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THE DUTY OF DISCLOSURE IN PARLIAMENTARY INVESTIGATION: A COMPARATIVE STUDY*

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"... that legalized atrocity, the Congressional investigation, where Congressmen starved of their legitimate food for thought, go on a wild and feverish man-hunt, and do not stop at cannibalism."—W. LIPPMANN, *Public Opinion* (1922).

"Whenever you take away from the legislative body of any country in the world the power of investigation, the power to look into the executive department and every other department of the government, you have taken a full step that will eventually lead into absolute monarchy and destroy any government such as ours."—SENATOR NORRIS, *Congressional Record*, May 6, 1924.

IF OURS is a "government by discussion," all of the partners to the discussion need to know the facts around which that discussion centers.¹ If successful democratic government demands "eternal vigilance," those charged with the exercise of that vigilance must be well aware of the occurrences and movements they are called upon to control.

No parliament can fulfill its basic duties intelligently without ascertainment of facts. While there are various means of obtaining the indispensable information,² parliamentary investigation, which matured with

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¹ For a recent and timely restatement of the democratic process of discussion, taking into account British wartime experiences, see Barker, *Reflections on Government* 36 et seq., 67 (1942). For a critical appraisal of Professor Barker's approach see Holdsworth, *Professor Barker's Reflections on Government*, 59 L.Q. Rev. 33 et seq. (1943).

² See, for an enumeration, Willoughby, *Principles of Legislative Organization and Administration* 176 (1934); and for an inquiry into the usefulness of the various means, the Second Progress Report of the American Political Science Association's Committee on Congress, 36 Am. Pol. Sci. Rev. 1093-4 (1942).

the rise of representative government,³ will remain under every form of representative government an "essential and appropriate auxiliary to the legislative function."⁴ It has been said that the fate of parliamentary inquiry in the different countries and epochs mirrors the development of parliamentary powers.⁵ But the mere right of "naked" inquiries means little if the parliament does not possess the powers necessary to gather all the evidence which a successful investigation requires.⁶ It is thus equally true to say that the extent of the duty to disclose the truth before parliamentary committees is an indication of the actual distribution of influence under a given system of government.

Controversies as to the extent of investigating powers have been concerned almost exclusively with inquiries by which the parliament endeavors to exercise its function as an organ of criticism and control of the executive.⁷

When the parliament wishes to look into responsibility for political and financial scandals, or into the misconduct of public officials, or when it attempts to uncover the reasons for the failure of administrative machinery to work smoothly, the way to the discovery of the truth will often be barred. The need for accurate information will encounter the claim of the citizen to privacy and the request of the administration for secrecy. The immunities granted to the individual by the Bill of Rights and those

³ See Morstein-Marx, *Commissions of Inquiry in Germany*, 30 *Am. Pol. Sci. Rev.* 1134 (1936).

⁴ See *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927); see also Frankfurter, *Hands off the Investigations*, 38 *New Republic* 329-31 (1924), and Herwitz and Mulligan, *The Legislative Investigation Committees*, 33 *Col. L. Rev.* 4 at 27 (1933).

⁵ Zweig, *Die parlamentarische Enquête nach deutschem und österreichischem Recht*, 6 *Zeitschrift für Politik* 267, at 269 (1913).

⁶ See Whitridge, *Legislative Inquests*, 1 *Pol. Sci. Q.* 4 (1886); Bondy, *The Separation of Governmental Powers in History, in Theory, and in the Constitutions* 114 (1896); Galloway, *The Investigative Function of Congress*, 21 *Am. Pol. Sci. Rev.* 50 (1927). Lammers, in 2 *Handbuch des deutschen Staatsrechts* 460 (1932), states that it is the very essence of the "genuine parliamentary right of inquiry" to possess "enforceable powers" to make investigations.

⁷ These inquiries are generally distinguished from those investigations undertaken by parliament to obtain information for the making of laws. See, e.g., Eberling, *Congressional Investigations* 8 (1928); Dimock, *Congressional Investigating Committees* 21 (1929). In France analogous attempts at classifications had been made, the French term for the inquiry into executive matters being "enquête politique"; see Michon, *Des Enquêtes parlementaires* 5 (1890), and Arnitz, *Les Enquêtes parlementaires d'ordre politique* 9 et seq. (1917). This paper will be concerned almost exclusively with investigations of the supervisory type, because the question of the extent of investigating powers has been controversial mostly in the course of those inquiries. See Luce, *Legislative Procedure* 171 (1922): "The few volunteer truth, where the many volunteer wisdom." Similarly McGarry, *The Development of Congressional Investigative Power* 122 (1940), states that in the case of "research" investigations the power to compel disclosures is of much less importance than in "inquisitorial" investigations. His classification coincides to a large extent with the one adopted here.

asked for by the executive power in the name of efficiency will have to be weighed against the demands of the democratic parliament for adequate information and a successful investigation. To rely, in those cases, solely on voluntary testimony from both private witnesses and administrative bureaus will result in flawed and distorted evidence. A parliament which is "meant to be the eyes and the voice . . . of its constituents"⁸ can discharge its informative and supervisory functions only if it sees the facts through its own eyes. But, to do this, parliament must be vested with powers to require testimony and to compel the production of records and papers so that its investigations cannot be thwarted by a rebellious witness or a taciturn official.⁹

