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ON

PROCEEDINGS INVOLVING CONTEMPT OF CONGRESS
AND ITS COMMITTEES

UNITED STATES SENATE

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PREFACE

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 under-privileged 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.

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PROCEEDINGS INVOLVING CONTEMPT OF CONGRESS AND ITS COMMITTEES

The following report, prepared by the Legislative Reference Service, at the request of the chairman (Mr. Wiley), is presented for the use of the Senate Committee on the Judiciary.

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 inherent in the national legislative body is indicated by the act of May 3, 1798,¹ 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.

CONGRESSIONAL POWER OF INVESTIGATION GENERALLY

At the outset it is deemed advisable to list the following 17 guiding principles. Particular attention is invited to Revised Statutes 102,² 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 Power 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.

¹1 Stat. 554, Chap. XXXVI.

²U. S. C. 2, 102—item 10

2. PROCEEDINGS INVOLVING CONTEMPT OF CONGRESS

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.³

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 legislatures⁴.

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.⁵

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. * * *

* * * "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."⁶

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. * * *

³ *Anderson v. Dunn* (1821), 6 Wheat. 201, p. 221.

⁴ *McGrain v. Daugherty* (1927), 273 U. S. 135, 161.

⁵ *In re Chapman* (1897), 166 U. S. 661, 670.

⁶ *McGrain v. Daugherty* (1927), 273 U. S. 135, 178.

⁷ Quoting *People v. Keeler*, 99 N. Y. 473, p. 478.

⁸ *Townsend v. United States*, 95 F. 2d 352, 361.

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*,¹⁴ * * * the decisions in *Kilburn v. Thompson*¹⁵ * * * and *Marshall v. Gordon*¹⁶ * * *, 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.¹⁷

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*¹⁸ * * *. And Congress has passed laws calculated to facilitate such investigations.¹⁹

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.²⁰

¹⁴ *Hearst v. Black*, 87 F. 2d 68, 71.

¹⁵ *Reed v. County Commissioners*, 277 U. S. 376, 388.

¹⁶ *Sinclair v. United States*, 273 U. S. 263, 298.

9. 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.¹²

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.¹³

10. 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.

The authority to punish under this section rests with Congress and its committees and not with its employees.¹⁴

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 deprive 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 offense 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.¹⁵

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.¹⁶

11. 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 would require; that he had

¹² *Townsend v. United States*, 95 F. 2d 361.

¹³ *Sinclair v. United States*, 279 U. S. 263, 299.

¹⁴ See *F. v. parte I ranfeld*, 32 F. Supp 915.

¹⁵ *In re Chapman*, 166 U. S. 661, 671, 672.

¹⁶ *Fx parte Nugent* (1848), 18 Fed. Cas. 483.

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 question 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.¹⁷

12. 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."¹⁸
 * * *
 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 demurrer 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.¹⁹

13. 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.²⁰

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.²¹

14. 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 * * * *"²² (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. Clair²³ and the creation of a joint committee on the conduct of the war in 1861.²⁴

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.²⁵

¹⁷ Compare *Barry v. United States ex rel. Cunningham*, 279 U. S. 507; *Henry v. Henkel*, 235 U. S. 219, *Matter of Gregory*, 219 U. S. 910. (*Jurcy v. MacCracken*, 294 U. S. 125, 152.)

¹⁸ *Kilbourn v. Thompson*, 103 U. S. 168, 201.

¹⁹ *Kilbourn v. Thompson*, 103 U. S. 168, 205.

²⁰ R. S. 103, U. S. C. 2193.

²¹ *McGraw v. Daugherty*, 273 U. S. 135, 170-180.

²² Hinds', sec. 1725.

²³ Hinds', sec. 1728.

²⁴ Hinds', sec. 1737. See generally Hinds', vol. 6, secs. 404-437.

15. 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 intent of Congress 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.

16. 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.²⁵

17. Investigatory powers are granted to the standing committees of the Senate by Public Law 601, Seventy-ninth Congress.

See, 131, (a) Each standing committee of the Senate, including any sub-committee 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 subpoena 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.

