

## CONGRESSIONAL POWER OF INVESTIGATION

A STUDY PREPARED AT THE REQUEST OF  
SENATOR WILLIAM LANGER, CHAIRMAN OF  
THE COMMITTEE ON THE JUDICIARY

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RELATIVE TO

CONGRESSIONAL POWER OF INVESTIGATION

PRESENTED BY MR. LANGER

FEBRUARY 9 (legislative day, FEBRUARY 8), 1954.—Ordered to be printed

UNITED STATES  
GOVERNMENT PRINTING OFFICE  
WASHINGTON : 1954

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## PREFACE

Congressional Power of Investigation is a revision of a study prepared at the direction of Senator Wiley in the 80th Congress by the Legislative Reference Service for the use of the Committee on the Judiciary. The earlier study, published as a committee print, was entitled "Proceedings Involving Contempt of Congress and Its Committees." The copies of this print were soon exhausted because of current public interest. Numerous requests that the study be revised and republished by the Service thereafter were received. However, the requested work could not be done because of limitations placed on appropriations with respect to publishing Service studies.

Following the adjournment of the 1st session of the 83d Congress, I requested that the subject be reexamined and the study revised for publication as a Senate document. Thereafter similar requests were received from Senators Hendrickson, Ferguson, Wiley, and Jenner.

The revision, as completed, contains the original preface of Senator Wiley.

WILLIAM LANGER,  
*Chairman, Committee on the Judiciary, United States Senate.*

FEBRUARY 9, 1954.



## **ORIGINAL PREFACE BY SENATOR WILEY**

Whenever men have banded together for mutual protection, assistance, and survival, they have been confronted with a problem whose complexities are legion—the problem of regulating their relationships one with the other. It involves compromise, respect, understanding, protection of individual rights, and the rights of minorities and the underprivileged while safeguarding the rights and the well-being of an all-encompassing group. The machinery for regulating man's relationship with man we call government. Our Government evolved in part from our common heritage with Anglo-Saxon history.

From the time of the Magna Carta there was a constant widening of the schism between the Sovereign and his direct control of the people. As the concerns of the nation became more complex, as the barons and their successors became more resistant, the need for the monarch to consult the nation became more imperative and imposed vague restraints upon the Crown.

The nature and procedure of this consultation was uncertain, but the passing years built up many precedents. Obviously, the Sovereign could not consult each person, or for that matter each spokesman of the people; the only medium he had was the Parliament, and it was destined that this body of humble origin should become the prototype of the most important instruments for governing yet devised by mankind:

The origin of the English Parliament seems traceable to the witenagemot of the Saxon Kings which apparently began as the King's Council of wise men to perform various legislative-judicial functions for the Sovereign. After the Norman conquest it took on the name of curia regis and ultimately became known as the Parliament. The powers of the Parliament grew through the generations. The powers of the King correspondingly diminished. This struggle took centuries with an autonomous Parliament finally emerging as the legislative branch of the English nation.

In the early colonial days of our own country the various Colonies needed a legislative branch of their own. Although, they were under English domination, many autonomous acts were permitted them, and they set up their own assemblies patterned after the Parliament of their home country.

It has been said that the one fundamental dogma of English constitutional law is absolute sovereignty of the Parliament. The Colonies inherited this concept. When the Founding Fathers met to establish a government of their own, their compelling considerations were the rights of the 13 member Colonies, the establishment of a system patterned on their English heritage, and the drawing of a Constitution which would protect them from the abuses of the old system.

The Constitution set up as we all know so well the tripartite system with checks and balances. To the legislative branch, which received

the most consideration, went the law-making power (among others) held by the duly constituted and elected members.

History has shown us that the best law is the one which is based upon the most widespread human knowledge and proper ascertainment of the facts. A rule made by one man is not nearly so good as the one a man would make after consultation with those who are intimately acquainted with the situation the rule is designed to cover.

However, large bodies of men experience difficulty in taking direct action or agreeing to take action, and a corollary of this is that large bodies of men would waste time considering in toto each item. Congress, of course, reconciles the need for consultation with the time limitation by following the committee system.

The power of Congress to investigate facts is well settled by our history and precedents. The Constitution makes the legislative grant to Congress and implied in the grant is the power to do those things necessary to bring the grant into being. One means which Congress has taken to carry out the power is the committee process.

The general lack of understanding of the status, duties, and powers of the congressional committees is a matter for concern in an age when the efficient functioning of legislative bodies is the principal bulwark of free men against totalitarian ideologies. As chairman of the Senate Committee on the Judiciary I felt it was desirable to make a study of proceedings involving contempt of Congress and its committees. The committee accordingly has authorized the publication of this study.

It was my thought that a work such as this would serve as a source of information on the investigative function of Congress. The emphasis naturally is upon the substantive part of the study for it is essentially a memorandum involving the rights of individuals when called upon to serve the public by testifying to facts peculiar to their knowledge. An attempt has been made to clarify the procedural aspects of committee proceedings.

The aspect of committee proceedings which is most widely discussed is the typical case where the witness desires to refrain from giving answers which would tend to render him infamous and abhorrent in the eyes of his fellow men. It is the clashing of two public policies: (1) the protection of the dignity of the individual; and (2) the public policy of protecting the right of the whole people to have the legislative information which the one possesses though the disclosure may unfortunately be defamatory to the witness.

I believe this situation will be understood better after studying the text. It is an earnest hope that this memorandum will be of some service to committee members and to the public.

ALEXANDER WILEY,

*Chairman, United States Senate Committee on the Judiciary.*

JANUARY 6, 1948.

## CONGRESSIONAL POWER OF INVESTIGATION

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This is a revision of a study prepared in the 80th Congress by the Legislative Reference Service, at the direction of Senator Wiley, for the use of the Committee on the Judiciary. The earlier study, published as a committee print, was entitled "Proceedings Involving Contempt of Congress and Its Committees." Like the earlier work, this revision examines and discusses the investigatory powers of the Congress giving particular attention to the problems faced by the legislative branch. To other persons are left the expositions of the subject as viewed by the executive and judicial branches, except insofar as reference to such views will serve as a guide to Congress.

In referring to certain instances, and in selecting certain illustrations there has been no intention to criticize or reflect discredit on actions or individuals. The instances and materials have been selected because they may serve as guides or suggest variations in methods of handling problems. In some cases they are used merely to indicate possible attitudes on the part of the judiciary.

This revision follows the earlier outline except that the sections dealing with punishment at the bar of the Senate or the House are placed at the end. Proceedings at the bar have not been used in recent years although they remain a potent weapon to use in obtaining definitive adjudications if the need arises and either House wills the test. There has been no enlargement of these sections.

Much of the newer material incorporated has been taken from memoranda prepared by this Service. Many problems selected for presentation or examination were suggested by questions raised earlier by Members of Congress or members of the professional staffs. It is hoped that this selected material will be useful to the Members and to committees confronted in the future with situations which may be new to them.

The power of Congress and its committees to obtain information deemed necessary to the legislative process and the assertion and exercise of this power has been of extreme interest throughout the history of the national lawmaking body. That Congress considered this power to be implied in the general grant of legislative power is shown by the act of May 3, 1798 (1 Stat. 554, Chap. XXXVI), which reads:

*SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the Senate, the Speaker of the House of Representatives, a chairman of a committee of the whole, or a chairman of a select committee of either house, shall be empowered to administer oaths or affirmations to witnesses, in any case under their examination.*

*SECTION 2. And be it further enacted, That if any person shall wilfully, absolutely and falsely swear or affirm, touching any matter or thing material to the point in question, whereto he or she shall be thus examined, every person so offending, and being thereof duly convicted, shall be subjected, to the pains, penalties and disabilities, which by law are prescribed for the punishment of the crime of wilful and corrupt perjury.*

Since that date there has evolved a considerable body of law and precedent which serves as a guide to the Congress and its committees in requiring the production of information and the attendance of witnesses and in dealing with recusancy and contumacy. In recent years the practice has been to leave the punishment of recalcitrant witnesses up to the courts under Revised Statutes 102.

### I. CONGRESSIONAL POWER OF INVESTIGATION GENERALLY

At the outset it is deemed advisable to list the following 20 guiding principles. Only basic authorities are cited. Particular attention is invited to Revised Statutes 102 (U. S. C. 2:192, *infra*), which applies to "every person" who fails to appear as a witness or produce the papers requested.

#### *1. The Constitution grants the legislative authority to Congress*

Any authority of a congressional committee essential to the legislative process must be found in the powers granted to Congress in article I, section 1, and in section 5, clause 2, of the Constitution.

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

SECTION 5. \* \* \* Each House may determine the Rules of its Proceedings, punish its members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

#### *2. The constitutional grants do not spell out express powers of Congress to compel disclosures by means of contempt proceedings*

It is certainly true that there is no power given by the constitution to either house, to punish for contempts except when committed by their own members. Nor does the judicial or criminal power given to the United States, in any part, expressly extend to the infliction of punishment for contempt of either house, or any one coordinate branch of the government. Shall we, therefore, decide that no such power exists?

It is true that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted that the effort would have been made by the framers of the constitution. But what is the fact? There is not in the whole of that admirable instrument a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate \* \* \* (*Anderson v. Dunn* (1821) 6 Wheat. 204, 224).

\* \* \* Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits. Experience admonishes us to tread warily in this domain. The loose language of *Kilbourn v. Thompson*, 103 U. S. 168, the weighty criticism to which it has been subjected, see e. g., Fairman, Mr. Justice Miller and the Supreme Court, 332-334; Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, the inroads that have been made upon that case by later cases, *McGrain v. Daugherty*, 273 U. S. 135, 170-171, and *Sinclair v. United States*, 279 U. S. 263, strongly counsel abstention from adjudication unless no choice is left (U. S. v. *Rumely* (1953) 345 U. S. 41, 46).

#### *3. Power to compel pertinent disclosures is implied in the grant of all legislative power to Congress*

\* \* \* there is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively. So the question arises whether this power is so far incidental to the legislative function as to be implied.

In actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so

regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures (*McGrain v. Daugherty* (1927) 273 U. S. 135, 161).

#### 4. A legislative purpose will be presumed in authorizing a congressional investigation

We cannot assume on this record that the action of the Senate was without a legitimate object, and so encroach upon the province of that body. Indeed, we think it affirmatively appears that the Senate was acting within its right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded (*In re Chapman* (1897) 166 U. S. 661, 670).

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject matter was not indispensable \* \* \* (*McGrain v. Daugherty* (1927) 273 U. S. 135, 178).

\* \* \* "We are bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed, and we have no right to assume that the contrary was intended." (Quoting *People v. Keeler*, 99 N. Y. 473.)

Accordingly, the courts will not attempt to determine in advance whether invalid or unconstitutional legislation may emanate from the investigation (*U. S. v. Dennis* (1947) 72 F. Supp. 417, *Barsky v. U. S.* (1948) 167 F. 2d 241).

#### 5. A congressional inquiry may be as broad as the legislative purpose requires

A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress \* \* \*. A judicial inquiry relates to a *case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates *all possible cases* which may arise thereunder, and the evidence admissible must be responsive to the scope of the inquiry, which generally is very broad. Many a witness in a judicial inquiry has, no doubt, been embarrassed and irritated by questions which to him seemed incompetent, irrelevant, immaterial, and impertinent. But that is not a matter for a witness finally to decide. Because a witness could not understand the purpose of cross-examination, he would not be justified in leaving a courtroom. The orderly processes of judicial determination do not permit the exercise of such discretion by a witness. The orderly processes of legislative inquiry require that the committee shall determine such questions for itself. Within the realm of legislative discretion, the exercise of good taste and good judgment in the examination of witnesses must be entrusted to those who have been vested with authority to conduct such investigations. \* \* \* (*Townsend v. U. S.* (1938) 95 F. 2d 352, 361. See also *Marshall v. U. S.* (1949) 176 F. 2d 473, 474, cert. den. 339 U. S. 933).

#### 6. Appeals by persons investigated to courts for aid should be timely and necessary

Once information is in the possession of a committee, courts are reluctant to interfere with its use.

And so we think the law is settled that if appellant were before the Senate Committee as a witness and were questioned as to matters unrelated to the legislative business in hand, as his bill alleges is true of the messages in question, he would be entitled to refuse to answer; and if, for his supposed contumacy, he were imprisoned, he could secure his release on habeas corpus. And so, also, if a Senate Committee were to attempt to force a telegraph company to produce telegrams not pertinent to the matters the committee was created to investigate, the company could be restrained at the instance of the sender of the telegrams, for as the Supreme Court said in *McGrain v. Daugherty* \* \* \* the decisions in *Kilburn v. Thompson* \* \* \* and *Marshall v. Gordon* \* \* \*, point, in such circumstances, to admissible measures of relief. We are, therefore, of opinion that the court below was right in assuming jurisdiction as to the commission, and

if the bill had been filed while the trespass was in process it would have been the duty of the lower court by order on the commission or the telegraph companies or the agents of the committee to enjoin the acts complained of. But the main question we have to decide is in a different aspect. Here, as appears both from the bill and by admission of parties, the committee has obtained copies of the telegrams and they are now physically in its possession; and this means neither more nor less than that they are in the hands of the Senate, for the committee is a part of the Senate \* \* \* created, as we have seen, by the Senate for the purpose of investigating the subject of lobbying, in aid of proposed legislation. The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of appellant's legal rights, we should say to the committee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference (*Hearst v. Black* (1936) 87 F. 2d 68, 71).

#### 7. Congress should enforce its own process

\* \* \* It has been customary for the Senate—and the House as well—to rely on its own power to compel attendance of witnesses and production of evidence in investigations made by it or through its committees. By means of its own process or that of its committee, the Senate is empowered to obtain evidence relating to the matters committed to it by the Constitution. *McGrain v. Daugherty* \* \* \*. And Congress has passed laws calculated to facilitate such investigations. (*Reed v. County Commissioners* (1928) 277 U. S. 376, 388. See also the statement of Mr. McCormack, Cong. Rec. 94:5710.)

Congress has the power to prescribe the duties of the citizens of the United States, including the duty to return from abroad to give testimony (*Blackmer v. U. S.* (1932) 284 U. S. 421).

#### 8. Pertinency of the evidence is not determined by its probative value

Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation \* \* \*

The question of pertinency under sec. 102 [U. S. C. 2: 192] was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary, it is uniformly held that relevancy is a question of law. (*Sinclair v. U. S.* (1929) 279 U. S. 263, 296–297, 298.) [See also *Morford v. U. S.* (1949) 176 F. 2d 54.]

#### 9. The "Do-you-know-a-certain-person" question, without more, is of doubtful pertinency

\* \* \* Committees may and do obtain vague information and receive hearsay evidence from which they form well-grounded suspicions that evils exist at which legislation should be aimed. That is to say, committee's conclusions that corrective legislation should be enacted need not be reached on the basis of relevant and pertinent evidence only. The precision of court procedure is not required. It may often be proper, justifiable, and ultimately helpful in the accomplishment of its investigative purposes for a Congressional committee to address to witnesses questions which it cannot demonstrate to be pertinent. But in branding a refusal to answer as a misdemeanor, Congress was careful to provide that the question must be "pertinent to the question under inquiry." It follows that, when a witness refuses to answer a question and the government undertakes to convict him of a criminal offense for not answering, then pertinency must be established. Presumption or possibility of pertinency will not suffice (*Bowers v. U. S.* (1953) 202 F. 2d 447, 448).

*10. Witnesses may be punished for mistakes of law in refusing to answer*

\* \* \* A witness may exercise his privilege of refusing to answer questions [before a committee] and submit to a court the correctness of his judgment in so doing, but in the event he is mistaken as to the law it is no defense, for he is bound rightly to construe the statute \* \* \* Beyond this, he must conform to the procedure of the committee and respond to its questions \* \* \*. He cannot be heard to plead justification and, hence, lack of willfulness in defiantly leaving a hearing because he does not like the questions propounded to him—remedy by objection and refusal to answer both being open to him (*Townsend v. U. S.* (1938) 95 F. 2d 352, 361).

There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer [the committee] he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and section 102 made it appellant's duty to answer. He was bound rightly to construe the statute (*Sinclair v. U. S.* (1929) 279 U. S. 263, 299).

*11. Contumacy may be punished either by Congress or as a misdemeanor under United States Code 2: 192 (Rev. Stat. 102)*

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

This statute cannot be qualified by permitting a witness to set conditions before he will testify (*Eisler v. U. S.* (1948) 170 F. 2d 273). "Wilful" does not involve, necessarily, a criminal intent (*Barsky v. U. S.* (1948) 167 F. 2d 241). It means no more than that a person charged with the duty of testifying knows what he is doing and not that he must suppose he was breaking the law (*Fields v. U. S.* (1947) 164 F. 2d 97).

The authority to punish under this section rests with Congress and its committees and not with its employees. See *Ex parte Frankfeld* (1940) 32 F. Supp. 915.

Counsel contend \* \* \* that the law delegates to the District of Columbia Criminal Court the exclusive jurisdiction and power to punish as contempt the acts denounced, and thus deprives the Houses of Congress of their constitutional functions in the particular class of cases. \* \* \*

The refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the Senate, of course, constitutes a contempt of that body, and by the statute this is also made an offence against the United States.

\* \* \* We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended; but, because Congress, by the act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved; and the statute is not open to objection on that account (*In re Chapman* (1897) 166 U. S. 661, 671, 672).

Where proceedings of the Senate require secrecy, judgment for contempt may be pronounced in secret session.

It was also contended in argument that although the Senate might hold secret sessions, they could not in secret session punish a man for a contempt. The court, however, cannot perceive any reason why the Senate should not have the same power of punishing contempts in secret as in open session \* \* \* (*Ex parte Nugent* (1848) 18 Fed. Cas. 483).

*12. Whether or not the witness has purged himself of contempt is for the House of Congress having jurisdiction to decide*

\* \* \* MacCracken contends that he is not punishable for contempt, because the obstruction, if any, which he caused to legislative processes, had been entirely removed and its evil effects undone before the contempt proceedings were instituted. He points to the allegations in the petition for habeas corpus that he had surrendered all papers in his possession; that he was ready and willing to give any additional testimony which the Committee might require; that he had secured the return of the papers taken from the files by Givven, with his permission, and that he was in no way responsible for the removal and destruction of the papers by Brittin. This contention goes to the question of guilt, not to that of the jurisdiction of the Senate. The contempt with which MacCracken is charged is "the destruction and removal of certain papers." Whether he is guilty, and whether he has so far purged himself of contempt that he does not now deserve punishment, are the questions which the Senate proposes to try. The respondent to the petition did not, by demurring, transfer to the court the decision of those questions. The sole function of the writ of habeas corpus is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes. (Compare *Barry v. U. S. ex rel. Cunningham* (1929) 279 U. S. 597; *Henry v. Henkel* (1914) 235 U. S. 219; *Matter of Gregory* (1911) 219 U. S. 210 (*Jurney v. MacCracken* (1935) 294 U. S. 125, 152).)

*13. Members of a committee may plead immunity to prosecution for false arrest of a witness*

The House of Representatives is not an ordinary tribunal. The defendants set up the protection of the Constitution, under which they do business as part of the Congress of the United States. That Constitution declares that the senators and representatives "shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place" (*Kilbourn v. Thompson* (1881) 103 U. S. 168, 201).

\* \* \* the plea set up by those of the defendants who were members of the House is a good defence, and the judgment of the court overruling the demurser to it and giving judgment for those defendants will be affirmed. As to Thompson [the sergeant at arms], the judgment will be reversed and the case remanded for further proceedings (*Ibid.*, p. 168).

*14. The plea of privilege may be denied to witnesses*

No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or by any committee of either House, 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 (R. S. 103, U. S. C. 2:193).