This paper proposes to examine the record of the investigating powers of parliament in France and Germany (until the end of the Third French Republic and the First German Republic, respectively) and to confront this record with similar situations in the United States. It is, throughout, a history of the conflict between the claim for civil liberties and the submission to the civic duty of disclosure, between the desire of parliament to get to the facts and the reluctance of the executive to lay them open. It is hoped that this chapter of comparative constitutional law and history will show the political significance of the various enforcement devices which may be placed at the disposal of the investigating committee.¹⁰

I. TESTIMONIAL EVIDENCE

In *France* the right of the legislature to organize inquiries has never found expression in a constitutional provision. "No positive law establishes clearly the scope [of the right of inquiry], its limits, and how it is to be exercised. . . . Those questions have been decided according to custom

⁸ Wilson, *Congressional Government* 303 (1925 ed.). It is known that Wilson claimed that the informing duty of Congress should be preferred even to its legislative duty. As a matter of fact the former is inherent in the latter.

⁹ "The legislative power in a free government . . . has a right and ought to have the means of examining in what manner its laws have been executed." Montesquieu, *Spirit of Laws* Bk XI, c. 6 (transl. 1757). "To deny Congress power to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness." Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 *Harv. L. Rev.* 153, at 221 (1926). The same author, at p. 221, describes it as the foremost function of investigation to "require of senators that they shall be seers."

¹⁰ On the general significance of the difference between common law and civil law countries in regard to the duty of disclosure, see Pekelis, *Legal Techniques and Political Ideologies, A Comparative Study*, 41 *Mich. L. Rev.* 665, especially 668-69, 680-81 (1943); Pekelis, *Administrative Discretion and the Rule of Law*, 10 *Social Research*, especially 33-34 (1943); Krassa, *Interaction of Common Law and Latin Law: Enforcement of Specific Performance in Louisiana and Quebec*, 21 *Canadian Bar Rev.* 337-68 (1943). The three mentioned papers are concerned with the principal topics of the Research Project of which this article is a collateral study.

and according to a series of rulings by the Houses or by the inquiring committees which solved the controversial points as they arose. . . ."¹¹

The emergence of parliamentary investigations in France was closely connected with the growth of representative government.¹² The right of inquiry first found recognition, however slowly, during the period of the Restoration, through a deliberate adaptation of the English practice.¹³

This right has always been considered as inherent in the legislative power of the *British* Parliament and exercised by all the *American* legislatures since earliest colonial times.¹⁴ It seems to have been asserted and exercised first by the House of Representatives in 1792.¹⁵ Since then the practice of investigation has never been interrupted.

In *France* the institution of investigation was not only much younger, its development was also less steady. Exercised under the monarchy of July (1830-1848), parliamentary investigations were resorted to only during the first year of the precarious Second Republic (1848-1851); interrupted by the dictatorship of Napoleon III, it was revived at the end of the Second Empire, along with the parliamentary right of interpellation and the principle of ministerial responsibility. Throughout the period of the Third Republic (1870-1940), parliamentary investigations were conducted by both houses—much more frequently, especially during the last decades, by the Chamber of Deputies than by the Senate.¹⁶

¹¹ Deputy Savary, before the Assemblée Nationale, on February 25, 1875, *Journal Officiel* 1478 et seq. (1875). This situation never changed substantially.

¹² We do not deal here with the very powerful investigations launched by the Committee of Public Safety during the French Revolution. For a discussion of their activities, which transgressed the bounds of parliamentary inquiry, see 2 Esmein, *Eléments de droit constitutionnel français et comparé* 508 (1928).

¹³ See Joseph-Barthélémy, *Introduction du régime parlementaire sous Louis XVIII et Charles X* 246-51 (1904).

¹⁴ See *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927), and Cushing, *Elements of the Law and Practice of Legislative Assemblies in the U.S.A.* 253-59 (9th ed. 1874). A very complete account of the history of investigation in colonial times is given by Eberling, *supra*, note 7, at p. 17 et seq., and by Landis, *supra*, note 9, at p. 169. For details as to the state legislatures, see Whitridge, *supra*, note 6, at p. 84; Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. Pa. L. R. 691, at 711-25 (1926), and Hervitz and Mulligan, *supra*, note 4, at p. 1 et seq. This paper, so far as it deals with American law, will be concerned mainly with the investigations of either House of Congress.

¹⁵ 2d Congress 3 *Congr. Annals*, 490-94. Frankfurter, *supra*, note 4, at p. 329, maintains that the power was claimed as early as 1789.