II. HOUSE PRECEDENTS—PUNISHMENT AT THE BAR

An examination of precedents of the House,²⁶ relating to contempt proceedings before the bar of the House, indicates an established procedure having not only general uniformity, but also considerable

²⁵ *McGrain v. Daugherty*, 273 U. S. 135, 181.

²⁶ Volume 3, Hinds'.

flexibility.¹ 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,² and not under oath;³ have at other times been required to answer in writing and under oath,⁴ or in writing but not sworn to,⁵ or having answered in writing, have been permitted to make oral statements;⁶ have been permitted to file an amended answer,⁷ and present an answer which in fact was an argument;⁸

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.⁹

2. Confinement

A person adjudged in contempt may, under order of the House (1) be continued in close custody by the Sergeant at Arms,¹⁰ (2) be committed to the common jail of the District of Columbia,¹¹ or (3) be kept by the Sergeant at Arms in close confinement in the guardroom of the Capitol Police.¹²

3. Continuance

A continuance may be granted to permit the witness to consult counsel and prepare his answer.¹³

4. Costs

The payment of costs has been required as a condition to discharge.¹⁴

The House has assumed the expenses of Members defending suits brought by persons punished for contempt.¹⁵

5. Counsel

The general practice has been to permit a recusant witness to have the assistance of counsel.¹⁶

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.¹⁷

During the trial before the bar of the House, Members were examined in their places.¹⁸

7. Habeas corpus

The Sergeant at Arms asks for and receives instructions from the House upon being served with a writ of habeas corpus.¹⁹

¹ See 1669.

² See 1688.

³ See 1670, 1681.

⁴ See 1687.

⁵ See 1686.

⁶ See 1673, 1693.

⁷ See 1689.

⁸ See 1684.

⁹ See 1669, 1684.

¹⁰ See 1672, 1690.

¹¹ See 1686.

¹² See 1668 and 1695.

¹³ See 1677, 1680, 1688.

¹⁴ See 1716 and 1717.

¹⁵ See 1667 and 1696.

¹⁶ See 1688.

¹⁷ See 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.⁴⁴ (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.⁴⁵

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.⁴⁶
- (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.⁴⁷
- (3) By showing that he left town, contrary to the order of the House, under a misapprehension or misunderstanding.⁴⁸

⁴⁴ See, 1689.

⁴⁵ See, 1672.

⁴⁶ Secs. 1670, 1676, 1678, 1681, 1682, and 1692.

⁴⁷ See, 1673.

⁴⁸ See, 1674.

(4) By showing that he had appeared before the committee, testified, and paid the costs growing out of the attachment.⁵⁰

(5) By a letter of apology where a disrespectful answer was submitted upon arraignment.⁵¹

(6) By promising to respond⁵² although he may be retained in custody until the committee reports the purgation.⁵³

12. Record

A committee in reporting contumacy included a transcript of the testimony.⁵⁴

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.⁵⁵

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.⁵⁶ The Sergeant at Arms has, however, without specific authorization merely endorsed on a subpoena a deputation to another.⁵⁷ The form of the resolution may command the Sergeant at Arms or his special messenger to execute the order or make the arrest.⁵⁸

(NOTE: 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.⁵⁹)

14. Subpoena

The validity of a subpoena signed only by the chairman of a House committee has been sustained⁶⁰ and verbal defects will not avail to defeat contempt proceedings.⁶¹

15. Warrant - return

The warrant of the Speaker is as follows:

To A. J. Grossbienner, 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.

[U. S.] Attest:
J. C. Allen, Clerk.

JAMES L. ORR, Speaker.

Verbal return by the House Sergeant at Arms, having the witness in custody, has been accepted.⁶²

⁵⁰ See 1673.

⁵¹ See 1677.

⁵² See 1693.

⁵³ See 1694.

⁵⁴ See 1701.

⁵⁵ See 1671.

⁵⁶ See 1669.

⁵⁷ See 1688.

⁵⁸ 15 Gray 399 (see 1718).

⁵⁹ See 1698.

⁶⁰ See 1696.

⁶¹ Secs. 1678 and 1697.