We think the resolution and proceedings give no warrant for thinking the Senate was attempting or intending to try the Attorney General at its bar or before its committee for any crime or wrongdoing. Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on his part (*McGrain v. Daugherty* (1927) 273 U. S. 135, 179-180). [See sec. III of this memorandum.]

*15. Forcing officers of the executive department to divulge information may be a question of expediency rather than one of authority*

A certain amount of discretion in making disclosures will ordinarily be exercised by an executive officer [Hinds' Precedents of the House of Representatives \* \* \* 1907, vol. III, sec. 1738]. "The mischief of the House calling for documents might easily be a very great one \* \* \*" (sec. 1700).

Congress has gone far at times in asserting its authority to investigate activities in the executive department; for examples, the resolution to investigate, in 1792, the failure of the expedition under Major General St. Clair (Hinds', sec. 1725) and the creation of a joint committee on the conduct of the war in 1861 (Hinds', sec. 1728).

On the other hand, President Jackson resisted with vigor an attempt of a committee of the House to secure his assistance in an investigation of his administration. (Hinds', sec. 1737. See generally Hinds', vol. 6, secs. 404-437.) President Truman probably resisted even more vigorously though he had extensive legislative experience in conducting investigations.

*16. The authority of the President to pardon persons punished by either House for contempt has not been determined*

This is an interesting question for which there is no settled law. Certainly the right of Congress to obtain information for a legislative purpose should not be permitted to be defeated by the Presidential pardoning power. The pardoning power is limited to relief from undue harshness or evident mistake. Many people have urged that criminal contempts should not be held within the pardoning power because it would tend to destroy the independence of the judiciary. Undoubtedly the courts would differentiate between the pardoning of the contempt of a committee when prosecuted under the statutes and the pardoning of a contempt when prosecuted before the bar of the House or Senate as an enforcement in their own right. An example of a pardon of the statutory offense was that granted to Mr. Townsend by the President following the affirmation of his conviction. (See *Townsend v. U. S.*, supra.) However, to be considered is the exercise by the President of his power to pardon a criminal contempt of court. On this point it has been said by the Supreme Court:

\* \* \* [C]riminal contempts of a federal court have been pardoned for eighty-five years. In that time the power has been exercised twenty-seven times. In 1830, Attorney General Berrien, in an opinion on a state of fact which did not involve the pardon of a contempt, expressed merely in passing the view that the pardoning power did not include impeachments or *contempts*, using Rawle's general words from his work on the Constitution. Examination shows that the author's exception of contempts had reference only to contempts of a House of Congress. In 1841, Attorney General Gilpin approved the pardon of a contempt on the ground that the principles of the common law embraced such a case and this Court had held that we should follow them as to pardons (3 Op. A. G. 622). Attorney General Nelson in 1844 (4 Op. A. G. 317), Attorney General Mason in 1845 (4 Op. A. G. 458), and Attorney General Miller in 1890 (19 Op. A. G. 476) rendered similar opinions. Similar views were expressed, though the opinions were not reported, by Attorney General Knox in 1901 and by Attorney General Daugherty in 1923. Such long practice under the pardoning power and acquiescence in it strongly sustains the construction it is based on (p. 118).

\* \* \* it is urged that criminal contempts should not be held within the pardoning power because it will tend to destroy the independence of the judiciary. \* \* \* (p. 119).

\* \* \* Complete independence and separation between the three branches, however, are not attained, or intended \* \* \* (p. 119).

Executive clemency exists to afford relief from undue harshness or evident mistake \* \* \* (p. 120).

(*Ex parte Grossman* (1925) 267 U. S. 87, 118, 119, 120).

*17. The life of a House committee expires with a Congress, but that of a Senate committee depends upon its authorization*

\* \* \* It is said in Jefferson's Manual: "Neither House can continue any portion of itself in any parliamentary function beyond the end of the session without the consent of the other two branches. When done, it is by a bill constituting them commissioners for the particular purpose." But the context shows that, the reference is to the two houses of Parliament when adjourned by prorogation or dissolution by the King. The rule may be the same with the House of Representatives whose members are all elected for the period of a single Congress; but it cannot well be the same with the Senate, which is a continuing body whose

members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress, save as vacancies may occur through death or resignation.

Mr. Hinds in his collection of precedents says: "The Senate, as a continuing body, may continue its committees through the recess following the expiration of a Congress"; and, after quoting the above statement from Jefferson's Manual, he says: "The Senate, however, being a continuing body, gives authority to its committees during the recess after the expiration of a Congress." So far as we are advised, the select committee having this investigation in charge has neither made a final report nor been discharged, nor has it been continued by an affirmative order. Apparently its activities have been suspended pending the decision of this case. But, be this as it may, it is certain that the committee may be continued or revived now by motion to that effect, and, if continued or revived, will have all its original powers \* \* \* (*McGrain v. Daugherty* (1927) 273 U. S. 135, 181).

The continuity of the Senate was questioned at the beginning of the 83d Congress. The issue was resolved in favor of the precedent. On this point see Senate Rules and the Senate as a Continuing Body (1953), S. Doc. 4, 83d Congress.

*18. Investigatory powers are granted to the standing committees of the Senate by the Legislative Reorganization Act of 1946*

SEC. 134. (a) Each standing committee of the Senate, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures (not in excess of \$10,000 for each committee during any Congress) as it deems advisable. Each such committee may make investigations into any matter within its jurisdiction, may report such hearings as may be had by it, and may employ stenographic assistance at a cost not exceeding 25 cents per hundred words. The expenses of the committee shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman.

On the House side, the Legislative Reorganization Act of 1946 (60 Stat. 812) granted general investigatory powers only to the Committee on Un-American Activities. Therefore, authority of other committees must be sought in specific resolutions passed by the House for that purpose.

*19. Perjury, under the criminal statute, can be committed only before a duly constituted committee or subcommittee*

We are measuring a conviction of a crime [of perjury] by the statute which defined it [D. C. C. 22-2501] \* \* \*. An element of the crime charged in the instant indictment is the presence of a competent tribunal. \* \* \* The House insists that to be such a tribunal a committee must consist of a quorum, and \* \* \* to convict, the jury had to be satisfied beyond a reasonable doubt that there were "actually and physically present" a majority of the committee (*Christoffel v. U. S.* (1949) 338 U. S. 84, 89).

*20. A witness is not required to enter into a guessing game*

Committees of Congress must conduct examinations in such a manner that it is clear to the witness that the committee recognizes him as being in default, and anything short of a clear-cut default on the part of the witness will not sustain a conviction for contempt of Congress. The transcript of defendant Kamp's testimony fails to disclose such a clear-cut default. The witness is not required to enter into a guessing game when called upon to appear before a committee. The burden is upon the presiding member to make clear the directions of the committee, to consider any reasonable explanations given by the witness, and then to rule on the witness' response (*U. S. v. Kamp* (1952) 102 F. Supp. 757, 759).

## II. INVESTIGATIONS INVOLVING MATTERS ALREADY BEFORE THE COURTS

Two Supreme Court cases, *Kilbourn v. Thompson* (1880) (103 U. S. 168) and *Marshall v. Gordon* (1917) (243 U. S. 521), furnish some indication of the attitude of the judicial branch where an investigation by a committee of Congress cuts across or involves matters pending before the courts. (See also *Delaney v. U. S.* (1952) 199 F. 2d 107.)

The power of congressional committees to invade the judicial field is an undecided question. The courts will not permit a committee to sit in judgment over people or issues when the identical case or controversy is pending before a court of competent jurisdiction. The rule has been laid down that the implied power of legislative assemblies to deal with contempt is the least possible power adequate to the end proposed. The courts seem disposed to apply this rule when a congressional inquiry becomes enmeshed with the judicial machinery.

The question is open as to what the congressional power is after the legal processes have been exhausted. There seems to be no reason or precedent against investigations involving matters which have been finally decided by the courts. It is the interference with the court systems while operating that is abhorrent to our theory of jurisprudence.

To be considered in addition to investigatory powers are constitutional principles and indications of the attitude of the judicial branch. Based largely on these latter considerations, the probable rules are that (1) a congressional committee cannot subpoena and thereby force a grand jury foreman to make disclosures respecting the proceedings of a grand jury, and (2) if in response to such a subpoena he does make disclosures, he could be subject to disciplinary action by the court. That does not mean that he will be disciplined.

The Constitution of the United States unavoidably deals in general language (*Martin v. Hunter* (1816) 1 Wheat. 304, 326). The fifth amendment spells out none of the details concerning the powers of a grand jury which was an established institution with established prerogatives when reference to it was first specifically incorporated in the Constitution upon the adoption of the first 10 amendments in 1791. Its origin is difficult to trace to an exact source. (See Edwards, *The grand jury \* \* \** (1906), part 1.) But, this and other historical legal institutions have assisted in preserving the spirit of personal liberty and individual right through progressive growth and wise adaptation to new circumstances. See *Hurtado v. California* (1884) (110 U. S. 516). As will be noted later, grand jury proceedings are protected by a veil of secrecy which may be lifted only in the sound discretion of the court. See *U. S. v. American Medical Ass'n et al.* (1939) (26 F. Supp. 429, 430), *Application of Texas Co.* (1939) (27 F. Supp. 847, 850-851). The secrecy of grand jury proceedings is specifically protected by rule 6 (e) of the Federal Rules of Criminal Procedure which reads:

(e) **SECRECY OF PROCEEDINGS AND DISCLOSURE.** Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by

the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

This rule has a statutory foundation. It was promulgated by the United States Supreme Court under the authority of an act of Congress (act of June 29, 1940, 54 Stat. 688). It may be said to have continued the traditional practice of secrecy on the part of members of the grand jury except when the Court permits a disclosure. See the notes to this rule, and *U. S. v. Socony-Vacuum Oil Co.* (1940) (310 U. S. 150, 233-234), *Schmidt v. U. S.* (1940) (115 F. 2d 394), and other cases. However, see also *Atwell v. U. S.* (1908) (162 F. 97).

Secrecy extends to the vote in any given case, to the evidence delivered by witnesses and to the communications of the grand jurors to each other. The disclosure of these facts, unless under the sanction of the court, would render the imprudent person making them liable to punishment. See for examples *Goodman v. U. S.* (1939) (108 F. 2d 516, 519), and *State v. Pennington* (1859) (40 Tenn. 299). As stated in *U. S. v. Alper* (1946) (156 F. 2d 222, 226):

\* \* \* Rule 6 (e) of the New Federal Rules of Criminal Procedure also recognizes, at least by implication, that the court has power "in connection with a criminal proceeding" to compel disclosure of matters occurring before the grand jury. Whether the power should be exercised lies, like other matters pertaining to the conduct of a trial, within the court's discretion. \* \* \*

See also *U. S. v. Byoir* (1945) (58 F. Supp. 273, 274-275) and *American Jurist Grand Jury* (sec. 47 et seq.).

We are unable to resolve the constitutional issue of secrecy, which is also protected by court rule based on statutory law, in favor of the power of the committee to compel disclosure by a grand jury foreman in response to a subpoena. As indicated above, the foreman should appear and then claim his privilege, but if he voluntarily makes disclosures without permission of the court he may be subject to summary action by the court in which instance Congress probably could afford no redress whatever.

Appendix 3 contains a brief digest of the issues and decisions in the two controlling Supreme Court cases of *Kilbourn v. Thompson* and *Marshall v. Gordon*.

### III. PRIVILEGE AGAINST INCRIMINATION

The fifth amendment to the Constitution states that "no witness shall be compelled in any criminal case to be a witness against himself." The Supreme Court has given this provision a broad construction holding that it is not limited to criminal prosecutions. It applies in instances where the Government of the United States is attempting to obtain incriminatory information from a witness against his will. See *Counselman v. Hitchcock* (1892) (142 U. S. 547, 562).

Note should be taken of the fact that the fifth amendment does not say that a person shall not be asked an incriminatory question. It says he shall not be compelled to answer. In fact, the privilege is personal (*Hale v. Henkel* (1906) 201 U. S. 43) and may be waived,

that is, a person may answer if he so wishes (*U. S. v. Monia* (1943) 317 U. S. 424). But, if he does not wish to answer, he must claim his constitutional right to refuse. To do so requires no technical statement on his part but merely understandable language indicating that he knows his right and wishes to claim it. However, he cannot make a partial waiver of his constitutional right. If he waives this privilege, he must make a full disclosure (*Brown v. Walker* (1896) 161 U. S. 591, 597 and *Rogers v. U. S.* (1951) 340 U. S. 367). With respect to immunity afforded by statute, *U. S. v. Monia, supra*, indicates that unless the statute requires an affirmative claim of the privilege, it automatically attaches.

The immunity statute applicable to congressional investigations is United States Code 18:3486. The infirmity of this law has been pointed out by Mr. Chief Justice Vinson in *U. S. v. Bryan* (1950) 339 U. S. 323, as follows:

Third. Respondent also contended at the trial that the court erred in permitting the Government to read to the jury the testimony she had given before the House Committee when called upon to produce the records. She relies upon R. S. § 859, now codified in § 3486 of Title 18 U. S. C., which provides that "No testimony given by a witness before \* \* \* any committee of either House, \* \* \* 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. \* \* \*" Admittedly her testimony relative to production of the books comes within the literal language of the statute; but the trial court thought that to apply the statute to respondent's testimony would subvert the congressional purpose in its passage. We agree.

We need not set out the history of the statute in detail. It should be noted, however, that its function was to provide an immunity in subsequent criminal proceedings to witnesses before congressional committees, in return for which it was thought that witnesses could be compelled to give self-incriminating testimony. That purpose was effectively nullified in 1892 by this Court's decision in *Counselman v. Hitchcock*, 142 U. S. 547, holding that R. S. § 860, a statute identical in all material respects with R. S. § 859, was not a sufficient substitute for the constitutional privilege of refusing to answer self-incriminating questions. Under that decision, a witness who is offered only the partial protection of a statute such as §§ 859 and 860—that his testimony may not be used against him in subsequent criminal proceedings—rather than complete immunity from prosecution for any act concerning which he testifies may claim his privilege and remain silent with impunity (pp. 335-336).

If the witness does rely on section 3486 and testifies, he is entitled to the limited protection it affords. (See *U. S. v. DeLorenzo* (1945) 151 F. 2d 122.) However, voluntary disclosure of a fact waives the privilege as to details (*Rogers v. U. S.* (1951) 340 U. S. 367, 373).

The immediate predecessor of section 3486 was Revised Statutes 859 which stemmed from the act of January 24, 1862 (12 Stat. 333). This latter act was preceded by the act of June 24, 1857 (11 Stat. 155), which granted immunity on such broad terms that persons who had committed grave crimes against the Government were said to have welcomed and even sought a chance to appear before an investigating committee and make general disclosures thereby immunizing themselves against criminal prosecution. See the debate on H. R. 219, 37th Congress, 2d session, *Globe* (pp. 428-431). See also the debate, 34th Congress, 3d session, *Globe* (pp. 404-405). Congress apparently intended by the act of January 24, 1862, *supra*, to foreclose this loophole and require that the witness claim his privilege. Judge Hoehling of the old Supreme Court of the District of Columbia appears to have ruled in accordance with this intent in the trials of Secretary Albert B. Fall and Mr. Edward L. Doheny for conspiracy to defraud the

Government in the leasing of the naval oil reserve at Elk Hill, Calif. The attempt of the defense, under Revised Statutes 859, to prevent the introduction of testimony given before the Senate investigating committee, was rejected on the ground that Fall and Doheny waived protection by testifying voluntarily; in other words, they had not claimed their privilege. See United States Daily for December 1, 1926 (p. 15), and December 2, 1926 (p. 7). This ruling, of course, preceded *U. S. v. Monia* (1943) (317 U. S. 424), which held that the immunity provision of the Sherman Act, which does not contain a clause requiring a witness to claim his privilege against self-incrimination, precludes subsequent prosecution of the witness whether he claimed the privilege at the time or not (p. 426). The act of June 22, 1938 (52 Stat. 943), merely inserted the reference to any joint committee established by a joint or concurrent resolution in Revised Statutes 859.

Returning to the Bryan case, *supra*, you will note that it refers to *Counselman v. Hitchcock* (1892) (142 U. S. 547). The immunity statute found in that case to be constitutionally inadequate was Revised Statutes, section 860, which read:

No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, *shall be given in evidence*, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid. [Italics supplied.]

The immunity statute in question, relating to testimony before Congress, as enacted by Public Law 772, 80th Congress, reads:

#### § 3486. TESTIMONY BEFORE CONGRESS; IMMUNITY

No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, *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. But an official paper or record produced by him is not within the said privilege. [Italics supplied.]

Note that both of these provisions merely state that the information shall not be used as evidence against the person who was compelled to make the disclosure. This does not mean that the testimony cannot be introduced to prove willful default under United States Code 2: 192 (*U. S. v. Fleischman* (1950) 339 U. S. 349, 352). See also *U. S. v. Emspak* (1951) (95 F. Supp. 1012).

The wording of the immunity statute (U. S. C. 15:32), which was found in *Heike v. U. S.* (1913) (227 U. S. 131), *U. S. v. Monia, supra*; etc., to satisfy the constitutional requirement, reads:

#### § 32. IMMUNITY OF WITNESS.

*No person shall be prosecuted* or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1-7 of this title and all Acts amendatory thereof or supplemental thereto, and sections 8-11 of this title: *Provided*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying (February 25, 1903, ch. 755, § 1, 32 Stat. 904). [Italics supplied.]

Before leaving the subject of the immunity statute, we wish to point out that a plea, that the testimony will incriminate the witness under State law, may not, necessarily, avail under the rule of *U. S. v. Murdock* (1931) (284 U. S. 141), notwithstanding the fact that

in an earlier decision (*Ballmann v. Fagin* (1906), 200 U. S. 186) a contrary view had been indicated. See also *U. S. v. Salina Bank* (1828) (1 Pet. 100, 103). Later decisions appear to have followed the Murdock decision, for example see *U. S. v. Greenberg* (1951) (20 L. W. 2197-2198). However, *U. S. v. DiCarlo* (1952) (102 F. Supp. 597, 605) has held that the Murdock rule cannot be extended to cases where, in the exercise of overlapping jurisdiction of the Federal Government, a congressional committee enters upon investigations of State crimes.

#### IV. PRIVILEGE OF AN ATTORNEY

The right of an attorney to raise personally the plea of privilege before a congressional committee is controlled largely by *Jurney v. MacCracken* (1935) (294 U. S. 125) and by Revised Statutes 102, 103, and 104 (U. S. C. 2:192, 193, and 194).

The provisions of the Revised Statutes are as follows:

##### SEC. 192. REFUSAL OF WITNESS TO TESTIFY.

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months (Revised Statutes, sec. 102; June 22, 1938, ch. 594, 52 Stat. 942).

##### SEC. 193. PRIVILEGE OF WITNESSES.

No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or by any committee of either House, 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 (Revised Statutes, sec. 103; June 22, 1938, ch. 594, 52 Stat. 942).

##### SEC. 194. WITNESSES FAILING TO TESTIFY OR PRODUCE RECORDS.

Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action (Revised Statutes, sec. 104; July 13, 1936, ch. 884, 49 Stat. 2041; June 22, 1938, ch. 594, 52 Stat. 942).

The facts of *Jurney v. MacCracken* indicate that the court will not concern itself with a plea of privilege raised during an authorized congressional investigation until that question has been decided by the House of Congress concerned. See appendix 4 for factual brief and decision.

In connection with the statutes and the case cited, consideration should be given to the following propositions:

(a) Generally speaking, an attorney at law is not allowed to divulge confidential communications, information, and secrets imparted to

him by the client or acquired during their professional relation unless he is authorized to do so by the client himself (5 Am. Jur. 286).

(b) *Arnold v. Chesebrough* (1886) 41 F. 74 infers that this is not an absolute privilege. In this case an attorney's refusal to produce evidence was upheld on the ground that there was nothing to show that it was impossible to serve the subpoena duces tecum on the person from whom the attorney received the correspondence.

