demanded information is deemed pertinent by the investigators. The witness refuses to answer at his peril, even though he sincerely believes that his answer could not possibly be relevant to the inquiry. Add to this the broad field of inquiry set forth in some recent Congressional resolutions empowering investigations[34] and it becomes clear that virtually no question or line of questioning is denied to the committee.

While no court has as yet decided that one of the legitimate purposes for which a Congressional investigation might be held is to inform the public, a few eminent legal scholars have suggested that this is an important purpose and within the Constitutional grant of power to the Congress.[35] Undoubtedly, a democracy thrives best where the public is well informed; but informing the public and entertaining the public are two different things. In every case where it appears that extraordinary publication of the proceedings would serve to convey some valuable information to the public, the public interest must be balanced against the witness' individual rights. Except in rare instances, it is doubtful that extraordinary publication (e.g., television and radio broadcasting) of committee proceedings involving the exposure of private affairs accomplishes any valuable informative function, although, in the light of public reaction to the Kefauver Committee telecasts, its entertainment value cannot be doubted. Ordinarily the informative function can best be served by publication of the findings of the committee at the conclusion of its hearings.

It is an unfortunate truism that the public at large is always anxious to see a good show even at the expense of the individual liberty of the person providing the show. The public is notoriously insensitive to the rights of others in such circumstances. The circulation of even "high-class" publications bears a surprising correlation to the amount of sensational, sordid and lewd material which appears.

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[31] *Sinclair v. United States,* note 28 *supra,* at 296.

[32] *Eisler v. United States,* note 16 *supra; Morford v. United States,* 176 F. 2d 241, 258 (D. C. Cir. 1949), cert. denied 339 U. S. 258 (1950); *Barsky v. United States,* note 5 *supra;* cf. *Tenney v. Brandhove,* note 25 *supra.*

[33] *Jones v. Securities and Exchange Commission,* 298 U. S. 1, 25 (1935).

[34] E.g., the resolution setting up the Dies Committee gave it power to investigate "(1) the extent, character and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) *all other questions in relation thereto that would aid Congress in any necessary remedial legislation.*" House Res. 282, 75th Cong., 3rd sess., (1938). (Italics supplied).

[35] E.g., see Woodrow Wilson, CONGRESSIONAL GOVERNMENT (15th Ed., 1900), p. 303.

Uncolored facts have little commercial value. It would be indeed unfortunate for individual rights if the Congressional power of inquisition should ever be measured by standards of popular appeal or "newsworthiness".

Only in exceptional cases should the Congressional committee be allowed to expose private affairs to unlimited publicity, for, although a public show might incidentally perform the legitimate functions of obtaining information for legislation and informing the public, the danger exists that the primary purpose of such investigations will degenerate, in the absence of external limitations, into one of the following:

1. Obtaining free publicity for the committee members.[36]

2. A political weapon for the character assassination of adversaries.

3. A means of punishing the reluctant or contumacious witness.

4. An extra-judicial form of punishment for criminals who are immune from criminal prosecution.[37]

5. To disclose weaknesses in *local* laws or law enforcement.

6. To obtain information for criminal prosecution of the witness or others.[38]

7. To indoctrinate or propagandize the voter as to the desirability of a proposed cause of action.

The possibility that excessive publicity will foster these abuses at the expense of individual rights, and without any compensating profit to the Congress or the public, indicates that ordinarily such committees should be required to conform to the traditional procedure and decorum of the parent body.[39]

> And whether these forms be in all cases the most rational or not is really not of so great importance. It is much more material that there should be a rule to go by than what that rule is; that there may be a uniformity of proceeding in business not subject to the caprice of the Speaker or captiousness of the members. It is very material that order decency and regularity be preserved in a dignified public body.[40]

Exceptions should be clearly defined and their status as *exceptions* to the normal manner of proceeding in Congressional investigations definitely established. Two tests suggest themselves for defining these exceptions: (1) the activities or persons exposed must be of such a nature that their existence threatens the survival of the nation or its institutions, and (2) the danger must be substantial and reasonably imminent. Application of these tests would permit unlimited publicity for investigations into subversive activities and possibly, large scale organized

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[36] It has been suggested that the chairmanship of a sensational inquiry is a political plum waiting to be plucked by the astute politician, or available to be offered to the party wheelhorse who needs a boost in prestige to insure his reelection.

[37] This raises the interesting question whether a resolution empowering a committee to sit for such a purpose is not in effect a Bill of Attainder.

[38] Such a purpose usurps the grand-jury function.

[39] "The rules of the House are here by made the rules of its standing committee so far as applicable, except that a motion to recess from day to day is hereby made a motion of high privilege in said committees." Rule XII (f), Rules of the House of Representatives.