III. 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."⁶⁰ 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.⁶¹

1. *Confinement*

The Senate has ordered the confinement of a contumacious witness in the common jail of the District of Columbia.⁶²

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.⁶³

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.⁶⁴ 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.⁶⁵

5. *Subpoena*

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.⁶⁶

IV. 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.

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

⁶⁰ See 1718.

⁶¹ Eberling, Congressional Investigations (1928), p. 272.

⁶² See 1721.

⁶³ See 1722 and f., n. 2, cf. sec. 1723.

⁶⁴ Secs. 1702, 1703.

⁶⁵ See 1720.

⁶⁶ See 1702.

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.

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*.

V. PRIVILEGE AGAINST INCRIMINATION

Section 859 of the Revised Statutes, as amended,⁶⁶ reads:

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.

The act of June 24, 1857,⁶⁷ which preceded the act of January 24, 1862,⁶⁸ from which Revised Statute 859 stems, granted immunity in such broad terms that persons who had committed grave crimes against the Government welcomed and even sought a chance to appear before an investigating committee and make general disclosures, thereby immunizing themselves against criminal prosecution.⁶⁹ Congress apparently intended by the act of January 24, 1862, to close this loophole and require that the witness claim privilege. Judge Hochling, of the old Supreme Court of the District of Columbia, 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 Statute 859, to prevent the introduction of testimony given before the Senate investigating committee was rejected on the ground that Fall and Doheny waived protection of this section by testifying voluntarily; in other words, they had not claimed privilege. As the purpose of the section was to prohibit forced self-incrimination, to argue that it immunized the witness against future use of all testimony in a criminal proceeding, whether given voluntarily or involuntarily would confer upon him greater immunity than is afforded by the fifth amendment.⁷⁰

Immunity statutes, such as Revised Statute 859, have been enacted for the purpose of obtaining evidence which could not otherwise be obtained because of the prohibition of the fifth amendment of the Constitution against compelling a person "in any criminal case, to be a witness against himself." The theory upon which these provisions have been predicated is that immunity against subsequent prosecution

⁶⁶ 2d Stat. 93 & 1st Sess. C. 2863.

⁶⁷ 11 Stat. 125.

⁶⁸ 12 Stat. 338.

⁶⁹ See the debate on H. R. 229, 57th Cong., 2d sess., Globe, pp. 428-431.

⁷⁰ See United States Decy for December 1 (p. 17) and 281926 (p. 7).

by the Government should equal the protection furnished by the amendment against compulsory self-incrimination where a witness is required to answer questions which might incriminate him. While there are no cases decided under Revised Statute 859, *United States v. Monia*⁷¹ has held that a similar immunity statute⁷² without a clause requiring the witness to claim his privilege against self-incrimination precludes subsequent prosecution of the witness whether he claimed privilege at the time or not.⁷³ Earlier the Supreme Court had held in *Counselman v. Hitchcock*⁷⁴ that nothing short of absolute immunity would justify compelling the witness to testify if he claimed his privileges.

It is necessary that this provision be given a broad construction in favor of the right which the fifth amendment was intended to secure, the object being to insure a witness, in any investigation in Federal proceedings, against being compelled to give testimony which might tend to incriminate him.

It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself.⁷⁵

Attention is invited to S. 634, of the Seventy-ninth Congress, which sought to rectify this situation by amending various immunity statutes, including Revised Statute 859, to require that the witness claim his privilege against self-incrimination (p. 11).

From the foregoing it is apparent that an investigatory committee faces a delicate question of means whereby a proper relationship can be achieved for the three interests involved. The interest of Congress in obtaining information for legislative purposes; the interest of the witness in maintaining his rights under the Constitution; and the interest of the executive department in prosecuting violations of criminal law. It is obviously possible for a committee to impede greatly later activities of the executive by injudicious use of the power to summon witnesses and compel disclosures, and this possibility is enhanced by the *Monia* case, which indicates that a witness need not claim privilege to immunize himself from future prosecution. It appears that this decision places committees in the same position in which they found themselves after the act of June 24, 1857, when rogues sought appearance before investigating committees for the purpose of foreclosing future criminal prosecutions.