(c) *U. S. v. Philadelphia and R. Ry. Co.* (1915) 225 F. 301: Records cannot be cloaked with immunity or privilege merely by depositing them in the legal department of a company. In fact, an individual is responsible for producing records, even if the office through which he acts is one of joint responsibility (*U. S. v. Fleishman* (1950), 339 U. S. 349; *U. S. v. Bryan* (1950), 339 U. S. 323).

(d) *Bowles v. Insel* (1945) 148 F. 2d 91, 93: Records required by law to be kept are not privileged. See also a discussion of this in *Wilson v. U. S.*, infra.

(e) *Wilson v. U. S.* (1911) 221 U. S. 361: A person has no privilege, constitutional or otherwise, against the compulsory production of records belonging to another. (See pp. 379-386.)

(f) *McMann v. Engel* (1936) 16 F. Supp. 446, 448: There are exceptions to the above rule where a relationship raising a privilege exists—such as attorney and client.

## V. RECENT CITATIONS

In addition to the resolutions or reports already cited in connection with prosecutions or particular problems, we invite attention to the following:

House Reports Nos. 2849, 2855, 2856, 2857, and 2858, 81st Congress, from the House Committee on Un-American Activities, citing Philip Bart, James J. Matles, Thomas J. Fitzpatrick, Thomas Quinn, and Frank Panzino, respectively.

House Report No. 1293, 82d Congress, from the House Committee on Un-American Activities, citing Sidney Buchman.

Senate Reports Nos. 30 and 88, 82d Congress, from the Senate Special Committee to Investigate Organized Crime in Interstate Commerce, citing Walter M. Pechart and David N. Kessel, respectively. In addition, the following reports from this special committee are of interest because they contain memoranda from committee counsel or associate counsel certifying that the contempts complained of were, in their opinions, punishable as a matter of law: Senate Reports Nos. 200, 201, 202, 205, 206, and 207, 82d Congress, citing Frank Erickson, Joseph Doto, alias Joe Adonis, Stanley Cohen, William G. O'Brien, Ralph J. O'Hara, and John Croft, respectively.

House Report No. 1748, 82d Congress, from the House Committee on Ways and Means, citing Henry W. Grunewald exemplifies more the difficulty a committee may experience with the counsel of a witness, than the recusancy of the witness. Judge Alexander Holtzoff of the District Court, District of Columbia, fined Grunewald \$1,000 and suspended a 90-day jail sentence which he later revoked. The Washington Star of June 4, 1953, carried the following account:

The judge cited as "mitigating circumstances" the "fantastically bad" advice given Grunewald by his former attorney, William Power Maloney of New York.

In a blistering denunciation of Mr. Maloney's tactics before the House Ways and Means Subcommittee delving into Grunewald's connection with high Internal

Revenue Bureau officials, which called Grunewald as a witness in 1951, Judge Holtzoff declared: "Were it not for the fact that it isn't customary to prosecute" defense counsel in such matters "he could have been indicted for aiding and abetting contempt."

#### NO JUSTIFICATION FOR ADVICE

The jurist was alluding to Mr. Maloney's action in repeatedly directing Grunewald not to answer questions posed by the subcommittee even to the extent of refusal to divulge his name.

"There is no doubt that this was sheer defiance of the committee," the judge stated. "On the other hand," he said, "the witness was accompanied by a supposedly competent counsel. He was confronted by a situation which placed him between Scylla and Charybdis."

The jurist continued: "He received very bad advice—so bad as to be fantastic. There was no justification to advise that he refuse to answer."

"The fact that a defendant is advised by counsel to commit a criminal act is no defense. But in determining sentence it may be mitigating. The average client feels he has a lawyer who knows what he is doing."

"The court will consider this mitigating circumstance."

A salutary result probably could have been obtained by requiring Mr. Maloney to appear before the bar of the House to answer for his actions.

## VI. RIGHTS OF A WITNESS

There are few safeguards for the protection of a witness before a congressional committee. However, the Supreme Court claims it has not hesitated to protect the rights of a private individual when it found Congress was acting outside its legislative role (*Tenney v. Brandhove* (1951), 341 U. S. 367, 377). In committee, his treatment usually depends upon the skill and attitude of the chairman and the members. Since an investigation by a committee is not a trial, the committee is under no compulsion to make the hearings public. (See Eberling, *Congressional Investigation* (1928), pp. 288, 390; 3 Hinds' *Precedents of the House of Representatives* (1907), sec. 1732; and *Ex parte Nugent* (1848) 18 Fed. Cas. 483.) For the same reason the committee is not required to make the inquiry speedy. (See Dimock, *Congressional Investigating Committees* (1929), p. 158, and the sixth amendment to the Constitution of the United States.) Self-incrimination has been treated separately in part III.

### 1. Searches and seizures

The question of unreasonable searches and seizures, with regard to a committee investigation, resolves into a determination of the committee's jurisdiction in making the investigation, and whether the required testimony and the documents of the witness are pertinent thereto. (See Dimock, op. cit. supra, p. 153.) Where the committee has jurisdiction, the congressional attitude at times in the past has been that a broad and sweeping inquiry into papers and documents could be made without specificity and that this would not be hindered or prevented by the fourth amendment. (See Eberling, op. cit. supra, pp. 226, 232-241, 245, and 285; Dimock, op. cit. supra, pp. 153-154, and 155-156.) There has been a later tendency, however, toward definiteness or careful designation in subpenaing the papers and records desired (Dimock, op. cit. supra, p. 155). A more recent writer states that the fourth amendment serves as "a definite check on the methods which the committees may employ" and that "neither House of Congress has any 'general power' to search into, or compel disclosures concerning private affairs." (See McGeary, *The Develop-*

ment of Congressional Investigative Power, 1940, p. 106.) This assertion is supported by the decision in *Straun v. Western Union Telegraph Co.* (Sup. Ct. D. Col. 1936, 3 L. W. 646), holding that response to a committee subpoena could be restrained on the basis that it constituted an unreasonable search and seizure under the fourth amendment and "went way beyond any legitimate exercise of the right of the subpoena duces tecum." A witness confronted with a broad subpoena, therefore, can appeal to the courts for aid but his appeal must be timely, for once his papers are in the possession of the committee, the courts will be reluctant to interfere with their use (*Hearst v. Black* (1936), 87 F. 2d 68, 71).

Where officers of an association are directed to produce books and papers, they cannot severally thwart with immunity the demands of the investigating committee by denying possession of the requested items or the authority to produce them. See *United States v. Fleischman* (1950) (339 U. S. 349). Further, records required by law to be kept are not privileged (*Bowles v. Insel* (1945), 148 F. 2d 91, 93, and *United States v. Wilson* (1911), 221 U. S. 361).

### *2. Disgracing and inconveniencing questions*

A witness may not refuse to answer a question upon the ground that his testimony may tend to disgrace or otherwise render him infamous. Revised Statutes, section 103 (U. S. C. 2: 193), states:

No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or by any committee of either House, 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.

Nor may a witness be excused from supplying information properly within the scope of the inquiry by the fact that the testimony sought by the committee will militate against the interest of the witness in a pending suit. (See 6 Hinds' Precedents \* \* \* sec. 338.) He cannot justify his refusal to answer inquiries on the refusal of the committee to keep his testimony secret (*U. S. v. Orman* (1953), 207 F. 2d 148, 159). However, the Supreme Court has pointedly warned against the conversion of investigations into mere harassment of persons and beliefs (*U. S. v. Rumely* (1953), 345 U. S. 41, 43-44).

### *3. Right to counsel*

The privilege of a witness to have advice of counsel depends upon the committee, and the rule has varied a good deal (Dimock, op. cit. supra, 159-160). In some cases, presence of or consultation with counsel has been permitted (Dimock, op. cit. supra; 3 Hinds' op. cit. supra, secs. 1735, 1772, 1788). In others, it has been refused (Dimock, op. cit. supra; 3 Hinds' Precedents \* \* \* sec. 1837). It has been urged, as a matter of fairness, that counsel should be allowed to appear, and it has been said that the tendency is in this direction (Dimock, op. cit. supra, pp. 161-163; see also McGeary, op. cit. supra, p. 80, n. 88). But in the final analysis, the matter is one which the committee has the power to determine for itself; it is "a matter of privilege, not of right" (Eberling, op. cit. supra, p. 390). (See also 3 Hinds' Precedents \* \* \* sec. 2501.)

#### 4. *Cross-examination*

Whether a witness or his counsel may cross-examine other witnesses depends upon the attitude of the committee. It has been said that the custom is to permit little or no cross-examination (McGeary, op. cit. supra; p. 80). For an instance recounted where cross-examination was permitted, see Dimock (op. cit. supra, p. 160). And in one case, the committee permitted counsel to communicate questions through some member of the committee but not to ask them directly (Dimock, op. cit. supra; 3 Hinds' Precedents \* \* \* sec. 1788).

It has been contended that the privilege of cross-examination should be accorded those who are being investigated or those representing issues under investigation (McGeary, op. cit. supra, pp. 80-81; also quoting then Professor (now Justice) Frankfurter, Dimock, op. cit. supra, pp. 161-163). For cases where this has been done, see Hinds' Precedents \* \* \* (secs. 1620, 1644).

#### 5. *Presenting written statements or calling witnesses*

Whether or not a witness may present a preliminary written statement by himself or counsel depends generally upon the desires of the committee (Dimock, op. cit. supra, pp. 158-159; McGeary, op. cit. supra, pp. 79-80). This is also demonstrated by the recent successful prosecution of Gerhart Eisler for contempt in refusing to be sworn as a witness until he had made a brief statement. Because these statements are sometimes needlessly long or have little relevance some committees, in order to expedite matters, have refused witnesses the privilege (McGeary, op. cit. supra). Where the privilege is granted, the reading of the statement may be interrupted by interrogations which are aimed at clarification (*ibid*). The Legislative Reorganization Act of 1946 (sec. 133), provides that—

Each standing committee shall, so far as practicable, require all witnesses appearing before it to file in advance written statements of their proposed testimony, and to limit their oral presentation to brief summaries of their argument.

A witness may call other witnesses in his behalf, as a rule, upon permission accorded him by the committee, but he has no inherent right to do so (Dimock, op. cit. supra, p. 159). For instances where production of testimony was allowed, see 3 Hinds' Precedents \* \* \* (secs. 1741, 1787). In investigating charges of an impeachable offense, a committee permitted the accused to have process to compel testimony (3 Hinds' Precedents \* \* \* sec. 1736). In one case, an investigating committee permitted a person implicated by prior testimony to appear and testify (3 Hinds' Precedents \* \* \* sec. 1789).

#### 6. *Pertinency of the testimony*

Pertinency of evidence presented before a congressional committee is not determined by its probative value. This matter received attention in *Sinclair v. United States* (1929) (279 U. S. 263, 296), wherein the Court said:

Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation. \* \* \*

The question of pertinency under section 102 (U. S. C. 2:192) was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary, it is uniformly held that relevancy is a question of law (p. 298).

Where an indictment charges unlawful refusal to answer questions "all of which were pertinent to the question then under inquiry before the subcommittee," pertinency is an element of the criminal offense which must be shown by the prosecution \* \* \* (*Bowers v. U. S.* (1953), 202 F. 2d 447, 452).

#### 7. *Defamation by a congressional witness*

Defamatory testimony before a regularly constituted legislative body, or a committee thereof, making a legally authorized investigation, is generally held to be subject to the same rules of privilege as similar testimony in courts of justice. If the testimony is material to the inquiry, or is responsive to a question asked by the members of a committee, it is generally privileged absolutely (12 A. L. R. 1255 citing *Terry v. Fellows* (1869) 21 La. Ann. 375; *Wright v. Lothrop* (1889) 149 Mass. 385; *Sheppard v. Bryant* (1906) 191 Mass. 591). See also *McLaughlin v. Charles* (1891) (60 Hun. 239). Compare *Blakeslee v. Carroll* (1894) (64 Conn. 223).

#### 8. *The oath*

While the administration of an oath to a witness adds dignity to a congressional hearing, it is not essential. If administered, it comes within the purview of Revised Statutes, section 101 (U. S. C. 2:191), which reads:

The President of the Senate, the Speaker of the House of Representatives, or a chairman of any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or of a Committee of the Whole, or of any committee of either House of Congress, is empowered to administer oaths to witnesses in any case under their examination.

Any Member of either House of Congress may administer oaths to witnesses in any matter depending in either House of Congress of which he is a Member, or any committee thereof.

In case of false testimony after taking an oath, a witness may be prosecuted under United States Code 18:1621, which reads:

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the Untied States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both.

A correction in testimony, subsequently made, will not prevent a verdict of guilty of perjury. See *United States v. Norris* (1937) (300 U. S. 564). However, it is essential that the committee or subcommittee be duly constituted at the time that the perjured testimony is given and that quorum requirements be met (*Christoffel v. United States* (1949), 338 U. S. 84). The failure to state the name and the authority of the person who administered the oath to a congressional witness does not invalidate an indictment for perjury (*U. S. v. Debrow* (1953), Docket 51, 1953-54 term, 22 L. W. 4019).

### 9. Undignified activity of a member

In *U. S. v. Pechart et al.* (1952) (103 F. Supp. 417), attention was directed to language used by a member in addressing a witness who was attempting to assert his constitutional privilege against self-incrimination. The statement of the member, said the judge (p. 419): certainly could not have put the defendants in a frame of mind where they felt that they were being questioned in an atmosphere of impartiality appropriate to accomplish the laudable purposes of a very important committee of the United States Senate.

There is no indication that impartiality and dignity are requisite to a successful prosecution. However, their lack may influence decisions of courts.

A different view is taken in *Barsky v. U. S.* (1943) (167 F. 2d 241, 250), which states that unseemly conduct, if any, by committees of Congress is a problem for Congress or the people to consider. It is a political, not a judicial question.

Judge Louis E. Goodman, United States district court, San Francisco, Calif., who thus criticized the Senate committee in the Pechart case showed some truculence before the Special Subcommittee To Investigate the Department of Justice, House Committee on the Judiciary, 83d Congress, under House Resolution 50. See serial No. 2, part 2, pages 1752-1766. The Congress, of course, legislates with respect to many things pertaining to the courts such as jurisdiction, rules, procedures, and the administration of justice generally. This matter is discussed briefly in part VIII.

### 10. Immunity from service of civil process

The service of summons and complaint on a nonresident while he was in attendance as a witness before a committee of Congress has been quashed on the ground that such a witness is immune from service of civil process while in attendance as a witness and while traveling to and from the place where he was called upon to testify. Notwithstanding *Wilder v. Welsh* (1874) (8 D. C. 566, 1 MacArthur 566), it has been held that the immunity of a nonresident witness to service of process applies not only to witnesses before judicial tribunals, but also to witnesses before bodies of the executive branch of the Government. "This being the case," said the court, "no reason appears for not applying the immunity to witnesses appearing before the legislative branch of the Government" (*Youpe v. Strasser* (1953) 113 F. Supp. 289).

### 11. Privilege with respect to international organizations

The subject of privileged communications is within the field of municipal law and is governed by the law of the United States and not by any principle of international law. \* \* \* The United Nations is not clothed with the power to legislate on matters in the realm of municipal law of the United States. This proposition is axiomatic and may be stated without disparaging or detracting from the tremendous importance and vital significance of this international organization (*U. S. v. Keeney* (1953), 111 F. Supp. 233, 234, 235).

### 12. Quorum

We have already indicated the importance of quorum in perjury cases (*Christoffel v. U. S., supra*). To avoid future difficulties on this point, the Senate passed Senate Resolution 180, 81st Congress, adding a new paragraph (b) to section 3 of rule XXV, authorizing standing committees and subcommittees to fix a lesser number than one-third

of its entire membership who shall constitute a quorum for the purpose of taking sworn testimony. Thus these Senate committees and subcommittees can authorize interrogation by a single member. See *U. S. v. DiCarlo* (1952) (102 F. Supp. 597) and *U. S. v. Auippa* (1952) (102 F. Supp. 609).

The House does not have this provision in its rules. However, we know of no objection to the designation of small subcommittees for the purpose of taking testimony. A witness may rightfully demand the presence of quorum and if this is done, the committee should show specifically in the transcript at that point that a quorum was present. See *U. S. v. Bryan* (1950) (339 U. S. 323, 332-335).

### 13. Telecasting

Neither the House nor the Senate has provided by rule for televising hearings. Accordingly, it may be possible to effectively object to testifying before cameras. See *U. S. v. Kleinman* (1952) (107 F. Supp. 407), wherein the court stated (p. 408):

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

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

The court held that the refusal of the defendants to testify was justified. See also Congressional Record (February 25, 1952) (98:1334-1335) wherein the Speaker ruled on the question.

## VII. INVESTIGATION OF THE EXECUTIVE BRANCH

Many events have transpired since the publication of the original study in the 80th Congress. A former President has been subpoenaed and has declined to appear before the congressional committee from whence the subpoena issued. Both Congress and the President have strongly asserted their rights but to date the basic issue has not been settled by the Supreme Court. Law review articles, such as Wolkinson, Demands of Congressional Committees for Executive Papers (1949, 1950) (Fed. B. J. 10:103-150, 223-259, and 319-350) have supported the President while others, such as Collins, The Power of Congressional Committees of Investigation To Obtain Information From the Executive Branch: The Argument for the Legislative Branch (1951) (Geo. L. J. 39:563), have supported the Congress. Views, pro and con, also have been presented in House Report No. 1595, 80th Congress, on House Joint Resolution 342, and House Report No. 1753, 80th Congress, on House Resolution 522, directing the Secretary of Commerce to transmit to the House of Representatives a certain letter with respect to Dr. Edward U. Condon, Director of the National Bureau of Standards. While the resolution passed the House April 22, 1948, no further action was taken and the letter was not produced.

The House of Representatives probably could have forced the issue in the Condon case to a definitive court adjudication had it desired to do so. This would have required the passage of a resolution directing the Speaker to issue his warrant directing the Sergeant at Arms to take the Secretary of Commerce into custody and to bring him before the bar of the House to answer for his failure or refusal. Upon further refusal, the House could have ordered that he be kept by the Sergeant at Arms in the guardroom of the Capitol Police. (See 3 Hinds' \* \* \* secs. 1669, 1672, 1684, 1686, and 1690.) The matter probably would be placed immediately before the courts by means of a petition for a writ of habeas corpus and a definitive pronouncement could thus be obtained.

It is obvious that a definitive court pronouncement could not be obtained by the usual procedure of reporting the refusal under Revised Statutes 104 (U. S. C. 2:194), whereby a statutory prosecution under Revised Statutes 102 (U. S. C. 2:192) would be sought by a United States district attorney. It is unlikely that the Department of Justice would prosecute an executive officer whose refusal was based on a Presidential directive. Further, inasmuch as a statutory penalty would be involved, there could be little doubt concerning the power of the President to pardon in advance. See Taft, Our Chief Magistrate and His Powers (1925 edition, 121-124). It is doubtful, however, if the President could take definitive action in this manner with respect to a person held under an order of the House. See *Ex parte Grossman* (1925) (267 U. S. 87, 118).

In pointing to this possible action, there is no intention to recommend that either the Senate or the House seek definitive action in a given instance.

While there is a respectable body of general case law and precedent on the investigatory power of Congress and its committees, that phase dealing with the extent of congressional power with respect to investigations of the executive branch is singularly lacking in definitive precedents. (See sec. 1 of his report.)

This study supports generally the following propositions:

(a) That the scope of a congressional investigation is as broad as the legislative purpose requires (*Townsend v. U. S.* (1938) 95 F. (2d) 352, 361, and sec. 1 of this report).

(b) That the subpoena of a duly authorized investigatory committee of Congress is no more restricted than that of a grand jury. (See sec. 4 of this section.)