¹⁶ In the United States, the opposite development has been noted. During President Roosevelt's first term, one hundred and four investigations were initiated by the Senate, as against forty-seven by the House of Representatives; of the latter, only two could be considered as checks on the Executive. See McGeary, *Congressional Investigation during Franklin D. Roosevelt's First Term*, 31 *Am. Pol. Sci. Rev.* 687 (1937). For the decline of House investigation, see also a letter by Senator Walsh, quoted by Eberling, *supra*, note 7, at p. 280, and Rog-

As early as 1826, a French writer stated that so long as the committees did not have the power, which obtained in England, to compel sworn testimony, but were dependent on voluntary information, the results of investigation would necessarily be meager. He concluded that only a law could give those investigating powers to the committees.¹⁷ Discussion of the powers of the committees over persons and papers has not abated in the ensuing one hundred and ten years.

There had been a few investigating committees to which the assembly creating them granted broad powers to compel witnesses to appear, testify, and deliver those papers which the committee deemed necessary for the elucidation of the facts. As there was no general statute, special legislative action was taken in every instance in which the parliament wished to confer those powers. This was done in the following cases: (1) The commission instituted by the Chamber on August 13, 1830, and provided with the necessary powers on August 20, 1830, to investigate the unconstitutional deeds of the ministers of Charles X, who had been dethroned by the revolution of July.¹⁸ (2) The committee charged by the Constituent Assembly on June 26, 1848, to investigate the origins of the bloodily quelled insurrection of June, 1848, in Paris.¹⁹ (3) The committee organized by the National Assembly on April 6, 1871, to investigate and control contracts for war supplies.²⁰ And, finally, (4) the committee charged by the same assembly on June 16, 1871, to investigate the insurrection of March, in which the "Commune" of Paris had originated.²¹

All of these investigations were born out of periods of emergency: counterrevolution, revolution, war. Three of them were, moreover, set up not by ordinary parliaments, but by national conventions elected to provide the country with a new constitution, and therefore entrusted with

ers, *The American Senate* 202 (1926). 1 Bryce, *The American Commonwealth* 161 (1914 ed.), had already noticed certain flaws in House investigations. The different development in the French and the American democracies is explained by the different structure of the lower Houses in the two republics. In France the more progressive Chamber of Deputies was more often at odds with the administration than was the conservative Senate, which also tried, successfully, to keep aloof from political scandals. In the House of Representatives, party government is usually strong enough to prevent embarrassing inquiries into executive performance. See Hasbrouck, *Party Government in the House of Representatives* 61 (1927). The picture changes only when an administration faces a hostile House, as in the last two years of Wilson's second term. It is easily predictable that the number of House investigations will also increase considerably during the sessions of the 78th Congress.

¹⁷ Duvergier de Hauranne, 1 *De l'Ordre légal en France et des abus d'autorité* 118 (1826).

¹⁸ *Moniteur Universel* 901-2, 940 (1830).

¹⁹ *Compte-Rendu des séances de l'Assemblée Nationale* 208 (1838).

²⁰ *Journal Officiel* 446 (1871).

²¹ *Ibid.*, at 1407.

all powers required by a period of constitutional vacuum. In such a situation, but only in such a situation,²² the investigations of the parliament could be conducted with at least part of the powers ordinarily exercised by committees of inquiry in England and the United States.

Save for the four exceptional cases mentioned, none of the investigating committees of the French parliaments²³ could obtain any testimony which was not given voluntarily. "We knew perfectly well," said the president of a parliamentary investigating committee in 1878, "that we cannot, that the law would not permit us to, compel citizens to appear before us." He went on to describe the consequences of the lack of every power to punish for contumacious behavior: the committee had sent out "polite letters" inviting persons to testify, and had received answers which were "utterly disgraceful." Finally the committee, fearing to endanger the dignity of parliament, gave up, and heard only evidence which could be obtained from friendly elements.²⁴ One can easily imagine the extent to which such a state of affairs furthered the discovery of the truth.

It was this very statement, moreover, which gave to a judicial decision, never overruled, the possibility of stating that persons testifying before investigating committees did not have the legal character of witnesses because they could not be compelled to testify.²⁵

²² Arnitz, *supra*, note 7, at p. 77, warns against drawing any conclusions from the powers obtained by these committees for ordinary investigations. When the deputy Savary, in his speech mentioned at note 11, *supra*, tried to infer from these precedents that there was a strong tradition for giving the committees the right to compel testimony, he intentionally refrained from making the distinction between periods of normalcy and periods of emergency. By doing so, he hoped to induce his colleagues to increase the wholly insufficient powers of a committee investigating the conspiratorial activities of the Bonapartists in 1874. His attempt was unsuccessful. See *Journal Officiel* 1482 (1875).

²³ By far the most complete, though not exhaustive, enumeration of parliamentary inquiries in France is given in Lafont, *Rapport général fait au nom de la Commission d'Enquête chargée de rechercher toutes les responsabilités politiques et administratives encourues depuis l'origine des affaires Stavisky*, *Chambre des Députés, Annex au procès verbal de la séance du 7 mars 1935* No. 4886 13-34 (hereafter quoted as *Lafont, Rapport*). Arnitz, *supra*, note 7 *passim*, gives a detailed description of only the most important investigations.

²⁴ Chamber Session of June 3, 1878, *Journal Officiel* 6211 (1878). Similar, though less striking, examples are given by Michon, *supra*, note 7, at p. 57-8.