VI. PRIVILEGE OF AN ATTORNEY

The right of an attorney to raise personally the plea of privilege before a congressional committee is controlled largely by *Jurley v. McCracken*⁷⁶ and by Revised Statutes 102, 103, and 104.⁷⁷

The provisions of the Revised Statutes are as follows:

Sect. 102. 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

⁷¹ 1942, 317 U. S. 424.

⁷² U. S. C. 15-32.

⁷³ P. 426.

⁷⁴ 1892, 142 U. S. 517.

⁷⁵ See the Constitution of the United States of America (Annotated), 1908, 8 Doc. 232, 51st Cong., p. 129, quoting from *Counselman v. Hitchcock* (p. 562).

⁷⁶ 201 U. S. 125.

⁷⁷ U. S. C. 2, 102, 103, and 104.

or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refused 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 see, 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, see, 103; June 22, 1938, ch. 594, 52 Stat. 942).

Sec. 194. WITNESS FAILING TO APPEAR OR PRODUCE RECORDS.

Whenever a witness summoned, as mentioned in section 193 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 where 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, see, 104, July 13, 1936, ch. 884, 49 Stat. 2041, June 22, 1938, ch. 594, 52 Stat. 942).

The facts of *Jury v. MacCracken*²⁰ 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 A 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.²¹

(b) *Ainold v. Cheshire*²² 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.*²³ Records cannot be cloaked with immunity or privilege merely by depositing them in the legal department of a company.

(d) *Bowles v. Insul.*²⁴ Records required by law to be kept are not privileged.²⁵

(e) *Wilson v. U. S.*²⁶ A person has no privilege, constitutional or otherwise, against the compulsory production of records belonging to another.²⁷

²⁰ 5 Am. Jur. 286
188, 41 L. 71

1915, 225 F. 301
1935, 118 F. 2d 91, 93

²¹ See also a discussion of this in *Wilson v. U. S.*

1914, 225 U. S. 302

²² See pp. 673-486

(f) *McMann v. Engel*:⁸⁵ There are exceptions to the above rule where a relationship raising a privilege exists—such as attorney and client.

VII. RECENT CITATIONS

Within recent years the following resolutions have been introduced for the purpose of certifying to the United States attorney for the District of Columbia contumacious acts:

House Resolutions 446, 452, 457, 458, 459, Seventy-sixth Congress.

House Resolutions 573, 601, 678, 749, 752, Seventy-ninth Congress.

House Resolution 104, Eightieth Congress.

See appendix 5 for a résumé of the proceedings under and the channelling of House Resolution 104, Eightieth Congress, concerning the contemptuous conduct of Gerhart Eisler.

VIII. RIGHTS OF A WITNESS

There are few safeguards for the protection of a witness before a committee. His treatment oftentimes is dependent upon the skill and attitude of the chairman and members of the committee. While an immunity statute (Revised Statute 859) protects him from forced self-incrimination, he has no protection against embarrassment (Revised Statute 103), and as committees are not bound by rules of evidence, a hapless witness may find objections futile. The following statement by Professor McGeary in his dissertation "The Developments of Congressional Investigative Power"⁸⁶ indicates some problems:

Procedure in hearings: The procedure employed in the hearings, perhaps more than any other aspect of investigations, has been the object of criticism both by witnesses and by outside observers. It must be admitted that, in many instances, the hearings can by no means be considered as models of an effective examination of witnesses and that the tone of the proceedings often leaves much to be desired. Too frequently the investigators have ignored the need for a careful preparation. The hearings are impromptu. The questioners are ill-informed. The witnesses, because the examination is fumbling, are the more willing to risk being held in contempt of the committee. They resort, therefore, to persiflage, and they parry the questions. Indeed, some of the inanities in the records of the hearings are incredible. They have to be seen to be believed.

While it is possible that the adoption of uniform standards of procedure and basic rules of evidence might substantially improve and facilitate the work of an investigatory committee, practicing lawyers could point out from court experience that these improvements would not necessarily be an ironclad safeguard or assurance that investigations would be conducted on a higher plane or that a witness would be handled in a judicious and fair manner. The wisdom and courtesy used in conducting an interrogation would probably bear a more direct relationship to the individual membership of the committee than to any rules and procedures which might be adopted. However, be that as it may, much confusion and ill feeling might be avoided by the adoption in each house of the Congress of standard rules and procedures for the guidance of committees conducting investigations. As a minimum, the right of cross-examination should

⁸⁵ 1966 10 F. Supp. 146, 148.