(c) That the right of a legislative body to demand and receive, from the executive branch, information and papers which it deems pertinent to the legislative process is established. (See sec. 1 of this section.)

(d) That this established right has been vigorously asserted at times by the Congress of the United States against the President and executive officers. (See sec. 3 of this section.)

(e) That the President and the executive officers have vigorously defended against such asserted right on the basis of the fundamental doctrine of separation of powers of the executive, legislative, and judicial branches of the Federal Government. (See sec. 3 of this section.)

(f) That the Congress has merely asserted its right to obtain information without attempting to enforce it. (See sec. 3 of this section.)

(g) That the Congress has never attempted to invoke against executive officers the law which provides that every person who, having

been summoned by either House to give testimony or to produce papers upon a matter under inquiry, willfully makes default, is criminally liable. (See sec. 1 of this report.)

### *1. Authority and purpose*

The primary purpose of a committee of Congress in conducting an investigation is to assist the function of lawmaking. A secondary purpose of almost equal importance is fulfilled by investigations whereby Congress supervises and checks activities in the executive departments. See section 136 of the Legislative Reorganization Act of 1946, *infra*. In the latter type of investigation two questions of basic importance arise: How far can Congress go in requiring information from the executive branch of the Government? To what extent does the separation of powers of the Federal Government protect the executive officers? (See McGahey, *Development of Congressional Investigative Power*, p. 102.) To date these questions have not been completely answered. Such answers as are obtained must be found in historical precedents and in analogies, for the possibility of clear-cut court decisions are unlikely on questions arising from congressional investigations culminating in tests of strength between the legislative and executive branches.

It is perhaps unfortunate that the Supreme Court of the United States has never flatly recognized the fitness and propriety of the investigative process in relation to the supervisory power of Congress over administration. When opportunity was apparently provided for such an avowal in the case of *McGrain v. Daugherty* (1927) (273 U. S. 135), the Court satisfied itself by declaring the investigation of the Attorney General necessary and proper on the ground that such information was needed for the "efficient exercise of the legislative function." By this indefinite phrase "the legislative function," the Court apparently meant the lawmaking function (*Dimock, Congressional Investigating Committees*, p. 27).

Investigations of the executive departments are necessary and proper, not only because Congress must learn the needs of the departments in legislating but also because it possesses and has consistently exercised the power to see that the departments are conducted in accordance with law and policy. When Congress suspects, for good and sufficient reason, that irregularities are taking place in a department, it is its duty and privilege under the Constitution to investigate as a means to other action (p. 28). Implementing legislation contained in section 136 of the Legislative Reorganization Act of 1946 (60 Stat. 812, 832), spells out this power of "legislative oversight" as follows:

SEC. 136. To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee; and, for that purpose, shall study all pertinent reports and data submitted to the Congress by the agencies in the executive branch of the Government.

"Legislative power" as used in article I, section 1, of the Constitution unhappily fails to be either a word of art or a self-defining concept. Like "judicial power," it summarizes the history of an institution of government for any particular period of time. It did so in 1789. When the political thinkers of that period erected a

Government and set forth its outlines in a Constitution, they were not dealing with new concepts into which judges of a later date were to pour a meaning dissociated from past history and experience. Bred to the bone, as they were, with English conceptions and traditions, a phrase such as "legislative power" precipitated centuries of parliamentary history and decades of colonial practice (Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 156).

A legislative committee of inquiry vested with power to summon witnesses and compel the production of records and papers is an institution rivaling most legislative institutions in the antiquity of its origin. Its roots lie deep in the British Parliament, and only in the light of a knowledge of these origins and subsequent developments does it become possible to comprehend its limits. The value of British precedents, however, has been doubted on the ground that Parliament as distinguished from Congress was originally a judicial body; that powers judicial in character commonly exercised by it are attributable to its judicial nature and therefore cannot be incident to a legislature stripped in its creation of all judicial functions. To this argument several answers are to be made. The assertion that Parliament was a judicial body is in itself one that scholars have vigorously denied. But assuming the premise to be true, neither the nature of the power to punish recalcitrant witnesses nor the history of its exercise lends color to the contention that it is to be deduced from the possession of judicial as distinguished from legislative powers by Parliament. Its character as a power ancillary and subordinate to the legislative process cannot be overemphasized. Its origins and its exercise are either necessary for the self-defense of the legislature or necessary for its efficient functioning (Landis, pp. 159-160).

Committees of Parliament deputed on inquiries of a different character were, during the period 1604-1868, armed with powers to compel the production of persons and papers, administer oaths, and report recalcitrant and untruthful witnesses to Parliament. Such committees might be concerned with discovering data for proposed legislative enactments. Such was the case of Sheriff Acton, of London, who was found guilty by the Commons of prevarication before a "Committee for the Examination of the Merchants' Business," and in consequence sentenced to the Tower. Similarly, on April 21, 1664, a committee, to whom the bill for settling the navigation of the River Wye had been referred, was empowered by the House to send to the warden of the fleet to cause James Pitson to be brought before them from time to time and be examined as occasion required (8 Comm. Journal, 547 (1664)). The power of Parliament over the purse also gave rise to the institution of committees to discover whether funds appropriated had been expended for authorized purposes. Among the earliest of these instances is that of a committee deputed "to inspect the several Accompts of the Officers of the Navy, Ordnance, and Stores," and empowered to send for persons and papers (*ibid.*, 628 (1666); Landis, p. 161).

The privileges and powers of the Commons were naturally assumed to be an incident of the representative assemblies of the Thirteen Colonies. The colonial records are too vast and uncharted a continent to permit the uninitiated to glean more than a handful of illustrations of the methods of work and the problems of 13 different

legislatures dealing with a multitude of different problems. But enough has been uncovered to illustrate the incidence of privileges and powers and the solution of the problem of self-defense by colonial legislatures on the principles of Parliamentary precedents and practices.

Just as military disasters in Ireland gave rise to a Parliamentary inquiry, the failure to carry out certain offensive operations in the field led the Massachusetts House of Representatives in 1722 to assert its right to summon before them Colonel Walton and Major Moody. The Governor's attempt to thwart the inquiry led to the solemn pronouncement by the house that it was—

not only their Privilege but Duty to demand of any Officer in the pay and service of this Government an account of his Management while in the Public Employ.

Parliamentary control over the purse by committees charged with examining the accounts of disbursing officials finds its parallel in the creation of a standing committee of the Pennsylvania House of Delegates charged with the duty of auditing and settling the accounts of the treasurer and given—

full Power and Authority to send for Persons, Papers, and Records by the Sergeant at Arms of this House.

Similarly the Colonial Assembly of North Carolina ordered the arrest and detention of the receiver of powder money at Roanoke for his refusal, under the Governor's orders, to submit his accounts to the house. Public scrutiny of the conduct of different departments of governments is illustrated by the action of the Pennsylvania House of Delegates in examining witnesses upon charges of misconduct against W. Moore, judge of the court of common pleas, whom the Governor alone had the power of removing. As a result of the examination of the charges, the house felt justified in petitioning the Governor for his removal (Landis, pp. 165-166).

## 2. *Supervision by investigation*

As pointed out earlier, the secondary function of a congressional investigation of the executive branch is for supervisory purposes. See section 136 of the Legislative Reorganization Act of 1946, *supra*. There are three important reasons why Congress must obtain information concerning the executive departments in carrying out this function: First, to learn departmental needs and hence legislate efficiently; second, to make possible alterations in the distribution of work in the respective departments; and third, to determine whether or not the law regulating the work of the departments is being carried out legally, economically, and to the best advantage. (See Dimock, *Congressional Investigating Committees* (1929), p. 85.) Perhaps another reason is to inform public opinion (Galloway, *Investigative Function of Congress*, 21 Am. Pol. Sc. Rev., p. 60).

Especially with regard to the last two reasons, the possible importance of the threat of investigation should not be overlooked. While there are no scales to measure the unethical and undesirable practices which it may prevent, the fear of publicity through investigation may carry the same restraint as fear of the law. (See McGahey, *The Developments of Congressional Investigative Power* (1940), p. 21.)

At this point it should be emphasized that the power to investigate the executive branch is perhaps the least of the great powers vested or

inherent in Congress. Of greater scope and consequence are the power to impeach, the power to control through appropriations, the power to abolish functions or transfer functions, and the power to refuse to withhold advice and consent.

### 3. *Congress versus the President*

The Constitution was hardly adopted and the new Government organized before Congress and the President were at odds over a request for the transmission of Executive papers. In 1796 the House of Representatives requested President Washington to lay before it certain papers relating to the negotiation of the treaty with the King of Great Britain. The President refused the request, pointing out that the assent of the House is not necessary to the validity of a treaty and that the treaty exhibited in itself all the objects requiring legislative provision. He wrote:

As it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office \* \* \* forbids a compliance with your request. (See I Richardson, J. D., *Messages of the Presidents* (Washington, 1896-99), p. 196.)

One of the most famous congressional investigations was that authorized in 1861 by concurrent action of the two Houses, which assumed, without much question, the right to investigate the conduct of the war. On December 9, 1861, the Senate agreed to the following:

*Resolved by the Senate, the House of Representatives concurring.* That a joint committee of three members of the Senate and four members of the House of Representatives be appointed to inquire into the conduct of the present war; that they have power to send for persons and papers, and to sit during the session of either House of Congress (37th Cong., 2d sess., *Globe*, p. 29).

The military disasters at Bull Run and Balls Bluff led to the demand in the Senate for this investigation. These victories had not only moderated the easy optimism of the North but had left Congress and the northerners badly bewildered. Perhaps, it was thought, the President was to blame. Certainly there was something wrong with the War Department. At any rate, Congress was determined to discover where the source of weakness lay, and the investigating committee appeared as the most efficient device. In the crisis Congress apparently did not trouble itself with the reflection that, inasmuch as the President is the Commander in Chief of the Army, such interference constituted a serious infringement of the Executive prerogative. In the Senate the resolution passed by a vote of 33 to 3, and in the House there was not even debate or division. This investigation marks the use for the first time of the joint investigating committee (Dimock, p. 111).

The Wade committee, so constituted, went about its duties vigilantly during the entire course of the war. Their reports comprise four large volumes. In truth, it may be said that this committee took over a partial control of Union operations. Practically no phase of the conflict escaped the inquisitorial eye. Battles, disloyal employees, naval stations, surrenders at sea, military and naval supplies were summarily investigated. War contracts were inspected with special zeal. If legislative meddling could be shown to be damaging from a strategic standpoint, at least Congress was able to legislate with adequate knowledge and to hold the officials in Washington and upon the line of battle to strict accountability (p. 112).

Attention is invited to the activities of the Joint Committee on the Investigation of the Pearl Harbor Attack, which furnishes a direct contrast to the Committee on the Conduct of the Civil War. Though actual hostilities had ceased when this last investigation of the disaster was undertaken, the activities of the committee were seriously restricted by an order issued by President Truman on August 28, 1945, which directed the pertinent departments, agencies, and units to—take such steps as are necessary to prevent release to the public except with the approval of the President in each case—

of certain information. While the order was later modified, this new order contained the phrase "material to the investigation," which in effect left the decision on this point in the Executive rather than in the committee. (See S. Doc. No. 244, 79th Cong., p. 498.)

Nor were these the only restrictions. The committee restricted the activities of its own members, preferring, it seems, to depend upon counsel to produce facts and develop the case. There was certainly no assertion of authority comparable to that asserted by its predecessor, the earlier Committee on the Conduct of the Civil War.

The congressional investigation into the conduct of Gen. Andrew Jackson during the Seminole War (Annals of Congress, 15th Cong., 2d sess., pp. 37, 256), may have influenced the attitude of the general, when the matter of the congressional investigation came up during his term of office as President. For an account of this episode see appendix 6.

Recent difficulties are characterized by the directive of March 13, 1948 (13 Federal Register 1359), wherein the President ordered that reports of the FBI and other investigative agencies of the executive branch were to be regarded as confidential.

Any subpoena or demand or request for information, reports, or files of the nature described, received from sources other than those persons in the executive branch \* \* \* who are entitled thereto by reason of their special duties, shall be respectfully declined on the basis of this directive, and the subpoena or demand or other request shall be referred to the office of the President for such response as the President may determine to be in the public interest in the particular case. There shall be no relaxation of this directive except with my express authority.

In this connection, see House Report No. 141, 45th Congress. The effectiveness of this type of regulation can be seen in *Touhy v. Ragen* (1951) (340 U. S. 462), which involved a similar regulation of the Attorney General (11 Federal Register 4920). The Supreme Court held that the order effectively precluded a response to a subpoena duces tecum by a subordinate officer, in this case an FBI agent.

Senate Resolution 15, 83d Congress, ostensibly is an attempt to provide summary proceedings in the Senate for the purpose of coping with the refusal of an officer to produce books and papers. It would, in effect, command the Sergeant at Arms either to produce the required books, papers and records or to take the defaulting officer into bodily custody and bring him before the bar of the Senate. (See Congressional Record (daily), January 9, 1953, vol. 99: 278-279).

The executive branch can be, and often is, very cooperative especially in situations of national excitement and public demand for information. For examples, note the information concerning the insurgency in prisoner-of-war camps in Korea which was promptly declassified and made available under pressures of congressional demand and public opinion. (See H. Repts. Nos. 2128, 2129, 2130, and 2131, 82d Cong.)

#### 4. *The subpoena*

As indicated in this report, investigations of Executive action are well grounded by long-continued practice. In conducting these investigations, the authority of Congress should be recognized in unequivocal terms. (See Dimock, Congressional Investigating Committees (1929), pp. 146-147.) While the use of a blanket subpoena might, in some instances, raise the cry of protest "fishing expedition," there appears to be no reason why the subpoena of a congressional committee, especially where an executive department or agency is involved, should not be as broad as, or broader than, that which a Federal grand jury may issue. A corporate officer does not hold the books and papers of his company in a private capacity (see *Essgee Co. v. U. S.* (1923), 262 U. S. 151, 158) and is required to submit them to a duly constituted authority, such as a grand jury, when demand is suitably made (p. 156). The time-honored cry "fishing expedition," standing alone, can no longer serve to halt pretrial discovery (*Hickman v. Taylor* (1947) 329 U. S. 495, 507.) Similarly, an officer in the executive branch does not hold the public papers and documents of his office in a private capacity and accordingly should be required to submit them to Congress, or one of its committees, upon proper demand.

In exercising its authority, Congress of necessity will be guided by good judgment and expediency, giving due consideration to the nature of the inquiry, the state of public and international affairs, and the general welfare of the country.

#### 5. *Concluding statement*

The beginning of this section stated that no categorical answer can be given to the question: How far can Congress go in requiring information from the executive branch? The activities of an investigatory committee and its members are limited by the extent of the backing which the particular House, or Congress itself, is willing to afford by way of official action, either at the bar of the Senate or House or otherwise.

In answer to the second question: To what extent does the separation of powers of the Federal Government protect the executive officers? The answer, to the extent that there is an answer, is found in the historical right of the legislative branch to assert the right of inspection, even over the objections of the Executive. Past practices in the Federal Government, in this regard, furnish an inconclusive and unsatisfactory guide. Precedent has never definitely passed the point where the assertion was made.

### VIII. INVESTIGATION OF THE JUDICIAL BRANCH

Congress legislates with respect to the courts. It enacts judicial codes (Public Law 772, 80th Cong., U. S. C. 28:1 et seq.). It provides for rules and it amends rules (48 Stat. 1064, 64 Stat. 158, 45 Stat. 54). It has removed jurisdiction (61 Stat. 81). It has provided an administrative office (U. S. C. 28:601 et seq.). To argue that Congress must enact legislation pertaining to the courts without the aid of pertinent knowledge would, indeed, be an anomaly. We do not believe that separation of powers requires this result either as a doctrine or as a practical matter. See *Ex parte Grossman* (1925) (267 U. S. 87, 119-120).

In the exercise of its constitutional power to obtain information for a legislative purpose, Congress has investigated the conduct of judges. See Senate Resolution 170, 74th Congress, which supplemented earlier resolutions by providing for an investigation of the administration of justice in the courts. As agreed to, this resolution reads:

*Resolved*, That in addition to the authority conferred upon the Special Committee of the Senate To Investigate the Administration of Receivership and Bankruptcy Proceedings in the Court of the United States, created under Senate Resolution 78, Seventy-third Congress, first session, agreed to June 13, 1933, and supplemented by Senate Resolution 72, Seventy-fourth Congress, first session, agreed to February 15, 1935, said committee shall have authority to make a full and complete investigation of the administration of justice in the courts of the United States. The Department of Justice is requested to furnish the committee such investigators and legal assistants as the committee may require in its investigation.

Pursuant to this resolution the special Senate committee interrogated a United States district court judge under oath and refused to permit him to be represented by counsel. (See hearings before a Special Committee To Investigate Bankruptcy and Receivership Proceedings and Administration of Justice in United States Courts, U. S. Senate, 74th Cong., 2d sess., pursuant to S. Res. 78, 73d Cong., and S. Res. 72 and S. Res. 170, 74th Cong., pt. 8, pp. 2299 ff.) Charges against judges and legislative propositions relating to the service of the Department of Justice historically have been within the jurisdiction of the Committee on the Judiciary. (See 4 Hinds' Precedents, secs. 4062 and 4067; see also Rules of the House, H. Doc. No. 564, 82d Cong., rule XI, 12, pp. 347-348.)

This service has supported consistently the general right of Congress to require the production of information deemed pertinent to its exercise of the constitutional grant of all legislative power. (See H. Rept. No. 1595, 80th Cong., pts. 1 and 2, on H. J. Res. 342; and H. Rept. No. 1753, 80th Cong., on H. Res. 522.) However, we also have stated consistently, and we wish to emphasize the fact, that the right is not self-executing and that the activities of investigatory committees are limited in many instances by the extent of the backing which the particular House, or Congress itself, is willing to afford by way of official action either at the bar of the Senate or the House or otherwise.

Mr. Justice Tom Clark declined an invitation of Chairman Keating, Subcommittee To Investigate the Department of Justice, 83d Congress (hearings \* \* \* serial No. 2, pt. 2, p. 2134), and he later declined to honor a subpoena from Chairman Velde, House Committee on Un-American Activities.

According to a news report (Washington Evening Star, June 23, 1953) the House Committee on the Judiciary voted 22 to 5 against the recommendation of the Keating subcommittee that Mr. Justice Clark be subpoenaed following his refusal of the invitation to testify.

Committee Chairman Chauncey W. Reed \* \* \* said his group decided not to disclose how individual members voted. He revealed, however, that the committee agreed unanimously that the committee had authority to issue a subpoena to a Supreme Court Justice.

The Keating subcommittee also directed United States District Judge Louis Goodman to appear. This is the same Judge Goodman who criticized a Senate committee for lacking an atmosphere of impartiality. In a letter to the subcommittee, seven district judges, including Judge Goodman, professed unwillingness that a judge should

testify with respect to any judicial proceeding (pp. 1753-1754). He did appear and did testify although with obvious reluctance (pp. 1752-1766).

## IX. GENERAL OBSERVATIONS AND SUGGESTIONS

If the general investigatory powers of Congress are derived by implication from the vesting by the Constitution of "All legislative Powers" in the Congress, then as a necessary corollary these powers must rest with the Congress, together with the right to effectively invoke them, rather than with the committees and subcommittees which merely exercise authority actually assigned. Stated otherwise, the ultimate power to punish a recusant witness rests with the Senate or the House of Representatives rather than with the committees, the subcommittees, or their chairmen. Even in instances where Revised Statute 102 is invoked, this is done upon the determination of the parent body. See in this connection the statement of Senator Walsh before the Senate, March 22, 1924 (Congressional Record 65: 4725-4726).