²⁵ *Labachie v. Moreau*, Court of Appeals of Bordeaux, July 26, 1879, *Sirey* 1879, 2. 223-6. The decision dealt primarily with the question whether a person testifying before a parliamentary committee could be tried for a calumnious statement contained in his testimony. The question of the obligation to testify was treated only incidentally. The court asserted that according to a general principle of French law those who testify as witnesses could not, so long as they did not give false testimony, be punished for its content. But for persons testifying before parliamentary committees this rule could not apply because they were not to be considered as witnesses. The note by Labbé in *Sirey*, *loc. cit.*, is critical of the court's conclusion. He explicitly concedes, however, that without a special law no witness could be compelled to appear before an investigating committee. For a favorable appraisal of the decision, see 4 Duguit, *Traité de droit constitutionnel* 396-7 (1924).

Consequently, those who chose to testify before a parliamentary committee had none of the duties of a witness before a court. They were not only free to lie and to take or refuse to take the oath, as they pleased. Even when swearing to a false statement, they could not be punished for false testimony or perjury.²⁶ Since the last two decades of the nineteenth century, it has been customary for witnesses to take the oath,²⁷ but this was done solely in the hope that the more solemn form would induce the witnesses to speak the truth.²⁸ When this hope remained unfulfilled, nothing could be done about it.

For *Congressional* investigations it had always been considered a matter of course that the committees should be vested with the right to send for persons and papers, and that such right could be enforced by the exercise of contempt powers.²⁹ "Experience has taught that mere requests for . . . information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed."³⁰ Earlier the power to punish a person not a member for contempt had been considered by the Supreme Court as an "implied" power of Congress; without such a power the legislature would be "exposed to every indignity and interruption that rudeness, caprice or even conspiracy may mediate against it."³¹

²⁶ See the statement of the Minister of Justice in session of June 24, 1904. *Journal Officiel, Débats de la Chambre des Députés*, quoted hereafter J. O. *Débats Ch.* 1651, and Senator Trouillot in session of March 20, 1914, *Journal Officiel, Débats du Sénat*, quoted hereafter J. O. *Débats Sén.* 442.

²⁷ For examples, see Pierre, *Traité de droit politique, électoral et parlementaire* 691 (5th ed. 1919). This work by the Secretary General of the Presidency of the Chamber of Deputies is invaluable for the extensive and otherwise unobtainable source material on parliamentary investigation. For an appraisal of Pierre's work, see Gooch, *Eugène Pierre*, 41 *Pol. Sci. Q.* 436-52 (1926).

²⁸ See Coustis de la Rivière, *Les Commissions parlementaires d'enquête et la séparation des pouvoirs* 34 (1926).

²⁹ Landis, *supra*, note 9, at p. 313 draws attention to the fact that the Supreme Court of the United States on no occasion deemed it necessary to state that Congress, during a legitimate investigation, had the right to send for persons and papers. To such an extent was this right considered firmly rooted in history. One of the earliest cases in which a witness was committed to the custody of the sergeant-at-arms of the House of Representatives occurred in 1812, when one Rounsavell declined to answer a question put to him. See 3 *Hinds' Precedents of the House of Representatives of the United States* 1-2 (1907). Colonial traditions are also rich in examples of the jailing of recalcitrant witnesses. See Eberling, *supra*, note 7, at p. 19-22. Congress refrains from granting contempt powers only in those few instances in which the investigation serves purely educational purposes. See Galloway, *Investigation, Governmental*, 8 *Encyc. Soc. Sci.* 252 (1937).

³⁰ *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). Galloway, *supra*, note 6, at p. 60, defines the contempt powers as "corollary" to the power of investigation.

³¹ See *Anderson v. Dunn*, 6 Wheat. (U.S.) 204, 228 (1821). See, also, *In re Falvey*, 7 Wis. 630, 635 (1858). ". . . there must be some way of compelling the attendance of witnesses be-

That the contempt power of the Senate should rank high above the usual contempt power of the courts was announced from the Tribune of the Senate. "A contempt of a court, however humble that court may be, is always a matter of supreme importance. A contempt of this high tribunal can not be measured by any words."³²

It is well known that witnesses on whom a subpoena has been served by an investigating committee and who fail to appear or answer are usually taken into custody by the sergeant-at-arms; they are discharged only after purging themselves by consenting to answer the questions put to them. Persons who answer disrespectfully are usually treated in the same way; their discharge is ordered upon apology.³³ When a witness apparently testifies falsely, the House frequently transmits its records to the district attorney, whereupon the grand jury may indict the witness for perjury.³⁴

In a significant decision of the last decade, the Supreme Court strengthened the investigatory power of Congress so as to include penalties for "past contempt": Punishment is not confined to purposes of coercion, but may be employed also against obstructions which have ceased or whose removal has become impossible.³⁵

On the other hand it has been asserted that in spite of these sweeping contempt powers, a determined witness is still in a position to challenge successfully, by means of a writ of habeas corpus, a committee's attempt

fore the committee, and to give evidence. Otherwise the whole investigation might be obstructed, at the outset. . . ." For a good analysis of the leading contempt cases, see Luce, *Legislative Assemblies* 500 et seq. (1924).