[40] Jefferson's Manual, Section 1.

crime, but would insure that where there is no overwhelming public interest to be served, the rights of the individual would be protected.

There are certain other limitations which may properly be applied to Congressional committee activities by the courts. These are in the nature of requirements imposed by the Fifth Amendment to the Constitution upon the exercise of governmental functions by the Federal Government. A perfunctory appraisal of recent decisions in the federal courts might incline one to the view that the only tangible right which a witness possesses at these hearings is his privilege against self-incrimination. This is an obvious oversimplification.[41] No one would seriously contend that the powers of the committee are plenary in all other regards. As an extreme example, the courts would no more condone the use of "third-degree" methods by a committee to obtain information for legislation than by the police for criminal prosecution.[42]

The executive branch of the government is required to accord procedural due process to witnesses when it exercises quasi-judicial functions.[43] The reasons for requiring the same standard to be followed by Congressional committees are equally strong and compelling. Conforming to due process merely requires that the treatment of witnesses should be fair and just; it does not hinder the committee in obtaining the information which it is entitled to have. However, "fair play" and justice are not ephemeral illusions to be defined according to the standard of each committeeman who may have an axe to grind, or even from the relatively detached viewpoint of the committee-as-a-whole seeking to effectuate the purposes of the empowering resolution. On the contrary, the courts, impartially balancing the rights and duties of the individual against the public interest, are the logical agency to set the standards of due process to be accorded to witnesses. This can best be accomplished by the courts refusing to convict a witness under the contempt statute[44] where his contumacy consists of refusal to be a part of committee proceedings obviously motivated by the primary purpose of doing violence to his character.

The courts have stated categorically that no witness has the right to dictate the conditions under which he will testify before a Congressional committee.[45] Unfortunately, this dictum has developed out of cases where the objections of the witness were patently a subterfuge for not testifying at all, or otherwise obviously *mala fide*. Of course, no witness has a right to impose conditions of absolute secrecy (unless national security demands it), or anonymity, or to demand protection from every conceivable hazard to his reputation, liberty, life, or property. But, every witness has a right to insist that the treatment accorded him be reasonably fair and directed toward a proper end.

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[41] See Landis, *Constitutional Limitations on the Congressional Power Investigation,* 40 Harv. L. Rev. 153 (1926); and see 47 Col. L. Rev. 416 (1947).

[42] *Ashcroft v. Tennessee,* 322 U. S. 143 (1944).

[43] *Morgan v. United States,* note 10 *supra,* at 22.

[44] Note 8 *supra.*

[45] *Eisler v. United States,* note 16 *supra.*

Where the only legitimate function of an inquiry is to obtain information for legislating (as opposed to informing the public), the standard of the *Eisler* case[46] seems too extreme. If the witness is willing to give the information desired, but objects to the setting of the hearing (e.g., the presence of television, radio, press, or a large audience) because it disturbs him, confuses his thoughts, or restrains him from testifying with ordinary candor, his reasonable requests should be respected by the committee. By forcing him to testify in an objectionable atmosphere, the committee defeats the very purpose of the investigation, and gives the witness reason to complain that he is being denied due process of law.

The business of Congressional committees has been conducted in one of two forms, the executive (or closed) session, and the public (or open) session. The public and press are excluded from the executive session, and only so much of the proceedings reported for public dissemination as the committee or the empowering House of Congress deems appropriate. Although the initial justification for the executive session was to preserve the secrecy of matters affecting national security, more and more executive sessions are being utilized for the preliminary examination of witnesses. Apparently the purpose here is to give the cooperative witness a chance to aid the inquiry without being exposed to unwarranted publicity about his private affairs. Also, it undoubtedly gives the committee more leeway in conducting the inquiry without paralyzing formality necessary to properly impress the public and press representatives. Much of the gathering of factual information is done here.

On the other hand, there appears to be a growing tendency to use the public session, especially where sordid matters and notorious persons are involved, as a public show where the contumacious witness or the errant public official may be exposed and harrassed by the committee. A recent innovation in committee proceedings is the introduction of television and radio broadcasting. The constitutionality of the introduction of these media into the proceedings has been presumed by most authorities on the ground that it represents a mere extension of the walls of the hearing room, or an expansion of press facilities already properly present. From the standpoint of the right of Congress to prescribe the manner of its proceedings[47] this view is undoubtedly correct. No restraint can be imposed on the Congress in this regard. The right of a committee to require, in every circumstance, that every witness submit to having his testimony taken in the presence of these media is not so clear.

It is submitted that in every case the test must be balancing the public interest against individual rights. Unless a demonstrable need for informing the public in this manner can be shown, the witness should, at his option, be allowed to choose whether he will testify at executive or public session, as long as he is willing to give that information which the committee has a right to demand.

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[46] *Ibid.*
[47] Note 4 *supra.*