### *1. General types of contempt cases*

Two types of cases should be noted in any discussion of the exercise by Congress of its investigatory power. The first type involves the person whose attitude and actions are unruly and obstreperous and indicate contempt of Congress and its powers. The only recourse available in this instance is punishment at the bar of the House or the Senate. For excerpts of testimony illustrative of this type of case, see McGahey, *The Development of Congressional Investigative Power*, pages 74-79. The chairman in the recounted instance warned the witness of possible proceedings before the bar of the Senate. (See also Cannon's *Precedents*, vol. VI, secs. 332-334.)

The second type of case arises where the witness, though otherwise courteous and cooperative, refuses to give requested information. In this instance he may be taken before the bar of the Senate or House or he may be prosecuted under Revised Statute 102 (U. S. C. 2:192). The observations and suggestions in this section are directed to this second type of case.

### *2. Limitations on investigatory powers*

Inasmuch as the investigatory powers of Congress are derived by implication from the grant of "All legislative Power" in article I, section 1, of the Constitution there can be no express constitutional limitations on the exercise of these powers. The only general constitutional provision affording an absolute safeguard appears to be the privilege against self-incrimination found in the fifth amendment. However, the constitutional right (fourth amendment) to be free from unreasonable searches and seizures may be protected by a timely application to the proper court.

No assumption should be made that, because there are few absolute limitations or protective safeguards, the witness is completely at the mercy of a subcommittee, for its authority and activities are subject not only to review by the courts, but also to review and control of the whole committee as well as the Senate or the House, as the case may be. An omission in this chain of review occurs when Congress is not in session. Then the violation of Revised Statute 102, instead of being reported to the Senate or House, is reported to the President

of the Senate or the Speaker of the House who in turn certifies the statement of fact under seal to the appropriate United States attorney for submission to the grand jury for action (U. S. C. 2:194). An example of this type of certification is the following letter from Representative Rayburn, Speaker of the House, 79th Congress, to Representative Martin, Speaker of the House, 80th Congress (Congressional Record 93:39-40), relating to Benjamin F. Fields:

**SELECT COMMITTEE TO INVESTIGATE DISPOSITION OF SURPLUS PROPERTY**

The Speaker laid before the House the following communication which was read by the Clerk:

JANUARY 3, 1947.

The SPEAKER,  
*House of Representatives, United States,*  
*Washington, D. C.*

DEAR MR. SPEAKER: I desire to inform the House of Representatives that subsequent to the sine die adjournment of the 79th Congress the Select Committee To Investigate the Disposition of Surplus Property, authorized by House Resolution 385, 79th Congress, reported to and filed with me as Speaker a statement of facts concerning the willful and deliberate refusal of Benjamin F. Fields to produce certain books, records, documents, memoranda, and papers which had been duly subpoenaed before the said select committee of the House, and I, as Speaker of the 79th Congress, pursuant to the mandatory provisions of Public Resolution 123, 75th Congress, certified to the United States attorney, District of Columbia, the statement of facts concerning the said Benjamin F. Fields on September 6, 1946.

Respectfully,

SAM RAYBURN.

However, in certifying these facts—

it necessarily follows that either the President of the Senate or the Senate itself must determine to be true what the committee has found *prima facie*, namely, that it has propounded a pertinent question and the witness has refused to answer that pertinent inquiry (Senator George, discussing the Sinclair case, Congressional Record 65:4726).

**3. Relevancy and pertinency**

With regard to this matter of relevancy or pertinency, no set rule can be stated at this time. Congressional investigations are part of the legislative process and are used to obtain facts and information for legislative purposes. They are not criminal prosecutions, grand-jury inquisitions, nor any other type of judicial proceeding and therefore committees conducting such investigations are not bound by rules of evidence or other court procedural safeguards. A witness may take issue with a committee on the question of relevancy or pertinency and leave the correctness of his judgment to the final determination by the court as a question of law if he is prosecuted under Revised Statute 102 (*Townsend v. U. S.*, *supra*; *Sinclair v. U. S.*, *supra*; *McGrain v. Daugherty*, *supra*; *Morford v. U. S.* (1949) 176 F. 2d 54). But as pointed out before, if he is mistaken that will not save him from punishment though he acted in good faith or on advice of counsel. Relevancy is by precedent left largely to the determination of the committee (*Townsend v. U. S.*, *supra*; *McGrain v. Daugherty*, *supra*; and *U. S. v. Dennis* (1947) 72 F. S. 417, 420).

**4. Recommending action to the executive branch**

Mindful, then, of the fact that a legislative inquiry is not a judicial proceeding and is therefore not bound by court rules and procedural safeguards, a committee or a subcommittee should carefully avoid actions which indicate usurpation of judicial or grand-jury functions.

Granted that investigations seeking facts and information may disclose crimes, or that they may have certain salutary supervisory aspects with regard to administration of the laws, these are merely incidental though perhaps important results. Inviting the attention of proper administrative agencies informally to pertinent disclosures may be defensible but the formal transfer by a chairman of information obtained to the executive branch with a demand for action as a matter of practice is open to serious question. At least one safeguard suggests itself—if such formal reference is to be made it should be done upon the recommendation of the full committee as approved by the Senate or the House.

#### *5. Disclosure of crimes and future prosecutions*

At this point it is pertinent to note that perhaps a witness may be immunized by an incautious or overzealous chairman against possible conviction for crimes which he has committed. In this connection see part III of this memorandum. Therefore, where congressional investigation cuts across a situation involving a crime, a delicate question is presented. The fifth amendment protects a witness against forced disclosures in any proceedings which can later be used to convict him. This constitutional protection he must affirmatively claim. (See *In re Knickerbocker Steamboat Co.* (1905), 136 F. 956.) But the law (R. S. 102) makes the refusal of a witness to testify a crime. In order to invoke this law there must be afforded an absolute immunity which appears to be provided by United States Code 18:3486. Admitting that there is infirmity in this statute (*U. S. v. Bryan* (1950), 339 U. S. 323) a committee could not in good conscience require a witness to make disclosures which could be used to convict him later and then tell a witness he had no right to rely on the statutory immunity; that he should have claimed the constitutional immunity. Thus where a congressional investigation seeking information for legislative purposes indicates that transactions under scrutiny involve crimes, the committee will be required to decide whether it is more important to the legislative process to have all the facts regardless of possible immunization of the wrongdoers or whether a future criminal prosecution is more important. In the face of a dilemma of this nature, the committee should proceed with caution, seeking either a waiver of immunity by the witness or the counsel of law-enforcement units before proceeding with further interrogation.

#### *6. Potential resistance by executive officers*

As no dividing line can be drawn or worthwhile generalization made with regard to potential resistance to committee subpoenas by officers in the legislative, judicial, or executive branches (particularly the "principal officers" of the latter—see Constitution, art. 2, sec. 2, cl. 2) and, inasmuch as resistance, when experienced, often stems from instructions from the highest authority (see pt. VIII-3), perhaps mindful of the doctrine of separation of powers, the Senate and the House should adopt some uniform plan or procedure for determining in advance of an actual clash how far the committee or subcommittee is to be backed in seeking information. Where a special resolution has authorized and directed a specific inquiry, resort to this special procedure would be unnecessary because of the determination in advance of the scope thereof, but where the chairman of a standing

committee, and especially where the chairman of a subcommittee, seeks to invoke against a "principal officer" general investigatory authority, such as was granted to standing committees of the Senate by section 134 (a) of the Legislative Reorganization Act of 1946 (Public Law 601, 79th Cong., 60 Stat. 812), and resistance is anticipated as a result of the preliminary work of the subcommittee, then the matter should have the specific authorization of the full committee and the Senate or the House as the case may be. Such authority could be stated in the form of a resolution which should be voted up or down by the interested body. This procedure would avoid embarrassing tests of strength with subsequent appeals by chairmen of subcommittees to the parent body for vindication. At the same time it would serve as a guide to the "principal officer" of the will of the Senate or the House with regard to the pertinency of demanded information.

#### *7. Guide for handling recalcitrant witnesses*

The suggestion has been made that this memorandum also contain material which would serve as a procedural guide to a chairman who is confronted with a recalcitrant witness. The following proceedings before the Senate Committee on Public Lands and Surveys on March 22, 1924, will serve as a partial guide. Mr. Sinclair had just made a statement which, among other things, contained the following:

##### *(a) Immunity waived.—*

I do not decline to answer any question upon the ground that my answers tend to incriminate me (Congressional Record 65:4723 and 4786). \* \* \*

He thus waived immunity.

*(b) Questions framed with care.*—Thereupon the following proceedings were had:

Senator WALSH of Montana. Mr. Sinclair, I desire to interrogate you about a matter concerning which the committee had no knowledge or reliable information at any time when you had heretofore appeared before the committee and with respect to which you must then have had knowledge. I refer to the testimony given by Mr. Bonfils concerning a contract that you made with him touching the Teapot Dome. I wish you would tell us about that.

Mr. SINCLAIR. I decline to answer on advice of counsel, on the same ground.

Senator WALSH of Montana. Since you were last upon the stand we had, Mr. Sinclair, before us a copy of a contract entered into between the Mammoth Oil Co., under which or as a consequence of which the Pioneer Oil Co. ceased to be a competitor of yours in this lease of the Teapot Dome. Will you tell us about that matter?

Mr. SINCLAIR. I decline to answer on advice of counsel, on the same ground.

Senator WALSH of Montana. When your private confidential secretary, Mr. Wahlberg, was before the committee he told us about the loan of some stock of the Sinclair Consolidated Co. to one Hays. Will you tell us about that transaction?

Mr. SINCLAIR. I decline to answer by advice of counsel, on the same ground.

Senator WALSH of Montana. Since you were on the stand last Mr. John C. Shaffer told us about an agreement between yourself and Secretary Fall, under which Mr. Shaffer was to receive from you a certain portion of the territory covered by the lease which you secured for the Mammoth Oil Co. Will you tell us about that matter?

Mr. SINCLAIR. I decline to answer on the advice of counsel, on the same ground.

Senator WALSH of Montana. Mr. Sinclair, will you tell the committee where and when you met Secretary Fall during the months of November and December last?

Mr. SINCLAIR. I decline to answer on the advice of counsel, on the same ground.

Senator WALSH of Montana. On the 3d day of February 1923, Mr. Sinclair, as my information is, you caused to be transmitted to the National Metropolitan

Bank, of this city, from the National Park Bank, of New York, the sum of \$100,000 payable to your order which, on the 7th day of February 1923, you transmitted to the Chase National Bank upon your direction. Will you tell us about that transaction?

Mr. SINCLAIR. On advice of counsel I decline to answer, on the same ground.

Senator WALSH of Montana. Information has come to the committee to the effect that you contributed 75,000 shares of the stock of the Sinclair Consolidated Co. to Mr. Hays, or to someone representing the National Republican Committee, for the purpose of making up the deficit in the account of that committee. Will you tell us about that matter?

Mr. SINCLAIR. On advice of counsel I decline to answer, on the same ground.

Senator WALSH of Montana. The committee is still desirous, Mr. Sinclair, of examining the books of the Hyvas Corp. Are you prepared to produce those books?

Mr. SINCLAIR. On advice of counsel I decline to bring the books before this committee, upon the same ground.

Senator WALSH of Montana. Then, Mr. Chairman, I offer to prove by the witness, if he would answer, that, among other things—

Senator SPENCER (interposing). Do I understand, Senator Walsh, that what you propose to put into the record is what you think the witness would testify if he did not claim exemption?

Senator WALSH of Montana. Yes, sir. I propose to prove certain facts by this witness.

(c) *Counsel permitted to interpose.*—

Mr. LITTLETON. If I have any rights at all here—I am counsel for the witness—I certainly object to your putting into this record what you imagine the witness would have answered when he has claimed his rights here under the law.

Senator WALSH of Montana. All right, Mr. Littleton.

(d) *Member protests*—

Mr. LITTLETON. I protest most earnestly against it as an outrage.

Senator WALSH of Montana. I protest, Mr. Chairman, against any such remarks from counsel as an abuse of his privilege. Counsel yesterday, here by the courtesy of this committee, said that certain things that this committee propose to do were monstrous, and now we are told this morning that what I offered to do with the privilege of the committee, is an outrage. That is an abuse of the privilege of counsel, and I desire the chairman to admonish counsel to that effect.

(e) *Chairman rebukes counsel.*—

The CHAIRMAN. It is the opinion of the chairman that counsel went beyond his rights, both yesterday, and today, in his statements.

Senator WALSH of Montana. Now, Mr. Chairman, inasmuch as the witness, through his counsel, has objected and protested against the proposal which I make to set out what I expect to prove by the witness, I do not press my purpose to state the facts to the committee. That is all, Mr. Chairman.

The CHAIRMAN. Any further questions?

Senator DILL. I wanted to ask Mr. Sinclair whether he was willing to answer any questions about the services that Mr. Archie Roosevelt performed for his organization in reference to testimony given here since he was last before us.

Mr. SINCLAIR. I decline to answer, by advice of counsel, on the same ground.

Senator ADAMS. Mr. Sinclair, I believe in an earlier hearing you testified, in answer to a question, that you have in no way, and none of your companies had in any way, given or loaned anything to Secretary Fall. Is that correct?

Mr. SINCLAIR. I decline to answer, on advice of counsel, on the same ground.

The CHAIRMAN. Are there any further questions on the part of any member of the committee? Senator Adams, have you any further questions?

(No response.)

The CHAIRMAN. Mr. Sinclair, you are excused.

(f) *Declaration of contempt unnecessary.*—Note should be taken of the obvious care with which these questions were framed and the fact that several Senators participated. There was no declaration of contempt although the chairman might have specifically warned the witness had he deemed such warning useful under the circumstances

or necessary. At the close, the witness was simply notified, "Mr. Sinclair, you are excused."

(g) *Committee deliberates action and reports.*—A preliminary report of this proceeding was given to the Senate (p. 4722) on March 22, 1924. Two days later Senator Ladd, the chairman of the committee, submitted for the committee a further report which contained not only the earlier material but also an enumeration of the committee's authority—thus the report contained a statement of the authority of the committee and a bill of particulars (p. 4785). The decision to report the incident quite naturally was arrived at after full deliberation under the rules of the committee which decided questions of quorum and procedure as well as who should make the report. Thereupon Senator Walsh made the following motion before the Senate:

I now move that the President of the Senate be by the Senate directed to certify to the district attorney for the District of Columbia the facts as reported, in the report by the Committee on Public Lands and Surveys.

The PRESIDING OFFICER. The question is upon agreeing to the motion of the Senator from Montana (p. 4788).

(h) *Senate takes action.*—During the debate a suggestion was made and accepted by Senator Walsh that he modify the motion to read that "the Senate adopt the report of the committee and direct the Presiding Officer," etc., to certify the report to the district attorney. (See p. 4790.) The modified motion was agreed to by rollcall vote (p. 4791). The report of the committee was certified accordingly; an indictment was returned by the grand jury against Sinclair, and he was convicted. An appeal was carried to the United States Supreme Court (279 U. S. 263). There the Court reviewed the entire record. Questions cannot be lifted out of context or related questions in order to obtain a conviction (*U. S. v. Raley* (1951), 9 F. Supp. 495). Interesting to note is the fact that the first count in the indictment was based on the refusal of Sinclair to answer the first question asked by Senator Walsh (279 U. S. 288). Thus the Sinclair case furnishes excellent guidance in precedent to a chairman who is mindful of the fact that his primary function is directed at factfinding for legislative purposes rather than at potential criminal prosecutions. If the latter were the primary function, then of necessity complete procedural rules and safeguards would be necessary.

On the House side the present committee having the most extensive experience in citing recusant witnesses appears to have evolved a somewhat uniform procedure and form in presenting each case to the House of Representatives. A study of House Reports Nos. 1128 to 1137 of the 80th Congress indicates that the Committee on Un-American Activities has stated with care its authority and the incident which it reports. However, it is doubtful if a certification by committee counsel of the adequacy of the record carries any weight in the courts. (See S. Repts. Nos. 200, 201, 202, 205, 206, and 207, 82d Cong.)

#### 8. *Reversible procedural error*

Once criminal prosecution in the courts is under way, there arises a question of how far the court will go behind the resolution directing the certification of the case to the district attorney. The authorization of the committee will naturally be carefully examined; however, it is doubtful if the court will go behind the resolution to examine

the minutes and the rules of the committee. Supporting the assumption that it will not do so is the refusal of the Supreme Court to do this with regard to acts of Congress properly certified, approved, and deposited in the State Department in order to search for possible procedural deficiencies in the journals of the Senate or the House. (See *U. S. v. Ballin* (1892), 144 U. S. 1, 4, and *Field v. Clark* (1892), 143 U. S. 649, 669-670, and 673.) However, if the defendant has raised the question of quorum, then procedural proof is essential. (See *Christoffel v. U. S.* (1949) 338 U. S. 84, and *U. S. v. Bryan* (1950) 339 U. S. 323.)

## X. RULES

It is not the purpose of this memorandum to examine the various legislative proposals relating to uniform rules for conducting congressional investigations. (See Galloway, Proposed Reforms (1951), University of Chicago Law Review 18: 478.) For a current listing of proposals, see Digest of Public General Bills, items listed under subject heading "Investigations, hearings," etc. Rules of this nature are, of course, within the constitutional power of each House (art. I, sec. 5, cl. 2). They need not be enacted as statutory law.

House Report No. 1748, 82d Congress, reporting the recusancy of Henry W. Grunewald contains the rules of procedure of the Ways and Means Subcommittee on Administration of the Internal Revenue laws. (See pp. 43-44.) The House Committee on Un-American Activities has published its rules including applicable Rules of the House, in a small nine-page booklet containing advisory footnotes.

As an illustration of rules used in congressional investigations, we have selected for presentation here, the rules of procedure of the House Committee on the Judiciary, Subcommittee to Investigate the Department of Justice. (See Hearings \* \* \*, 83d Cong., serial No. 2, pt. 1, p. III.)

1. No major investigation shall be initiated without approval of a majority of the subcommittee. Preliminary inquiries may be initiated by the subcommittee staff with the approval of the chairman of the subcommittee.

2. The subject of any investigation in connection with which witnesses are summoned shall be clearly stated before the commencement of any hearings, and the evidence sought to be elicited shall be relevant and germane to the subject as so stated.

3. All witnesses at public or executive hearings who testify as to matters of fact shall be sworn.

4. Executive hearings shall be held only with the approval of a majority of the members of the subcommittee, present and voting. All other hearings shall be public.

5. Attendance at executive sessions shall be limited to members of the subcommittee and its staff and other persons whose presence is requested or consented to by the subcommittee.

6. All testimony taken in executive session shall be kept secret and shall not be released or used in public session without the approval of a majority of the subcommittee.

7. Any witness summoned at a public session and, unless the subcommittee by a majority vote determines otherwise, any witness before an executive session shall have the right to be accompanied by counsel, who shall be permitted to advise the witness of his rights while on the witness stand.

8. Every witness shall have an opportunity, at the conclusion of the examination by the subcommittee, to supplement the testimony which he has given, by making a brief written or oral statement, which shall be made part of the record; but such testimony shall be confined to matters with regard to which he has previously been examined. In the event of dispute, a majority of the subcommittee shall determine the relevancy of the material contained in such written or oral statement.

9. An accurate stenographic record shall be kept of the testimony of each witness, whether in public or in executive session. In either case, the record of his testimony shall be made available for inspection by the witness or his counsel; and, if given in public session, he shall be furnished with a copy thereof at his expense if he so requests; and, if given in executive session, he shall be furnished upon request with a copy thereof, at his expense, in case his testimony is subsequently used or referred to in a public session.

10. Any person who is identified by name in a public session before the subcommittee and who has reasonable ground to believe that testimony or other evidence given in such session, or comment made by any member of the subcommittee or its counsel, tends to affect his reputation adversely, shall be afforded the following privileges:

(a) To file with the subcommittee a sworn statement, of reasonable length, concerning such testimony, evidence, or comment, which shall be made a part of the record of such hearing.