³² Senator Walsh, 68th Congr. 1st sess. Record 4788. That the Senator designated the investigating Senate as a "high tribunal" was evidently no more than a rhetorical figure. But when the case then discussed came before the courts, the Supreme Court affirmed the judgment below, which had sentenced the witness to jail for three months and to pay a fine of \$500. See *Sinclair v. United States*, 279 U.S. 263 (1929); similarly placing the contempt powers of Congress above those of the courts, Judge New, 44th Congr. 1st sess. Record 2009. For an earlier statement in the House, see 35th Cong. 1st sess. Globe 686: "And how can [this committee] investigate if the House has no power to compel a witness to testify to facts within his knowledge which are indispensable to a proper understanding of the matter to be investigated?"

³³ For a case of lack of respect in 1875, see 3 Hinds' Precedents 44 (1907). For a contrasting situation in France, see above, at note 24.

³⁴ See 3 Hinds' Precedents 125 (1907). For recent cases of punishment for false testimony before an investigating committee, see *Seymour v. United States*, 77 F. 2d 577 (1935); *United States v. Norris*, 300 U.S. 564 (1937), reversing 86 F. 2d 379 (1936) (witness's conviction for perjury was upheld, although he had recanted his false statements before the investigation was over). In *United States v. Creech*, 21 F. Supp. 439 (1937), an indictment against Creech for the same offense was held good on demurrer; earlier cases were cited.

³⁵ See *Journey v. MacCracken*, 294 U.S. 125, 150, 152 (1935).

to discover the truth.³⁶ It must certainly be admitted that the case of Daugherty had a much greater importance under the aspect of broad principles outlined on that occasion by the Supreme Court than for the disclosure of misconduct of certain government officials. While the witness had been discharged by the district court from a one-month custody under attachment in 1924, without making the statement he had been asked to give, the reversal of this order was pronounced only in 1927, at a time when the investigation had long since ceased.³⁷

Such a case, however, must be deemed an exception.³⁸ It has frequently been stated that a witness faced with the stringent methods of inquiry such as practiced by the majority of investigating committees is not likely to choose refusal to answer; "in the present state of public opinion he has small hopes of saving his reputation if he defies the Senate inquisition . . . to a large part of the public he appears at once as a man who is hiding a shameful secret."³⁹

In *France* public opinion seems never to have protested against the complete lack of powers by investigating committees until 1892. Only the popular emotion provoked by the Panama Scandal was strong enough to induce a deputy to ask that the committee charged to inquire into the responsibility for the disgraceful events be granted the power to compel testimony. He asserted that parliamentary investigations without that power would yield insufficient results or none at all.⁴⁰ While various articles in the daily press, quoted at the tribune of the Chamber, emphasized that the investigating committee possessed only moral powers, a member of the Panama committee frankly described how far those "moral powers" went. He pictured how witnesses, having sworn to speak nothing but the truth, lied cynically, certain of their impunity; how others, who could have revealed all the decisive facts, refused to appear. He cited with admiration the examples of investigating powers in England and the

³⁶ See McBain, Congress, Inquiries and the Constitution, New York Times, March 11, 1928, IX, 6: 1-8 Galloway, *supra*, note 29, at 255.

³⁷ See 6 Cannon's Precedents of the House of Representatives of the United States 482-7 (1936). It is to be expected that after the decision in *McGrain v. Daugherty* declared legitimate a wide range of investigations (see *infra*, after note 111) the lower courts would rarely find occasion to grant a writ of habeas corpus to a witness held in contempt by Congress.

³⁸ For other instances of defiance (by Bishop Cannon and other leaders of the "Anti-Smith Democrats") see 6 Cannon, Precedents 499-503 (1936).

³⁹ Lippmann, The Senate Inquisition, 84 Forum 129, at p. 130 (1930); similarly Coudert, Congressional Inquisition vs. Individual Liberty, 15 Va. L. Rev. 537, at 550 (1929).

⁴⁰ Pourquery de Boisserin, in the session of November 22, 1892, J. O. Débats Ch. 1660 (1892).

United States, "countries which have nothing to envy in other countries of liberty."⁴¹ But the Minister of Justice successfully urged the rejection of a bill which would have assimilated witnesses before a committee to those before a court, by calling this attempt a threat to individual liberty and to the inviolability of the home.⁴² Personal freedom versus effective investigation became the issue in all subsequent discussions on parliamentary inquiry.