⁸⁶ Pp. 71-79.

be considered.⁸⁷ While the administration of an oath to a witness adds dignity to the proceeding, it is not necessarily essential. An oath, if administered, however, comes within the provision of Revised Statute 101,⁸⁸ and perjury is punishable under section 125 of the Criminal Code.⁸⁹

IX. INVESTIGATION OF THE EXECUTIVE BRANCH

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.⁹⁰

This study supports generally the following propositions:

- (a) That the scope of a congressional investigation is as broad as the legislative purpose requires.⁹¹
- (b) That the subpoena of a duly authorized investigatory committee of Congress is no more restricted than that of a grand jury.⁹²
- (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.⁹³
- (d) That this established right has been vigorously asserted at times by the Congress of the United States against the President and executive officers.⁹⁴
- (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.⁹⁵
- (f) That the Congress has merely asserted its right to obtain information without attempting to enforce it.⁹⁶
- (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.⁹⁷

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. 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?⁹⁸ To date these questions have not

⁸⁷ See McGeary, p. 80.

⁸⁸ U. S. C. 2191.

⁸⁹ U. S. C. 18:231.

⁹⁰ See see, 1 of this report.

⁹¹ *You need v. U. S.*, 95 F. (2d) 352, 361; and see 1 of this report.

⁹² See see, 1 of this section.

⁹³ See see, 1 of this section.

⁹⁴ See see, 3 of this section.

⁹⁵ See see, 1 of this report.

⁹⁶ See McGeary, Development of Congressional Investigative Power, p. 162.

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 Congress' supervisory power over the administration. When opportunity was apparently provided for such an avowal in the case of *McGrain v. Daugherty*,⁶⁷ 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.⁶⁸

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.⁶⁹

Authority for such investigation must be found in article I, section 1, of the Constitution, which states that "all legislative power herein granted shall be vested in a Congress."

"Legislative power" 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.⁷⁰

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 has, however, 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.⁷¹ But assuming the premise to be true, neither the nature of

⁶⁷ (1927) 273 U. S. 135.

⁶⁸ Dinnock, Congressional Investigating Committees, p. 27.

⁶⁹ P. 28.

⁷⁰ Landis, Constitutional Limitations on the Congressional Power of Investigation, 10 Harv. L. Rev., 153, 166.

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.

Committees (of Parliament) deputed on inquiries of a different character were, during the same 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.³ 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.⁴

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

³ Landis, pp. 159-160.

⁴ Comm. Journal 547 (1664).

⁵ *Ibid.*, 628 (1666). Landis, p. 161.

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.⁵

2. Supervision by investigation

As pointed out earlier, the secondary function of a congressional investigation of the executive branch is for supervisory purposes. 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.⁶ Perhaps another reason is to inform public opinion.⁷

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.⁸

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.⁹

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:

⁵ Landis, pp. 165-166.

⁶ See Dineen, Congressional Investigating Committees (1929), p. 85.

⁷ Galloway, Investigative Function of Congress, 21 Am. Pol. Sc. Rev. p. 60.

⁸ See McGaughy, The Developments of Congressional Investigative Power (1940), p. 21.

⁹ See I Richardson, J. D., Messages of the Presidents (Washington, 1896-1899), p. 196.

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.¹⁰

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.¹¹

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.¹²

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,¹³ may have influenced the attitude

¹⁰ Dimock, p. 111.

¹¹ P. 112.

¹² See S. Doc. No. 244, 79th Cong., p. 498.

¹³ Annals of Congress, 15th Cong., 2d sess., pp. 37, 256.

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.

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.¹⁴ 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.¹⁵ A corporate officer does not hold the books and papers of his company in a private capacity¹⁶ and is required to submit them to a duly constituted authority, such as a grand jury, when demand is suitably made.¹⁷ The time-honored cry "fishing expedition," standing alone, can no longer serve to halt pre-trial discovery.¹⁸ 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 will of necessity 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.