(b) To appear personally before the subcommittee and testify in his own behalf, unless the subcommittee by a majority vote shall determine otherwise.

(c) Unless the subcommittee by a majority vote shall determine otherwise, to have the subcommittee secure the appearance of witnesses whose testimony adversely affected him, and to submit to the subcommittee written questions to be propounded by the subcommittee or its counsel to such witnesses. Such questions must be proper in form and material and relevant to the matters alleged to have adversely affected the person claiming this privilege. The subcommittee reserves the right to determine the length of such questioning.

(d) To have the subcommittee call a reasonable number of witnesses in his behalf, if the subcommittee by a majority vote determines that the ends of justice require such action.

11. Any witness desiring to make a prepared or written statement in executive or public sessions shall be required to file a copy of such statement with the counsel or chairman of the subcommittee 24 hours in advance of the hearing at which the statement is to be presented.

12. No report shall be made or released to the public without the approval of a majority of the full Committee on the Judiciary.

13. No summary of a subcommittee report or statement of the contents of such report shall be released by any member of the subcommittee or its staff prior to the issuance of the report of the subcommittee.

## XI. HOUSE PRECEDENTS—PUNISHMENT AT THE BAR

An examination of volume 3, Hinds' Precedents of the House \* \* \*, relating to contempt proceedings before the bar of the House, indicates an established procedure having not only general uniformity, but also considerable flexibility. For convenience these precedents are outlined under the following 14 headings:

### 1. Answers at the bar

Witnesses arraigned at the bar of the House have at times been permitted to answer orally (sec. 1669) and not under oath (sec. 1688); have at other times been required to answer in writing and under oath (secs. 1670, 1684), or in writing but not sworn to (sec. 1687), or having answered in writing have been permitted to make oral statements (sec. 1686); have been permitted to file an amended answer (secs. 1673, 1693), and present an answer which in fact was an argument (sec. 1689).

It is for the House, not the Speaker, to determine whether or not a person arraigned for contempt shall be heard before being ordered into custody (sec. 1684).

### 2. Confinement

A person adjudged in contempt may, under order of the House (1) be continued in close custody by the Sergeant at Arms (secs. 1669, 1684), (2) be committed to the common jail of the District of Columbia

(secs. 1672, 1690), or (3) be kept by the Sergeant at Arms in close confinement in the guardroom of the Capitol Police (sec. 1686).

### 3. *Continuance*

A continuance may be granted to permit the witness to consult counsel and prepare his answer (secs. 1668 and 1695).

### 4. *Costs*

The payment of costs has been required as a condition to discharge (secs. 1677, 1680, 1688).

The House has assumed the expenses of Members defending suits brought by persons punished for contempt (secs. 1716 and 1717).

### 5. *Counsel*

The general practice has been to permit a recusant witness to have the assistance of counsel (secs. 1667 and 1696).

### 6. *Examination*

A person on trial at the bar of the House for contempt has been given permission to examine witnesses, while examination for the House was done by a committee (sec. 1668).

During the trial before the bar of the House, Members were examined in their places (sec. 1668).

### 7. *Habeas corpus*

The Sergeant at Arms asks for and receives instructions from the House upon being served with a writ of habeas corpus (sec. 1691).

### 8. *Privilege*

A witness has been held in contempt of the House and imprisoned for refusing to divulge information which, he claimed, involved transactions privileged by reason of an attorney-client relationship (sec. 1689). (In this case the witness, Stewart, later brought an action of trespass for assault and false arrest against Speaker Blaine and Sergeant at Arms Ordway but the court held that an order of the House was complete protection to both (*Stewart v. Blaine* (1874), 1 MacArthur 453).)

### 9. *Procedure—Arrest, arraignment, and trial in the House*

It is important to realize that the House of Representatives has the power, for which there is ample precedent, to conduct its own trial of the contempt of witnesses before committees. This jurisdiction has been used in the past against recalcitrant parties, and although not frequently assumed of late, it is nevertheless a selective course of action. In recent years it has been more common practice to deliver those charged with contempt to the proper tribunals for appropriate criminal action. The press of legislative affairs has prompted the Members to use the latter procedure. This trend has resulted perhaps in a more ordinary and uniform dispensation of justice, and moreover it has relieved a busy legislative body of an additional task, but both have been at a sacrifice. Undoubtedly the prestige of the legislative branch of the Government would be enhanced if it occasionally handled the punishment of contempt in its own right. Forceful and determinate action to substantiate the power of Congress to compel disclosure of information pertinent to the legislative processes would be a salutary caveat to prospective malefactors. It is believed

that the present is a propitious time for the House and the Senate to energetically enforce its prerogatives.

Appendix 1, attached hereto, is a sample case of the procedure of arrest, arraignment, and trial in the House. Close scrutiny of the procedural steps illustrates that the power of the House to conduct a trial is plenary and that the only inhibiting factor, from both the procedural and substantive legal aspects, is the will of the Members expressed by their votes.

#### *10. Prosecutions in the courts*

The case of a recalcitrant witness in custody, pursuant to a resolution requiring the Sergeant at Arms of the House to commit him to the common jail, has been certified by the Speaker to the district attorney of the District of Columbia. Upon indictment, the witness was delivered to the officers of the court (sec. 1672).

#### *11. Purgation*

A witness has been deemed to have purged himself of contempt—

(1) By respectful and sufficient answers at the bar of the House (secs. 1670, 1676, 1678, 1681, 1682, and 1692).

(2) By showing that he was under heavy local bonds which, he was advised, would be forfeited if he left the jurisdiction and that he was willing to appear and answer (sec. 1673).

(3) By showing that he left town, contrary to the order of the House, under a misapprehension or misunderstanding (sec. 1674).

(4) By showing that he had appeared before the committee, testified, and paid the costs growing out of the attachment (sec. 1673).

(5) By a letter of apology where a disrespectful answer was submitted upon arraignment (sec. 1693).

(6) By promising to respond (sec. 1694) although he may be retained in custody until the committee reports the purgation (sec. 1701).

#### *12. Record*

A committee in reporting contumacy included a transcript of the testimony (sec. 1671).

In reporting the contempt to the House, the committee should show that the testimony or papers required are material, and it should present copies of the subpoenas (sec. 1701).

#### *13. Service*

In the absence of the Sergeant at Arms, his deputy has been empowered by special resolution to execute the orders of the House and to arrest a recalcitrant witness (sec. 1669). The Sergeant at Arms has, however, without specific authorization merely endorsed on a subpoena a deputation to another (sec. 1673). In Massachusetts, a warrant for arrest directed only to the Senate Sergeant at Arms was held by Chief Justice Shaw to be limited to the person named and therefore could not be served by a deputy (sec. 1718, 15 Gray 399). The form of the resolution may command the Sergeant at Arms or his special messenger to execute the order or make the arrest (sec. 1688).

#### 14. Subpена

The validity of a subpena signed only by the chairman of a House committee has been sustained (sec. 1668) and verbal defects will not avail to defeat contempt proceedings (sec. 1696).

#### 15. Warrant—return

The warrant of the Speaker is as follows:

To A. J. Glossbrenner, Sergeant at Arms of the House of Representatives:

You are hereby commanded to arrest John W. Wolcott, wheresoever he may be found, and have his body at the bar of the House forthwith to answer as for a contempt in refusing to answer a proper and competent question propounded to him by a select committee of the House of Representatives, in pursuance of the authority conferred by the House upon said committee.

Witness my hand and the seal of the House of Representatives of the United States at the city of Washington this 11th day of February 1858.

[L. S.]

JAMES L. ORR, *Speaker.*

Attest:

J. C. ALLEN, *Clerk.*

Verbal return by the House Sergeant at Arms, having the witness in custody, has been accepted (secs. 1678 and 1697).

### XII. SENATE PRECEDENTS

On the Senate side there have not been as many instances of attempts to punish witness at the bar of the Senate for recusancy. In the early history of the Government, "the House conducted most of more important investigations, \* \* \* now the Senate is the grand inquisitor" (Eberling, Congressional Investigations (1928), p. 272). The following review of precedents is taken from volume 3 of Hinds' Precedents of the House and indicates that the Senate has looked to the House for guidance in dealing with contumacious witnesses (sec. 1724).

#### 1. Confinement

The Senate has ordered the confinement of a contumacious witness in the common jail of the District of Columbia (sec. 1722 and f., n. 2, of sec. 1724).

#### 2. Habeas corpus

A prisoner arrested by a deputy of the Sergeant at Arms was forcibly taken from his custody in Massachusetts by a deputy sheriff armed with a writ of habeas corpus. The supreme court of that State held that the authority granted in the warrant, which was directed to the Sergeant at Arms, could be exercised only by that officer (sec. 1718).

#### 3. Procedure—arrest, arraignment, and trial in the Senate

For an illustration of this procedure, see appendix 2. The remarks under II-9, "Procedure—arrest, arraignment, and trial in the House," are applicable to this corresponding section for the Senate.

#### 4. Purgation

Upon satisfactory statement of the reason for his failure to comply with the commands of a committee of the Senate, a witness has been discharged (secs. 1702, 1703). In at least one instance, a witness has been discharged on the ground that no beneficial result could be obtained from forcing him to testify inasmuch as his testimony could

not be relied on (sec. 1720). See also *Jurney v. MacCracken* (1935) 294 U. S. 125, 152.

### 5. Subpena

Return by the Sergeant at Arms on a subpoena served by his deputy has not availed to test the legality of the arrest of a witness (sec. 1702).

## XIII. APPENDIXES

### APPENDIX 1

#### *The Case of Reuben M. Whitney* (3 Hinds' Precedents \* \* \*)

On January 17, 1837, the House agreed to this resolution (sec. 1667):

*Resolved*, That so much of the President's message as relates to the "conduct of the various Executive Departments, the ability and integrity with which they have been conducted, the vigilant and faithful discharge of the public business in all of them, and the causes of complaint, from any quarter, at the manner in which they have fulfilled the objects of their creation," be referred to a select committee, to consist of nine members, with power to send for persons and papers, and with instructions to inquire into the condition of the various Executive Departments, the ability and integrity with which they have been conducted, into the manner in which the public business has been discharged in all of them, and into all causes of complaint from any quarter at the manner in which said departments, or their bureaus or offices, or any of their officers or agents of every description whatever, directly or indirectly connected with them, in any manner, officially or unofficially, in duties pertaining to the public interest, have fulfilled or failed to accomplish the objects of their creation, or have violated their duties or have injured and impaired the public service and interest; and that said committee, in its inquiries, may refer to such periods of time as to them may seem expedient and proper.

\* \* \* \* \*

On February 9, Mr. Wise [the chairman] made a report, in pursuance of the following proceeding of the select committee, which he handed in at the Clerk's table:

Reuben M. Whitney, who has been summoned as a witness before this committee, having, by letter, informed the committee of his peremptory refusal to attend, it becomes the duty of the committee to make the House acquainted with the fact: Therefore,

*Resolved*, That the chairman be directed to report the letter of Reuben M. Whitney to the House, that such order may be taken as the dignity and character of the House requires.

\* \* \* \* \*

Finally, the House [on February 10], by a vote of 99 yeas to 86 nays, agreed to the following:

*Resolved*, That whereas the select committee of this House, acting by authority of the House under a resolution of the 17th of January last, has reported that Reuben M. Whitney has peremptorily refused to give evidence in obedience to a summons duly issued by said committee, and has addressed to the committee the letter reported by said committee to the House: Therefore,

*Resolved*, That the Speaker of this House issue his warrant directed to the Sergeant at Arms, to take into custody the person of Reuben M. Whitney, that he may be brought to the bar of the House to answer for an alleged contempt of this House; and that he be allowed counsel on that occasion should he desire it.

On February 11 the Speaker announced to the House that the Sergeant at Arms had made return of the service of the warrant against Reuben M. Whitney, and that the said Whitney was in custody.

This announcement was made during proceedings on another matter, at the conclusion of which Mr. John Calhoun, of Kentucky, offered this resolution, which was agreed to:

*Resolved*, That Reuben M. Whitney, now in custody of the Sergeant at Arms, be brought to the bar of this House to answer for an alleged contempt of the House in peremptorily refusing to appear and give evidence as a witness, on a summons duly issued by a select committee acting by the authority of this House, under a resolution of the 17th of January last, and in the matter of a letter, expressing said refusal, addressed by the said Reuben M. Whitney to the committee, and by the committee referred to the House; and that he be forthwith furnished with a copy of the report of said committee, and of the letter aforesaid.

On the succeeding day the Speaker announced to the House that Reuben M. Whitney was in the custody of the Sergeant at Arms, without the bar, awaiting the further order of the House in the premises; and that he had been furnished by the Clerk with the copies of papers, as directed by the order of the 11th instant.

Whereupon, on motion of Mr. John M. Patton of Virginia, it was—

*Ordered*, That Reuben M. Whitney be brought to the bar of the House.

Reuben M. Whitney was then brought to the bar of the House by the Sergeant at Arms, when the Speaker addressed him, as follows:

Reuben M. Whitney: You have been brought before this House, by its order, to answer the charge of an alleged contempt of this House, in having peremptorily refused to give evidence in obedience to a summons duly issued by a committee of this House; which committee had, by an order of the House, power to send for persons and papers.

Before you are called upon to answer, in any manner, to the subject matter of this charge, it is my duty, as the presiding officer of this House, to inform you that, by an order of the House, you will be allowed counsel should you desire it. If you have any request to make in relation to this subject your request will now be received and considered by the House. If, however, you are now ready to proceed in the investigation of the charge, you will state it; and the House will take order accordingly.

To which the said Reuben M. Whitney answered as follows:

The undersigned answers that his refusal to attend the committee, upon the summons of its chairman, was not intended, or believed by him, to be disrespectful to the honorable the House of Representatives; nor does he now believe that he thereby committed a contempt of the House.

His reasons for refusing to attend the committee are truly stated in his letter to that committee.

He did not consider himself bound to obey a summons issued by the Chairman of the committee.

He had attended, in obedience to such a summons, before another committee, voluntarily and without objection to the validity of the process; and would have attended in the same way before the present committee but for the belief that he might thereby be exposed to insult and violence.

He denies, therefore, that he has committed a contempt of the House; because

First. The process upon him was illegal, and he was not bound to obey it; and

Secondly. Because he could not attend without exposing himself thereby to outrage and violence.

If the House shall decide in favor of the authority of the process, and that the respondent is bound to obey it, then he respectfully asks, in such case, that, in consideration of the peculiar circumstances in which he is placed, as known to the House, the committee may be instructed to receive testimony upon interrogatories to be answered, on oath, before a magistrate, as has been done in other instances in relation to other witnesses; or that the committee be instructed to prohibit the use or introduction of secret and deadly weapons in the committee room during the examination of the witnesses.

And, in case he shall think it necessary, he prays to be heard by counsel, and to be allowed to offer testimony on the matter herein submitted.

R. M. WHITNEY.

The House was proceeding to consider the method of procedure when Mr. John M. Patton, of Virginia, made the point of order that the respondent ought to retire during the deliberations.

The Speaker said that such had been the uniform course in former cases, and, believing it to be the sense of the House, he would direct the Sergeant at Arms to take Reuben M. Whitney from the bar; which was done.

Propositions were then made for the appointment of a committee of privileges to report a mode of procedure and also that the respondent be discharged. Finally, under the operation of the previous question, the House agreed to the following resolution proposed by Mr. Samuel J. Gholson, of Mississippi:

*Resolved*, That Reuben M. Whitney be now permitted to examine witnesses before this House in relation to his alleged contempt, and that a committee of five be appointed to examine such witnesses on the part of this House; that the questions put shall be reduced to writing before the same are proposed to the witness, and the answers shall also be reduced to writing. Every question put by a Member, not of the committee, shall be reduced to writing by such Member, and be propounded to the witness by the Speaker, if not objected to; but if any question shall be objected to, or any testimony offered shall be objected to by any Member, the Member so objecting, and the accused or his counsel, shall be heard thereon; after which the question shall be decided without further debate. If parol evidence is offered, the witness shall be sworn by the Speaker and be examined at the bar, unless they are Members of the House, in which case they may be examined in their places.

The following committee was then appointed: Messrs. Gholson, of Mississippi; Levi Lincoln, of Massachusetts; Francis Thomas, of Maryland; Benjamin Hardin, of Kentucky; and George W. Ownes, of Georgia.

Reuben M. Whitney was then again placed at the bar, and the resolution adopted by the House was read to him; and, being asked by the Speaker if he was ready to proceed in the trial of the case, he answered:

I am not ready to proceed at this time, and ask to be indulged until Wednesday next to make preparation. I herewith hand in a list of names of sundry persons, and respectfully request that they be summoned to attend as witnesses in the trial of the case.

This list, which appears in the Journal, contains the names of 4 Members of the House and 2 citizens.

It was then—

*Ordered*, That further proceedings in this trial be postponed until Wednesday next; and that Reuben M. Whitney be furnished with a copy of the resolution adopted by the House this day.

It was also—

*Ordered*, That subpoenas issue for the witnesses named by Reuben M. Whitney with directions to attend on Wednesday, the 15th day of February instant.

On February 15, 1837, the Sergeant at Arms was directed to place Reuben M. Whitney at the bar of the House; whereupon Reuben M. Whitney was placed at the bar of the House, accompanied by Walter Jones and Francis S. Key, as his counsel.

The Speaker addressed him as follows:

Reuben M. Whitney: You stand charged before this House with an alleged contempt of the House, in having peremptorily refused to give evidence in obedience to a summons duly issued by a committee of this House, which committee had, by an order of the House, power to send for persons and papers.

You will say whether you are now ready to proceed to trial, in the mode prescribed by the order of the House, before you are put upon your trial; if you have, it will now be received and considered by the House.

To which the said Reuben M. Whitney answered as follows:

I am ready to proceed to trial.

A motion was then made by Mr. George N. Briggs, of Massachusetts, in the words following:

Whereas, by the Eleventh rule of this House, all acts, addresses, and joint resolutions shall be signed by the Speaker; and all writs, warrants, and subpoenas, issued by order of the House, shall be under his hand and seal, attested by the Clerk;

And whereas the subpoena by virtue of which Reuben M. Whitney, now in the custody of the Sergeant at Arms of the House, by order of the House, for an alleged contempt, for refusing to appear and give testimony before one of the select committees of the House, was not under the hand and seal of the Speaker, attested by the Clerk, but signed by the chairman of the said select committee: Therefore

*Resolved*, That the refusal of Reuben M. Whitney to appear before said committee was not a contempt of this House;

*Resolved*, That said Whitney be forthwith discharged from the custody of this House.

In the course of debate on this resolution Mr. Abijah Mann, Jr., of New York, said that this question had been raised in several other cases, notably in the committee sent to Philadelphia to investigate the affairs of the Bank of the United States. In the latter case the committee were called upon to issue the highest process in its power; and the question was then raised and mooted, with a former Speaker or with the present, he was not certain which, whether the process issued by that committee, under the powers given them to send for persons and papers, should be signed by the Speaker of the House and attested by the Clerk. The committee decided, and in that decision, if he was not mistaken, the incumbent of the chair coincided, that the summons the committee were authorized to issue, by the power to send for persons and papers, need only be signed by the chairman of that committee. When the House issued an order or warrant in a particular case, under this rule, the Speaker must issue the summons under his hand and seal, and it must be attested by the Clerk; but when the power was granted to a committee to send for persons and papers in a particular case, a summons signed by the chairman of the committee was sufficient.

The motion of Mr. Briggs was ordered to lie on the table by a vote of 157 yeas to 33 nays.

*Ordered*, That further proceedings in the case of R. M. Whitney be postponed until 12 o'clock tomorrow; and that the Clerk of the House furnish to the three other witnesses, Members of this House, who are sworn, copies of all the questions that have been propounded to the witness just examined, that they may be prepared to answer them in writing tomorrow.