More than twenty years later, the so-called Rochette affair revealed both the futility of a powerless investigation and the gangrene of the judiciary and the political machine to such an extent that a modification of the law was obtained. A preliminary inquiry had been unable to clarify how M. Rochette, a "financier on the edge of respectability," had been able to obtain an adjournment of his trial, permitting him to continue his operations to the detriment of the saving public. In the courthouse, a few miles from the Chamber, it was an open secret that the public prosecutor had, in a personal note, confessed to have conceded the adjournment under pressure from both the Prime Minister and the Minister of Finance. But before the parliamentary commission, the Prime Minister, after an outcry of indignation, declared that he was appearing before the committee out of sheer politeness, and refused to enter into details;⁴³ the public prosecutor declined to speak about certain facts which he considered it contrary to his duty to reveal,⁴⁴ and the president of the Criminal Court of Appeal "spoke clearly only to say exactly the contrary of the truth."⁴⁵ It was not until one Minister, Barthou, had stolen the secret document from another, Briand, and the wife of a third, Caillaux, had murdered a journalist trying to publish the facts, and when, perhaps most important, it was the eve of general elections in an outraged country, that the legislators deemed it advisable to grant a certain increase of the investigating powers.⁴⁶

⁴¹ Gauthier de Clagny, in the session of December 15, 1892, *ibid.* 1819-20.

⁴² *Ibid.*, 1817. The bill was defeated by a majority of only six votes.

⁴³ See Pierre, *supra*, note 27, *Supplément* 810 (5th ed. 1924).

⁴⁴ See Pierre, *ibid.*, 817, and Raphael, *The Caillaux Drama* 234, 236 (1914).

⁴⁵ See Jaurès in the session of March 20, 1912, *J. O. Débats Ch.* 848 (1912), and in the session of April 3, 1914, *J. O. Débats Ch.* 2308 (1914), and Delahaye in the session of April 2, 1914, *ibid.*, 2230.

⁴⁶ That to a large extent the resistance of the government was weakened by the fact that in the course of the inquiry the adversaries of an income tax within the cabinet hoped to compromise its advocates, cannot be discussed here. On this point, see Paix-Séailles, Jaurès et Caillaux 107 et seq. (1918).

Even then, however, the bill proposed by the Chamber was changed substantially by the Senate. The Chamber had proposed to give the committee "full judicial powers," including those of search and seizure.⁴⁷ The Senate, it is true, extended the modification of legislation possibly to other committees than that concerned with the Rochette affair, so that the new statute would not have the appearance of an *ex post facto* law. But at the same time it substantially curtailed the "judicial powers" granted by the Chamber. The law as finally enacted on March 23, 1914,⁴⁸ regulated only the question of testimonial evidence. Henceforth a recalcitrant witness could be fined from 100 to 1,000 francs; he could also be arrested and brought before the committee. False testimony would be punished according to the penal code. Fine and punishment could not be inflicted by the committee itself, however; it must apply to the courts therefor. Moreover, these special investigating powers were available only to those committees to which they were explicitly granted by one of the two houses. This last provision later proved particularly helpful for denying on frequent occasions the means of an effective investigation. At the time of the enactment of the law, a senator declared that it was meant only to differentiate the political inquiries proper from inquiries into purely economic matters, for which those powers would not be needed.⁴⁹

The Congressional enactment corresponding to the French Statute of 1914 is the act "more effectually to enforce the attendance of witnesses . . . and to compel them to discover testimony" of January 24, 1857.⁵⁰ The origin of this statute had been rather similar to that of the so-called Rochette Law. In both cases the obstinacy of witnesses forced the hands of the legislators.⁵¹ A comparison of both statutes shows, however, that the powers of the American Congress were essentially broader

⁴⁷ Session of March 17, 1914. J. O. Débats Ch. 1700 (1914).

⁴⁸ J. O. 2650 (1914).

⁴⁹ Trouillot in the session of March 20, 1914, J. O. Débats Sén. 442 (1914). In view of later developments (see *infra*, at note 123), the sincerity of this statement might be doubted. We are probably faced here with one more example of the legislative technique in which the French Senate excelled: to blunt reform legislation which it could not resist by some devices, apparently technical, which actually turned out to be essential modifications. For a particularly illuminating study of the role of the French Senate between the two World Wars, see Lindsay Rogers, Mr. Blum and the French Senate, 52 Pol. Sci. Q. 321-9 (1937). For the period before 1914, see J. Barthélémy, Les Résistances du Sénat, 20 Revue du Droit Public et de la Science Politique 371, at p. 396 et *passim* (1913).

⁵⁰ Now embodied (with some significant changes; see especially below at notes 94 et seq.) in §§ 191-194, 28 U.S.C.A. § 634.

⁵¹ For the interesting legislative history of the statute of 1857, see Eberling, *supra*, note 7, at 302, 323.

than those granted in France. First of all, the contumacious witness before the French parliament could only be condemned to pay a modest fine, while those who refused to testify or produce papers before either House of Congress were liable to a much higher fine and (not or) to imprisonment up to one year. Moreover, the French statute had to be made applicable to every investigation by a special decision of Chamber or Senate. Most important: the statute of 1857 only added to already existing enforcement possibilities. Therefore the punishment for common law contempt and for the misdemeanor created by the statute remained co-existing.⁵²

When certain difficulties arose in both the United States and France in the enforcement through the courts of the statutory punishment of witnesses, it was possible for Congress to fall back on its contempt power; such a possibility did not exist for the French parliament.