X. 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.¹⁹ Stated otherwise,

¹⁴ See Dunwoody, Congressional Investigating Committees (1929), pp. 146, 147.

¹⁵ See *Boggs Co. v. U. S.*, 262 U. S. 151, 158.

¹⁶ P. 156.

¹⁷ *Hickman v. Taylor* (1947), 15 L. W. 4139, 4142.

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 (C. R. 65: 4725-6).

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*, volume VI, §§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 102.¹⁸ 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.¹⁹ 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.²⁰

¹⁸ U. S. C. 22-192.

¹⁹ U. S. C. 2191.

²⁰ Senator George, discussing the Sinclair case, C. R. 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 R. S. 102.²¹ 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.²²

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 V 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.²³ 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 Revised Statute 859. Admitting that there may be some infirmity in this statute (compare the statute involved in *Counselman v. Hitchcock*²⁴ and see the discussion of the problem in *United States v. DeLorenzo*)²⁵ 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

²¹ *Townsend v. U. S.*, *supra*; *Snedar v. U. S.*, *supra*, and *McGraw v. Daugherty*, *supra*.

²² *Townsend v. U. S.*, *supra*; *McGraw v. Daugherty*, *supra*, and *U. S. v. Dennis* (1947) 72 F. 8. 417, 420.

²³ See *In re Knickerbocker Steamheat Co.*, (1905) 136 F. 956.

²⁴ (1892) 132 U. S. 547.

²⁵ (1945) 151 F. 2d 122.

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 worth-while 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 Const., art. 2, sec. 2, cl. 2) and inasmuch as resistance when experience often stems from instructions from the highest authority, 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 134²⁵ (a) of the Legislative Reorganization Act of 1946,²⁶ 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 witness

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.²⁷ *

He thus waived immunity.

²⁵ P. L. 601, 70th Cong.
²⁶ C. R. 65, 4723 and 4786.

(b) *Questions framed with care*

Thereupon the following proceedings were had:

Senator WALSH. 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 on 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 some one 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 Hyas 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 Senate²⁸ 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.²⁹ 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.³⁰

(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

²⁸ P. 4722

²⁹ P. 4785

³⁰ P. 4788.

certify the report to the district attorney.³¹ The modified motion was agreed to by roll-call 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.³² There the Court reviewed the entire record. 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.³³ 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 fact finding 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 1128 to 1137 of the Eightieth Congress indicates that the Committee on Un-American Activities has stated with care its authority and the incident which it reports.

8. *Reversable 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.)

³¹ See p. 4790.

³² 279 U. S. 263.

³³ 279 U. S. 288.

APPENDIXES

APPENDIX I

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 four Members of the House and two 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 (see, 1668).

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

APPENDIX 2.

THE CASE OF THADDEUS HYATT

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 Harper's 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 21st 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 Harper's 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 following; 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 was 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' p. 1061).

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. 191).

MARSHALL v. GORDON

213 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).

APPENDIX 4

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 air-mail contracts. Another client, E. 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 air-mail 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.

APPENDIX 5

GERHART EISLER

House Resolution 104, Eightieth 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 said 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. 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 subpena 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 23rd day of January, 1947.

"J. PARNELL THOMAS, Chairman,

Attest:

"JOHN ANDREWS, Clerk."

The said subpena 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 subpena, 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 subpena 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 subpena 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 6

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-ermination; 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 so 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 one of two 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 maladministration; 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 peremptorily 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.

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 aim 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. 1431) (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. 1135. 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 sanction 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 thoughts 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 staunch 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).

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 Twenty-sixth and Twenty-seventh 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 *Cong. Record*, 39th Cong., 1st sess., Feb. 25, 1926, p. 4548.)

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 *Record*, 39th Cong., 1st sess., p. 4548.) (Eberling, p. 146.)

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 Government. (Cong. Rec., 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 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, &c., under consideration and not yet disposed of by the President and Senate (p. 1585).

(P. 1933.)

* * * * 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).