The examination of witnesses was continued until February 20, the record of questions and answers appearing in the Journal. From the examination it appeared that there had been personal difficulty between the respondent and Messrs. Peyton and Wise, of the investigating committee, and that there had occurred in the committee room a difference which had seemed likely at one time to result in the use of weapons. The idea that the witness had been deterred by fear from responding to the subpoena of the committee was broached. Finally Mr. Amos Lane, of Indiana, offered this resolution:

*Resolved*, That it is inexpedient to prosecute further the inquiry into the alleged contempt of R. M. Whitney against the authority of this House; and that the said Whitney be now discharged from custody.

This resolution was agreed to—yeas 99, nays 72.

And the said Reuben M. Whitney was discharged accordingly (sec. 1668).

A contumacious witness need not be given a second opportunity by a committee before the House orders his arrest (sec. 1671).

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## APPENDIX 2

### *The Case of Thaddeus Hyatt (3 Hinds' Precedents \* \* \*)*

On December 14, 1859, the Senate, after debate, agreed unanimously to a resolution providing that a committee be appointed to inquire into the facts attending the late invasion and seizure of the armory and arsenal at Harpers Ferry by a band of armed men and report whether the same was attended by armed resistance to the authorities and public force of the United States, and the murder of any citizens of Virginia, or any troops sent there to protect public property; whether such invasion was made under color of any organization intended to subvert the government of any of the States of the Union; the character and extent of such organization; whether any citizens of the United States not present were implicated therein or accessory thereto by contributions of money, arms, ammunition, or otherwise; the character and extent of the military equipments in the hands or under the control of said armed band; where, how, and when the same were obtained and transported to the place invaded; also, to report what legislation, if any, is necessary by the Government for the future preservation of the peace of the country and the safety of public property—the committee to have power to send for persons and papers.

The committee was appointed, consisting of Senators James M. Mason, of Virginia; Jefferson Davis, of Mississippi; Jacob Collamer, of Vermont; Graham N. Fitch, of Indiana; and James R. Doolittle, of Wisconsin.

On February 21, 1860, Mr. Mason, from the committee, reported the following preamble and resolution:

Whereas Thaddeus Hyatt, of the city of New York, was, on the 24th day of January, A. D. 1860, duly summoned to appear before the select committee of the Senate, appointed "to inquire into the facts attending the late invasion and seizure of the armory and arsenal of the United States at Harpers Ferry, in Virginia, by a band of armed men," and has failed and refused to appear before said committee, pursuant to said summons: Therefore,

*Resolved*, That the President of the Senate issue his warrant, directed to the Sergeant at Arms, commanding him to take into his custody the body of the said Thaddeus Hyatt, wherever to be found, and to have the same forthwith before the bar of the Senate to answer as for a contempt of the authority of the Senate.

After debate, the resolution was agreed to—yeas 43, nays 12.

On March 6 the Sergeant at Arms appeared at the bar of the Senate having Mr. Hyatt in custody, and Mr. Mason submitted the following preamble and resolution, which were agreed to—yeas 49, nays 6.

*Resolved*, That Thaddeus Hyatt, of the city of New York, now in custody of the Sergeant at Arms, on an attachment for contempt in refusing obedience to the summons requiring him to appear and testify before a committee of the Senate, be now arraigned at the bar of the Senate, and that the President of the Senate propound to him the following interrogatories:

First. What excuse have you for not appearing before the select committee of the Senate, in pursuance of the summons served on you on the 24th day of January 1860?

Second. Are you now ready to appear before the said committee and answer such proper questions as shall be put to you by said committee?

And that the said Thaddeus Hyatt be required to answer said questions in writing and under oath.

On March 9 the witness presented a sworn statement questioning the authority of the committee and declining to answer the questions. As part of this statement he presented the argument of his counsel, Messrs. S. E. Sewall and John A. Andrew, who thus summarized the objections to the Senate's jurisdiction:

The inquisition delegated to the committee, being an inquiry as to who committed crimes, was a judicial one, and a usurpation of the functions of the judiciary.

The object of the inquisition being unconstitutional, the Senate could have no power to compel the attendance of witnesses before the committee.

The investigations being made with a view to legislation cannot give the Senate authority to make a judicial inquisition as to the authors of specific crimes, if it would not otherwise have possessed such authority.

Even had the inquisition been constitutional, still, being for legislative purposes, the Senate could not coerce the attendance of witnesses.

All the powers of the Senate are derived from the Constitution, and not gained by long prescription, like those of the Houses of Parliament in Great Britain.

The power of committing witnesses for contempt in cases of this kind is not given directly by the Constitution, or by necessary implication, because legislation can be effected by it without any such power.

This is not a case in which the Senate has judicial or quasi-judicial power; in which case authority to compel the attendance of witnesses as a necessary incident of the power need not be disputed.

Since the statute of 1857 has made the refusal of a witness to appear before a committee an indictable offense, the Senate cannot try any such witness for a contempt, because that would be to try him for a crime without a jury, in violation of the Constitution. We deny, then, the power of the Senate committee to act as inquisitors in regard to crimes. We deny their right to drag our client from his home in New York to testify before them.

If the Senate can thus usurp some of the functions of the judiciary, what other functions of the judiciary or the executive may they not assume? The liberties of the people are gone, if the Senate by its own power can create a secret inquisitorial tribunal and compel any witnesses they please to appear before it.

The power of punishment for contempt is always arbitrary and dangerous, whether exercised by courts or legislative bodies. The constitutions and the legislation of the United States and of the several States have been constantly aiming to limit and define it. It is dangerous, because the party injured becomes the judge in his own case both of law and fact. It involves, therefore, a violation of one of the first principles of justice and is only to be sustained by the extremest necessity. We believe that the House and Senate have seldom been called to act in a case of alleged contempt in which the power has not been seriously questioned, and in which, from a just sense of its arbitrary character, they have not aimed to make the punishment light rather than severe. In the cases, for instance, of John Anderson and General Houston, the reprimands of the Speaker of the House appear small punishments compared with the gravity of the charges against them.

On March 12 Hyatt was brought to the bar, and Mr. Mason proposed the following preamble and resolution, which, after long debate, were agreed to—yeas 44, nays 10:

Whereas Thaddeus Hyatt, appearing at the bar of the Senate, in custody of the Sergeant at Arms, pursuant to the resolution of the Senate of the 6th of March instant, was required by order of the Senate then made, to answer the following questions, under oath and in writing: "1. What excuse have you for not appearing before the select committee of the Senate, in pursuance of the summons served on you on the 24th day of January 1860? 2. Are you ready to appear before said committee and answer such proper questions as shall be put to you by said committee?" time to answer the same being given until the 9th of March follow-

ing; and whereas on the said last-named day the said Thaddeus Hyatt, again appearing in like custody at the bar of the Senate, presented a paper, accompanied by an affidavit, which he stated was his answer to the said questions; and it appearing, upon examination thereof, that the said Thaddeus Hyatt has assigned no sufficient excuse in answer to the question first aforesaid, and in answer to the said second question, has not declared himself ready to appear and answer before said committee of the Senate, as set forth in said question, and has not purged himself of the contempt with which he stands charged: Therefore,

*Be it resolved*, That the said Thaddeus Hyatt be committed by the Sergeant at Arms to the common jail of the District of Columbia, to be kept in close custody until he shall signify his willingness to answer the questions propounded to him by the Senate; and for the commitment and detention of said Thaddeus Hyatt, this resolution shall be a sufficient warrant.

*Resolved*, That whenever the officer having the said Thaddeus Hyatt in custody shall be informed by said Hyatt that he is ready and willing to answer the questions aforesaid, it shall be the duty of such officer to deliver the said Thaddeus Hyatt over to the Sergeant at Arms of the Senate, whose duty it shall be again to bring him before the bar of the Senate, when so directed by the Senate.

In the course of the debate preceding the adoption of this preamble and resolution, Mr. Charles Sumner, of Massachusetts, argued that the Senate had no right to compel testimony required for legislative purposes only. On June 15, when the Senate ordered the discharge of Hyatt from confinement, Mr. Sumner spoke again on this subject, thus summarizing his argument:

We must not forget a fundamental difference between the powers of the House of Representatives and the powers of the Senate. It is from the former that the Senator from Virginia has drawn his precedents, and here is his mistake.

To the House of Representatives are given inquisitorial powers expressly by the Constitution, while no such powers are given to the Senate. This is expressed in the words, "the House of Representatives shall have the sole power of impeachment." Here, then, obviously, is something delegated to the House and not delegated to the Senate, namely, those inquiries which are in their nature preliminary to an impeachment—which may or may not end in impeachment; and since, by the Constitution, every "civil officer" of the General Government may be impeached, the inquisitorial powers of the House may be directed against every "civil officer," from the President down to the lowest on the list.

This is an extensive power, but it is confined solely to the House. Strictly speaking, the Senate has no general inquisitorial powers. It has judicial powers in three cases under the Constitution:

1. To try impeachments.
2. To judge the elections, returns, and qualifications of its Members.
3. To punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member.

In the execution of these powers, the Senate has the attributes of a court; and, according to established precedents, it may summon witnesses and compel their testimony, although it may well be doubted if a law be not necessary, even to the execution of this power.

Besides these three cases, expressly named in the Constitution, there are two others, where it has already undertaken to exercise judicial powers, not by virtue of express words, but in self-defense:

1. With regard to the conduct of its servants, as of its printer.
2. When its privileges have been violated, as in the case of William Duane, by a libel, or in the case of Nugent, by stealing and divulging a treaty while still under the seal of secrecy.

It will be observed that these two classes of cases are not sustained by the text of the Constitution; but if sustained at all, it must be by that principle of universal jurisprudence, and also of natural law, which gives to everybody, whether natural or artificial, the right to protect its own existence; in other words, the great right of self-defense. And I submit that no principle less solid could sustain this exercise of power. It is not enough to say that such a power would be convenient, highly convenient, or important. It must be absolutely essential to the self-preservation of the body; and even then, in the absence of any law, it may be open to the gravest doubts. (See Hinds', sec. 1722.)

## APPENDIX 3

*Kilbourn v. Thompson* (103 U. S. 168)

Briefly, the facts of the Kilbourn case are:

On January 24, 1876, the House authorized a special committee to inquire into the affairs of the defunct Jay Cooke & Co., and especially into its activities in a "real-estate pool." The preamble stated that, because of improvident deposits in the company by the Secretary of the Navy and because of certain settlements, the United States and other creditors were placed at a serious disadvantage which the courts were powerless "to afford adequate redress."

On March 14, 1876, the Select Committee on the Real Estate Pool and Jay Cooke Indebtedness served a subpoena on Hallet Kilbourn, requiring his appearance, certain specified papers and documents, "and all other documents, letters \* \* \* books \* \* \* or maps, that can afford any information or evidence \* \* \*".

Kilbourn appeared but refused to produce books and papers or to answer certain questions, on the ground that they involved private matters rather than the public interest. He was thereafter cited for contempt and upon arraignment before the bar of the House argued that his offense, if any, was punishable only under Revised Statutes 102. In the meantime he was indicted on five counts under the statute. Custody of the prisoner was refused the United States marshal for the District of Columbia. On April 15 the Sergeant at Arms was authorized to make a return of a writ of habeas corpus issued by the Supreme Court of the District of Columbia in person with Kilbourn. On April 19 the court ordered the marshal to take custody of the prisoner. On May 2 the House declined an offer of Kilbourn to appear before the committee and testify and furnish such information as his books might contain.

Kilbourn later brought an action for false imprisonment against John G. Thompson, the Sergeant at Arms, and several Members of the House (2 Hinds', sec. 1608).

The action was sustained as to the unfortunate Sergeant at Arms Thompson but not as to the Members.

Concerning the wording of the preamble, the Supreme Court pointedly asked:

How could the House of Representatives know, until it had been fairly tried, that the courts were powerless to redress the creditors of Jay Cooke & Co.? The matter was still pending in a court, and what right had the Congress of the United States to interfere with a suit pending in a court of competent jurisdiction? Again, what inadequacy of power existed in the court, or, as the preamble assumes, in all courts, to give redress which could lawfully be supplied by an investigation by a committee of one House of Congress, or by an act or resolution of Congress on the subject? The case being one of judicial nature, for which the power of the courts usually afford the only remedy, it may well be supposed that those powers were more appropriate and more efficient in aid of such relief than the powers which belong to a body whose function is exclusively legislative \* \* \* (p. 194).

## APPENDIX 4

*Marshall v. Gordon* (243 U. S. 521)

Briefly the facts of *Marshall v. Gordon* are:

Marshall, while a United States attorney, conducted a grand-jury investigation which led to the indictment of a Congressman. As

a result of the Member's charges of misfeasance and nonfeasance on the part of the attorney, the House, by resolution, directed its Judiciary Committee to inquire into and report on Marshall's liability to impeachment. During the inquiry, Marshall sent to the chairman and gave to the press a letter charging in intemperate language that the investigation was merely an attempt to frustrate the action of the grand jury and therefore had no legislative purpose. The House ordered his arrest, and the lower court refused to issue a writ of habeas corpus. In reversing the lower court, the Supreme Court based its opinion on the limitation enunciated in *Anderson v. Dunn* that—

\* \* \* in answering the question what was the rule by which the extent of the implied power of legislative assemblies to deal with contempt was controlled, it was declared to be "the least possible power adequate to the end proposed" (p. 541).

Accordingly, the power to punish Marshall for contempt was inadequate and the attempt was deemed to result from indignation on the part of the committee members rather than by reason of any obstruction to the legislative process (pp. 545-546).

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#### APPENDIX 5

##### *Jurney v. MacCracken* (294 U. S. 125)

William P. MacCracken, Jr., a lawyer, was arrested by Sergeant at Arms Chester W. Jurney on February 12, 1934, after declining to appear before the bar of the Senate in response to a citation of the Senate requiring him to show cause why he should not be punished for the removal and destruction of certain papers from his files after they had been subpoenaed by the Special Senate Committee Investigating Ocean and Air Mail Contracts. After being served with a subpoena duces tecum, MacCracken had personally given Gilbert Givven, a representative of Western Air Express, permission to examine the files relating to that company and to remove papers not related to airmail contracts. Another client, L. H. Brittin, of Northwest Airways, Inc., also removed papers, with the permission of MacCracken's partner, Mr. Lee, but without MacCracken's permission or knowledge.

The original subpoena, which had been served on MacCracken January 31, 1934, had ordered his appearance and the production of all books of accounts and papers relating to airmail and ocean mail contracts. He appeared on that day, testified that he was a lawyer; that he was ready to produce all books and papers which were not privileged; that unless he secured waivers from clients as to certain papers, he must exercise his own judgment as to which were privileged. He gave the committee the names of his clients and he obtained waivers from some of them, whereupon he immediately produced the papers released.

On February 2, before the committee had decided the question of privilege, MacCracken appeared and related his story of the removal and destruction of papers by Givven and Brittin. Upon conclusion of this testimony, the committee decided that none of the papers were privileged, and all papers then remaining in the files were produced. Upon MacCracken's request, Givven restored what were purported to be all of the papers taken by him. Many of the papers taken by

Brittin were recovered later from the trash and pieced together by post-office inspectors.

MacCracken was arrested pursuant to a resolution of the Senate and immediately petitioned the old Supreme Court of the District of Columbia for a writ of habeas corpus. After a hearing the petition was dismissed, but that judgment was reversed by the court of appeals. The United States Supreme Court issued a writ of certiorari because of the importance of the question presented.

In reversing the court of appeals, the Supreme Court held—

1. Where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible, is without significance. Congress can punish for past acts, subject to judicial review.
2. The enactment of Revised Statute 102 did not impair the right of Congress to punish for contempt.
3. Whether a recalcitrant witness has purged himself of contempt is for Congress to decide and cannot be inquired into by a court by a writ of habeas corpus.

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#### APPENDIX 6

##### *Gerhart Eisler*

House Resolution 104, 80th Congress, involved Gerhart Eisler, an alleged leader of Moscow-directed Communist activity in the United States, who refused to be sworn in as a witness before the House Committee on Un-American Activities until he had made a brief statement. The chairman informed the witness that he could make any statement he desired at the conclusion of his testimony. Eisler insisted on making his statement before taking the oath, whereupon the chairman ordered him to step aside.

During the afternoon session the chairman announced that the committee unanimously voted, in executive session, to request the certification of the proceedings to the Department of Justice for the purpose of charging Eisler with contempt of Congress. In accordance with this decision, the following resolution (H. Res. 104) was submitted in the House on February 18, 1947:

*Resolved*, That the Speaker of the House of Representatives certify the report of the Committee on Un-American Activities of the House of Representatives as to the willful and deliberate refusal of Gerhart Eisler to be sworn and to testify before the said Committee on Un-American Activities, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States Attorney for the District of Columbia, to the end that the said Gerhart Eisler may be proceeded against in the manner and form provided by law.

The report (H. Rept. No. 43, 80th Cong.) accompanying the resolution recited the following essential information:

##### REPORT CITING GERHART EISLER

The Committee on Un-American Activities, as created and authorized by the House of Representatives, through the enactment of Public Law No. 601, section 121, subsection Q (2), caused to be issued a subpoena to Gerhart Eisler, of 48-46 Forty-seventh Street, Borough of Queens, New York City, N. Y. The said subpoena directed Gerhart Eisler to be and appear before the said Committee on

Un-American Activities on February 6, 1947, and then and there to testify touching matters of inquiry committed to the said committee; the subpna being set forth in words and figures as follows:

"By authority of the House of Representatives of the Congress of the United States of America, to the Sergeant At Arms, or his special messenger: You are hereby commanded to summon Gerhart Eisler, 48-46 Forty-seventh Street, Borough of Queens, New York, N. Y., to be and appear before the Un-American Activities Committee of the House of Representatives of the United States, of which the Honorable J. Parnell Thomas is chairman, in their chamber in the city of Washington, on February 6, 1947, in room 226, Old House Office Building, at the hour of 10 a. m., then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee. Herein fail not, and make return of this summons.

"Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 23d day of January 1947.

"J. PARNELL THOMAS, *Chairman.*

"Attest:

"JOHN ANDREWS, *Clerk.*"

The said subpna was duly served, as appears by the return made thereon by Louis J. Russell, investigator of the Committee on Un-American Activities, who was duly authorized to serve the said subpna, the return of the service by the said Louis J. Russell being endorsed thereon, which is set forth in words and figures as follows:

"Subpoena for Gerhart Eisler, 48-46 Forty-seventh Street, Borough of Queens, New York City, N. Y., to appear before the committee on the 6th day of February 1947, at 10 a. m. Served the within named on January 24, 1947, at 8:30 a. m., at his residence by Louis J. Russell."

The said Gerhart Eisler, pursuant to said subpna and in compliance therewith, appeared before the said committee to give such testimony as required under and by virtue of Public Law No. 601, section 121, subsection Q (2). The said Gerhart Eisler, after making his appearance in the chambers of the said committee, refused to be sworn by the chairman of the said committee; and as the result of the said Gerhart Eisler's refusal to be sworn as a witness before the committee, your committee was prevented from receiving testimony and information concerning a matter of inquiry committed to said committee in accordance with the terms of the subpna served upon the said Gerhart Eisler. The record of the proceedings before the committee on Thursday, February 6, 1947, during which the said Gerhart Eisler refused to be sworn as a witness and to give testimony is set forth as follows: \* \* \*

Thereafter follows the transcript of the pertinent part of the proceedings of the committee and a concluding statement that this refusal to be sworn and to testify had deprived the committee of necessary information. The resolution was debated (Congressional Record (daily), February 18, 1947, pp. 1177-1187) and agreed to (p. 1187).

#### APPENDIX 7

##### *President Andrew Jackson*

The following account of this episode is related by Eberling in his study, Congressional Investigations, 1928 edition.