As far as can be seen,⁵³ the new French law did not do much, even in the second Rochette investigation, to elucidate facts which were not by then universally known.⁵⁴ The final report⁵⁵ had to state that there was still a discrepancy between the declarations of two eminent witnesses, although both of them had taken the oath. Actually many more contradictions existed between the sworn statements, and in the conviction of a member of the commission the President of the Court of Appeals had again

⁵² For the clearest statement to this effect see *In re Chapman*, 166 U.S. 661, 672 (1897): "... 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." Eberling, *supra*, note 7, at p. 318, contrasts the "coercive" power of contempt as against the statutory punitive power. Since the possibility of punishing for past contempt was recognized by the Supreme Court (see above, at note 35), it is hardly possible to designate the contempt powers as merely coercive any longer. But this does not change the applicability of both common law and statutory punishment to a reluctant witness.

⁵³ As hearings of investigating committees are not public in France, no precise record of the proceedings can be obtained. The testimony in the Rochette case had been communicated to the members of the parliament, but it had been deemed advisable not to publish it. See J. O. Documents Parlementaires, Chambre des Députés quoted hereafter as Doc. Ch. 1581 (1914). Valuable material is offered in a pamphlet written by one of the members of the committee, Barrès, *Dans le cloaque. Notes d'un membre de la Commission d'Enquête sur l'Affaire Rochette* (1914), and by Raphael, *supra*, note 44, at pp. 230-250. In general, a certain, if not complete, impression of the proceedings can be gathered from the daily press, because the committees very often gave to the press stenographic minutes of the proceedings. For more details on this point, see Pierre, *supra*, note 27, Supplém. 819 (5th ed. 1924).

⁵⁴ The eminent witnesses avowed, where they could not do otherwise, that they had lied to the first commission. See Barrès, *supra*, note 53, at p. 18. "A comparison of what they said in 1912 [during the first parliamentary investigation] and what they were obliged to say in 1914 is enough to move any lover of France to tears." Raphael, *supra*, note 44, at p. 230.

⁵⁵ J. O. Doc. Ch. 1597-8 (1914).

indulged in the most "unbelievable false testimony."⁵⁶ The measures which had been provided for in such cases by the law enacted a few days before were not taken.⁵⁷

The report conceded also that even the new investigation had been unable to overcome the resistance of a lawyer, M. Bernard, who hid his knowledge of essential facts behind the cloak of professional secrecy.

If Maître Bernard had presented himself before a Congressional committee alleging that he was unable or unwilling to divulge the secrets of his clients, communicated to him in professional confidence, he would have been found guilty of contempt. It was settled relatively early by *American* courts that an investigating committee had the right to proceed against a lawyer who withheld information he had obtained from his clients.⁵⁸ This principle has been consistently maintained by Congress.⁵⁹ Earlier the House had proceeded in the same way against a journalist who had refused to answer because he did not wish to commit "a violation of confidence."⁶⁰ The right of Congress to override the objection of professional secrecy arising out of the lawyer-client relationship has also been sustained in a recent decision.⁶¹ French investigations, on the other hand, before as well as after the enactment of the new statute, never dared, in their search for the truth, to make use of the knowledge of lawyers.

Upon the enactment of the *French* law of 1914, it had been expected that the new powers would be conferred on the investigating committee in every case of political inquiry.⁶² Actually, since the Rochette affair,

⁵⁶ See Barrès, *supra*, note 53, at p. 27, 36, 44, and Delahaye, in the session of April 2, 1914, J. O. Débats Ch. 2230.

⁵⁷ See the reproaches addressed as to this point to Jaurès, president of the committee, by Delahaye, in the session of April 2, 1914, J. O. Débats Ch. 2233 (1914). It has been maintained (see Brogan, *The Development of Modern France 1870-1939* 451 et seq. (1940); Daudet, *Panorama de la III^e République 1870-1936* 204-51 (1936); Michon, *La Préparation à la guerre. La Loi de Trois Ans 192-3, 208-9* (1935) that the seemingly utter putrefaction of French political life as revealed by the Caillaux-Rochette affair had some weight in the readiness of Germany to wage the World War. The merits of this contention cannot be discussed here. It is undoubtedly true that the usefulness of watching the moral conditions of a future military foe was not discovered first by the modern specialists in moral warfare.

⁵⁸ *Stewart v. Blaine*, 1 MacArthur (D.C.) 453, 458 (1874).

⁵⁹ See, e.g., 44th Congr. 1st sess. Record 2491. "Here the maxim applies," it was said, "*Salus populi suprema lex.*"

⁶⁰ 34th Cong. 3d sess. Globe 403 et seq.

⁶¹ *Jurney v. MacCracken*, 294 U.S. 125, 144 (1935).