The House committee appointed on January 17, 1837, "to examine into the condition of the executive departments, etc., " had a checkered career. On January 23 it adopted a series of resolutions calling on President Jackson and heads of departments for information of various kinds. One of these resolutions was as follows:

*Resolved*, That the President of the United States be requested and the Heads of the several departments be directed to furnish this committee with a list, or lists, of all officers or agents, or deputies, who have been appointed or employed and paid since 4th of March 1829, to the first of December last (if any without

authority of law) or whose names are not contained in the last printed register of public officers commonly called the Blue Book by the President or either of the said Heads of Departments respectively; and without nomination to, or the advice and consent of the Senate of the United States showing the names of such officers or agents or deputies; the sums paid each, the services rendered and by what authority appointed and paid, and what reasons for such appointments.

*Resolved*, That the various executive officers, in replying to the foregoing resolution, be requested at the same time, to furnish a statement of the period at which any innovations, not authorized by law (if such exist) had their origin, their causes, and the necessity which has required their continuance (24th Cong., 2d sess., Debates, vol. xiii, Appendix, pp. 199, 200).

By order of the committee, the chairman transmitted to the President of the United States a copy of the above resolutions. The copy transmitted in the letter of the chairman was attested by the clerk of the committee. On January 27, Mr. Andrew Jackson, Jr., Secretary of the President, entered the committee room and delivered to the chairman, Mr. Henry A. Wise, of Virginia, a letter addressed to Mr. Wise and giving the President's reasons for not complying with the request of the committee. The President pointed out in his letter that the resolution adopted by the House authorizing the investigation cast doubt upon the statement in his annual message that the executive departments were in excellent condition. He stated further:

The first proceeding of the investigating committee is to pass a series of resolutions, which, though amended in their passage, were, as understood, introduced by you, calling on the President and the Heads of Departments, not to answer to any specific charge, not to explain any alleged abuse, not to give information as to any particular transaction, but assuming that they have been guilty of the charges alleged, calls upon them to furnish evidence against themselves. After the reiterated charges you have made, it was to have been expected that you would have been prepared to reduce them to specifications, and that the committee would then proceed to investigate the matters alleged. But, instead of this, you resort to generalities even more vague than your original accusations; and in open violation of the Constitution, and of that well established and wise maxim, that all men are presumed to be innocent until proven guilty; according to the established rules of law, you request myself and the Heads of Departments to become our own accusers, and to furnish the evidence to convict ourselves; and this call purports to be founded on the authority of that body, in which alone by the Constitution, the power of impeachment is vested. The Heads of Departments may answer such a request as they please, provided they do not withdraw their own time and that of the officers under their direction, from the public business to the injury thereof \* \* \* For myself, I shall repel all such attempts as an invasion of the principles of justice, as well as of the Constitution; and I shall esteem it my sacred duty to the people of the United States to resist them as I would the establishment of a Spanish inquisition (24th Cong., 2d sess., Debates, vol. xiii, appendix, p. 202).

The President further lectured the chairman of the committee and concluded his letter by expressing astonishment that the House should make such a call on the Executive when there were six standing committees of the House specifically charged with examining the details of expenditures in the departments (*Ibid.*, p. 202).

The attitude of the President greatly enraged the chairman of the committee and, on January 30, he offered these resolutions to the committee:

*Resolved*, That the letter of the President of the United States dated the 26th inst. addressed to the Chairman of this committee and handed to him by the private secretary of the President in the presence of the committee, is an official attack of the President upon the proceedings of the House of Representatives and of this committee, and upon the privileges of members of both Houses of Congress, and opposes unlawful and unconstitutional resistance to the just powers of the House of Representatives and of the committee;

*Resolved*, That the Chairman of the committee be directed to report to the House his letter and the resolution of this committee enclosed, addressed to the President, and the letter of the President in reply thereto, dated the 26th inst. and to submit to the consideration of the House the propriety and necessity of adopting measures to defend its proceedings, to protect the privileges of its members; and to enforce its just powers and those of its committees; to enable this committee to discharge the duties devolved upon it by the resolution of the 17th inst. adopted by the House of Representatives.

These resolutions were voted down by a vote of 6 yeas to 3 nays. An effort was made to consider and amend them; but it failed.

It seems that the majority of the committee opposed their chairman and in their report stated:

Neither did the committee discover in the letter of the President any attack upon the proceedings of the House or the privileges of its members, for the plain reason that neither the House nor its members have any privilege to call upon parties accused to criminate themselves. Consequently, they could not sanction the resolution offered by the chairman to censure the President for his emphatic repulsion of what he construed to mean charges of personal accusation; and calls for self-crimination; nor could they consent to put a stop to the public business by getting up a debate in the House to enforce any pretended privilege of the House or its committees to compel public officers to furnish evidence against themselves. The committee were satisfied of the impropriety and inconsistency of all the calls upon the President and Heads of Departments embraced in the resolution offered by the Chairman; but to reject them entirely in the beginning, although, in effect, they called upon the accused to furnish evidence against themselves, might have subjected the committee to the charge of suppressing evidence, or inquiry. They preferred, therefore, to assume the responsibility of giving too great latitude to inquiry, rather than to seem to check it in the beginning (24th Cong., 2d sess., Debates, vol. xiii, appendix, p. 194).

The majority of the committee believed, as stated in their report, that this investigation could be instituted only for 1 of 2 purposes—impeachment or legislation; they maintained it could not be one for legislation, because no defect in the laws has been anywhere alleged, except in their execution. Hence, they could only regard this investigation in the light of a preliminary inquiry into facts and evidence, to show whether a process of impeachment ought not to be instituted by the House of Representatives against the Executive and heads of departments. Strong proof that this investigation could be regarded only in the light of an inquiry preliminary to impeachment, they held, lay in the fact that one of the powers conferred on the committee by the resolution of the House was the power to send for persons and papers. As they said:

At best, this is a vague and not well-defined power, incidental and not derived from any express provision in the Constitution. In its exercise, therefore, there should be some limitation; and it should be carefully used; only in cases where the direct legislation of Congress, the protection and enforcement of the privileges and rules of either House, or manifest public interest demand it. It is a judicial power, which Congress can exercise merely as a power incidental to the power, "to make all laws which shall be necessary and proper." To construe it into an unlimited power for a committee of this House to bring before them the persons of citizens from any part of the Union, at their own arbitrary will without just cause, or to compel the surrender of all papers which a committee might see fit to send for, would be to set up an incidental power of the House nowhere expressly recognized in the Constitution, which would totally annul one of the express provisions of the Constitution, to secure the citizen against these very outrages, viz: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

The committee decided they did not have the right to demand all the personal and private papers of public officers, in order that the

committee could decide whether there were any which ought to go into the public files, and concluded their report by stating that—so far as had come to their knowledge, from the results of this investigation, the condition of the various executive departments is prosperous, and that they have been conducted with ability and integrity.

Mr. Wise, the chairman of the committee, held that this letter of President Jackson is an official assumption of authority by the executive over the proceedings of the House of Representatives, and over the proceedings of one of its committees, that it is an official attack upon the privileges of members of both Houses of Congress; and that it opposes an unauthorized resistance to the just powers of the House and its committee, in direct hostility to inviolable principles necessary to the administration of a free government (24th Cong., 2d sess., Debates, vol. xiii, appendix, p. 203).

He believed that this Government was instituted for the common benefit, protection, and security of the people; that its form was adopted as one most effectually secured against the danger of mal-administration; that all power is vested in and consequently derived from the people; that magistrates are their trustees and servants at all times and amenable to them.

That if neither House of Congress could, nor would, inquire into the official conduct and administration of executive officers, the people who could not inquire in their aggregated or conventional capacity, and the States which cannot, from their own organization and that of the Federal Government, institute inquiries at all efficiently, could never be informed of the official conduct of their federal officers; and these officers would, in effect, become irresponsible for their acts, except such as they might disclose, being unknown.

Mr. Wise differentiated between "inquiries" and "inquisitions." Inquiry into the condition and conduct of public affairs is a right of legislators. Inquisition into the conduct and condition of private affairs is no right, even of the sovereign power. Inquisition would violate the fourth article of the amendments to the Constitution. The resolution of inquiry did not invade the security of these rights, as was urged by those in favor of the amendments proposed to it. That article reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

This right is the right of the people. Are the executive departments and their officers the people? They belong to the people; though the history of Government proves too sadly that, without constant vigilance and strict superintendence over them by the people or their representatives, the people soon come to belong to them. Had these officers the right to be secure from all inquiry? It was thought that they were mere trustees and servants, who might be called upon at any time to give an account of their stewardship. The inquiry proposed by the resolution was not deemed unreasonable (24th Cong., 2d sess., Debates, vol. xiii, appendix, p. 204).

The chairman mentioned some of the standing rules of the House such as rule 57, which made it the duty of the Committee on Ways and Means to examine into the state of the several executive departments. He said:

If the resolution of the House was inquisitorial, these rules were, and have been, from the earliest period of the existence of the House itself, standing inquisitions. There was the duty enjoined to examine into the state of the several executive departments. There was a search for any and whatever abuses might be found to exist and a report of them required. Was it ever dreamed that these standing rules were inquisitorial? No. They were the institutions of wise and jealous patriots, to insure that eternal vigilance which is the price of liberty.

He mentioned several previous inquiries to show that general and indefinite investigations had been made before (*ibid.*, p. 205; e. g., Post Office Investigation, June 26, 1834).

In concluding his report he claimed to have proved that the majority of the committee showed very little disposition to pursue inquiry and showed every disposition to sustain the President and the departments in their positions and in their course of obstructing fair and full investigation. This, he said, was proved by the following procedure of the committee: (1) The member of the committee at whose instance a witness was called was required to state in writing the charges the witness was expected to sustain; (2) the committee positively determined that it would not, in the absence of definite, specified charges of corruption and abuses, inquire into the reasons of the Executive, or heads of departments, for appointments to, or removals from office, in direct contradiction to the House, which rejected the amendment requiring specific charges; (3) it decided that when definite and specific charges were made of corruption and abuses in appointments and removals from office, and in subsidizing the public press, it would not inquire into them. The questions which were propounded to witnesses also showed that the committee desired to shield the Executive, according to Mr. Wise. He claimed there was neither consistency, nor propriety, nor liberality, nor fairness in propounding or rejecting interrogatories. Some questions were proposed to witnesses which in substance were rejected as to others. Subjects of inquiry of the deepest interest to the public were preemptorily excluded from investigation. (For a list of the questions, see *ibid.*, pp. 214, 215.)

But the chairman said:

Such a procedure was to be expected from the committee from the moment of its appointment. Six friends of the Executive to three of the opposition were placed upon it by the Speaker, who is supposed to owe his election to the influence of the President over a House where there is an overwhelming majority in favor of the administration; and of these six, several were known, by their speeches on the floor, to be utterly opposed to the resolution under which the committee was appointed and to the investigation which that resolution instituted.

This case represents one of the most successful attempts of a President of the United States to resist a congressional inquiry. Jackson's position in these proceedings was probably strengthened by the fact that he had an overwhelming majority in the House and he knew he could successfully resist an investigation for that reason, as his own party would not take serious issue with him. The fact that the committee reported that all was well with the executive departments after this feint at an investigation shows the importance of considering the political character of the committee personnel in these investigations. Investigating committees, packed with members in sympathy with the administration, might well become vehicles of vindication for the Executive.

## APPENDIX 8

*President Buchanan*

In direct contrast is the account of the Covode investigation during the administration of President Buchanan, also related by Eberling.

While President Buchanan "fully and cheerfully" admitted that inquiries which are incident to legislative duties were highly proper and belong equally to the Senate and the House, and that they were necessary in order to enable them to discover and to provide the appropriate legislative remedies for any abuse which might be ascertained, yet he protested the power given to the Covode committee to inquire—

not into any specific charge or charges, but whether the President has by money, patronage, or other improper means sought to influence not the individual action of members of Congress but the action of the entire body itself, or any committee thereof.

Such an accusation, Buchanan said—

extended to the whole circle of legislation, to interference for or against the passage of any law appertaining to the rights of any state or territory. Since the time of Star Chambers and general warrants, there has been no such proceeding in England.

He also protested because such an investigation was in violation of the rights of the coordinate executive branch of the Government and subversive of its constitutional independence. Moreover he claimed such an investigation was a flagrant abuse of a private person's rights under the Constitution, for John Covode, who accused the President, was also chairman of the committee.

I am to appear before Mr. Covode either personally or by a substitute, to cross-examine the witnesses which he may produce to sustain his own accusations against me; and perhaps this poor boon may be denied the President (36th Cong., 1st sess., *Globe*, p. 1434) (Eberling, p. 167).

Shall the Executive alone be deprived of rights which all his fellow citizens enjoy? The whole proceeding against him justifies the fears of those wise and great men, who, before the Constitution was adopted by the States, apprehended that the tendency of the Government was to the aggrandizement of the legislative at the expense of the executive and judicial departments (*Ibid.*, p. 1435. Cf. Madison's statement in *Federalist*, p. 219).

After a short debate on the President's protest his statement was referred to the Judiciary Committee, with leave to report at any time. On April 9 following, Mr. John Hickman, from said committee, made a report (see *Globe*, 36 Cong., 1st sess., vol. iii, H. Rept. No. 394), accompanied by the following resolution, viz:

*Resolved*, That the House dissents from the doctrine of the special message of the President of the United States on March 28, 1860; that the extent of power contemplated in the adoption of the resolutions of inquiry of March 5, 1860, is necessary to the proper discharge of the constitutional duties devolved upon Congress; that judicial determinations, the opinions of former Presidents, and uniform usage sanctions its use; and that to abandon it would leave the executive department of the Government without supervision or responsibility and would be likely to lead to a concentration of power in the hands of the President which would be dangerous to the rights of a free people.

The resolution was eventually adopted. On June 25 the President sent another protest to the House claiming that the committee had acted as though they possessed unlimited power, and without any warrant whatever had pursued a course not merely at war with the constitutional rights of the Executive but tending to degrade the

Presidential office itself to such a degree as to render it unworthy of the acceptance of any man of honor or principle (36th Cong., 1st sess., Globe, p. 3299). The President claimed that the committee had proceeded to investigate subjects not warranted in the resolutions; that it had taken testimony ex parte; had dragged private correspondence to light, which a truly honorable man would never have an even distant thought of divulging. Even members of the Cabinet were called upon to testify.

Should the proceedings of the committee be sanctioned by the House and become a precedent for future times, the balance of the Constitution will be entirely upset, and there will no longer remain the three coordinate and independent branches of the government, Legislative, Executive, and Judicial. Should secret committees be appointed, with unlimited authority to range over all the words and actions, and if possible the very thought of the President, with a view to discover something in his past life prejudicial to his character from parasites and informers, this would be an ordeal which scarcely any mere man since the fall could endure (*Ibid.*, p. 3300).

This last protest of the President was referred to a select committee which made a report. There is no question that Congress was firmly convinced, and in this case the House, that the power of investigating the President, even where specific charges were not made, constitutionally belongs to the legislative department. The argument made by the Executive in this case only seemed to arouse the ire of the House the more. It is true that the President had some stanch defenders in the House, but the great majority opposed him. This is seen in the vote on the first resolution dissenting from the doctrines enunciated in his first message to the Senate, viz, 87 to 40 (36th Cong., 1st sess., Globe, p. 1434).

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#### APPENDIX 9

##### *President Tyler*

In 1842 the House passed a resolution requesting certain information of President Tyler, namely, the names of such Members, if any, of the 26th and 27th Congresses, as have been applicants for office, with the details relating to such applications. Tyler refused, on the ground that, as the appointing power is vested solely in the Executive, the House could have no legitimate concern therein.

Tyler later complied with a similar request of the House in another matter but said:

Nor can it be a sound position that all papers, documents, and information of every description which may happen by any means to come into the hands of the President or the Heads of Departments must necessarily be subject to the call of the House of Representatives, merely because they relate to a subject of the deliberations of the House, although that subject may be within the sphere of legitimate powers \* \* \* The executive Departments and the citizens of this country have their rights and duties as well as the House of Representatives, and the maxim that the rights of one person or body are to be exercised as not to impair those of others is applicable in its fullest extent to this question. (For review of this case see Congressional Record, 69th Cong., 1st sess., February 25, 1926, p. 4548.)

## APPENDIX 10

*President Polk*

President Polk, in 1846, refused the request of the House for information, pointing out the confidential nature of the information although admitting that the House could obtain information in a formal proceeding for impeachment, when its power would be plenary. He said further:

If the House as the grand inquest of the Nation should at any time have reason to believe that there has been malversation in office by an improper use or application of the public money by a public officer, and should think proper to institute an inquiry into the matter, all the archives and papers of the executive departments, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the Executive be afforded to enable them to prosecute the investigation. (See Congressional Record, 69th Cong., 1st sess., p. 4548.) (Eberling, p. 146.)

## APPENDIX 11

*Senate resolution of 1886*

In January 1886 the Senate passed the following resolution:

*Resolved*, That the Attorney General of the United States, be, and he hereby is, directed to transmit to the Senate copies of all documents and papers that have been filed in the Department of Justice since the 1st day of January A. D. 1885, in relation to the management and conduct of the office of district attorney of the United States of the southern district of Alabama.

The Attorney General replied:

\* \* \* it is not considered that the public interest will be promoted by a compliance with said resolution and the transmission of papers and documents therein mentioned to the Senate in executive session.

The report submitted by the Senate Committee on the Judiciary vigorously asserted in the following language the right of Congress to receive, and the obligation of the executive branch to make available, the information requested:

The important question, then, is whether it is within the constitutional competence of either House of Congress to have access to the official papers and documents in the various public offices of the United States created by laws enacted by themselves. It may be fully admitted that except in respect of the Department of the Treasury, there is no statute which commands the head of any department to transmit to either House of Congress on its demand any information whatever concerning the administration of his Department; but the committee believes it to be clear that from the very nature of the powers intrusted by the Constitution to the two Houses of Congress it is a necessary incident that either House must have at all times the right to know all that officially exists or takes place in any of the Departments of the Goverment (Congressional Record, vol. 17, p. 1585).

It is believed that there is no instance of civilized governments having bodies representative of the people or of states in which the right and the power of those representative bodies to obtain in one form or another complete information as to every paper and transaction in any of the executive departments thereof that does not exist even though such papers might relate to what is ordinarily an executive function, if that function impinged upon any duty or function of the representative bodies. A qualification of this general right may under our Constitution exist in the case of calls by the House of Representatives for papers relating to treaties, etc., under consideration and not yet disposed of by the President and Senate (p. 1585).

\* \* \* The practical construction of the Constitution in these respects by all branches of the Government for so long a period would seem upon acknowledged

principles to settle what are the rights and powers of the two Houses of Congress in the exercise of their respective duties covering every branch of the operations of the Government, and it is submitted with confidence that such rights and powers are indispensable to the discharge of their duties and do not infringe any right of the Executive, and that it does not belong to either heads of Departments or to the President himself to take into consideration any supposed motives or purposes that either House may have in calling for such papers, or whether their possession or knowledge of their contents could be applied by either House to useful purposes.

\* \* \* \* \*

The Constitution of the United States was adopted in the light of the well-known history that even ministers of the English Crown were bound to lay before Parliament all papers when demanded on pain of the instant dismissal of such ministers on refusal, through the rapid and effectual instrumentality of a vote of want of confidence. And the Continental Congress had for more than ten years itself governed the country and had control of all papers and records, not by reason of anything expressed in the Articles of Confederation but by reason of intrinsic nature of free government. The jurisdiction of the two Houses of Congress to legislate and the power to advise or withhold advice concerning treaties and appointments necessarily involves the jurisdiction to officially know every step and action of the officers of the law and all the facts touching their conduct in the possession of any Department or even in the possession of the President himself. There was no need to express such a power, for it was necessarily an inherent incident to the exercise of the powers granted (p. 1586).

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FEBRUARY 9, 1954.