⁶² See the declarations in the Senate mentioned above at note 43, and Arnitz, *supra*, note 7, at p. 221: "One must fear that the legislature will esteem it indispensable, every time it opens an inquiry, to apply the law of March 23, which is ready and which can be put in action simply by adding one word to the decree ordering the inquiry."

between 1914 and 1939, in only fifteen cases were the powers of the law of 1914 granted, while the total number of investigations undertaken by the Senate and the Chamber amounted to about sixty.⁶³ Seven of the fifteen committees entitled to make use of the broader powers were directly or indirectly related to the events of the World War.⁶⁴ In view of the intimate relation of those investigations to the supreme national emergency, neither the executive nor parliament could resist the increased investigating powers granted by the law of 1914. Moreover, in none of these inquiries was the committee compelled to exercise such powers. It seems that on no more than two occasions did an investigating committee actually attempt to proceed against recalcitrant witnesses. In both instances, the courts, backed by public opinion, largely defeated the purposes of even so cautious a law as the statute of 1914.

In 1924, during an inquiry into the financial backing of previous elections, the committee applied to the courts for the punishment of well-known politicians, among them a vice-president of the Senate, who had refused to testify under oath. Most violent protests arose from almost all sides. The professor of administrative law and dean of the Law School in Paris, Berthélémy, undertook to "stigmatize" the "imprudent" law of 1914. "It is altogether abnormal and contrary to the supreme principles of our public law, that, in order to further the discovery of the truth, these improvised judges, whose impartiality is highly doubtful, should be armed against citizens with powers given by our laws only to judicial officers for the exercise of their functions."⁶⁵ Duguit, foremost authority on French constitutional law, and dean of the Law School of Bordeaux, had criticized the law from the very outset.⁶⁶ He had argued that because

⁶³ The total number of investigations cannot be definitely ascertained. In about three-fourths of the sixty cases mentioned no special inquiry committee was organized; but the right to inquire (*droit d'enquête*) was granted to one of the standing committees of the two houses. In such cases it is generally impossible to determine whether investigations actually took place.

⁶⁴ The Senate and the two Chamber committees investigating war contracts (see session of December 19, 1916, *J. O. Débats Sén.* 1065 (1916); sessions of December 29, 1916 and March 2, 1920, *J. O. Débats Ch.* 3864 (1916) and 394 (1920)); the committee investigating conditions in the metal industry at the end of the war (session of March 19, 1919, *ibid.* 1310) (1919); the inquiry into the services of the Ministry of Wartime Food Supply (session of August 7, 1919, *ibid.* 3901); the inquiry into wartime speculation (session of February 12, 1924, *ibid.* 672); and the committee investigating the situation of the territory formerly held by the Germans (session of July 31, 1924, *ibid.* 2892).

⁶⁵ *Les Limites du pouvoir législatif*, 125 *Revue Politique et Parlementaire* 355 et seq. (1925).

⁶⁶ See 4 *Traité de droit constitutionnel* 398 et seq. (1924). Equally hostile after the enactment of the law, and with an argumentation similar to that of Duguit, was Arnitz, *supra*, note 7, at p. 228 et seq. More favorable, though also exhorting the committees to make moderate use of their powers, Bonnard, *Les Pouvoirs judiciaires des commissions d'enquête parlementaire et la loi du 23 mars 1914*, 31 *Revue du Droit Public* 386, at p. 409 (1914).

the law of 1914 had vested the committees with judicial powers, parliamentary investigations would necessarily encroach upon the domain of the judiciary; where the committee had the same powers as the courts, an inquiry into matters already within the jurisdiction of the courts would easily create confusion and anarchy.⁶⁷ Duguít had recommended that the parliament exercise extreme prudence in the application of the law, and advised the government, if need be, to put the question of confidence before the parliament rather than to have granted to committee the powers of the 1914 law. In the discussion which arose in 1925, Duguít declared it particularly inconceivable that members of the legislature should have the right to impose the sacred oath upon witnesses.⁶⁸ Paul Reynaud, politician and eminent lawyer, considered the duty to testify under oath pursuant to the wishes of a parliamentary majority a curtailment of the rights of the citizen. To him the issue at stake was the "defense of civil liberties." "The judge," he wrote, "can make use of the oath only if a crime has been committed; he cannot undertake, out of mere curiosity or passion, investigations into the conscience of the citizens."⁶⁹ Both Berthélemy and Duguít, as well as other teachers of constitutional law, held the law of 1914 unconstitutional as a violation of the principle of separation of powers; it should not, therefore, be applied by the courts.⁷⁰

In *American* law, also, the question of the contempt power of Congress had been discussed frequently in terms of the problem of the separation of powers. In our opinion this approach has very often beclouded the issue of the investigative powers of the legislature;⁷¹ it did not, however, lead finally to a curtailment of these powers.

Those who consider the right of Congress to punish rebellious witnesses in the course of investigations as a "judicial" power are forced to conceive of the exercise of this right as an infringement upon the doctrine of the separation of powers of government. According to the individual outlook of the observer, the actual practice of both houses is regarded as "in de-

⁶⁷ Why this fear arose as soon as the parliamentary committee obtained larger investigating powers is almost beyond comprehension. The same author (*ibid.* 394) had explained that a parliamentary inquiry was entitled to investigate almost everything so long as it did not attempt to reach judicial decisions. Evidently Duguít held this to be true only so long as the inquiry was actually powerless to discover the true facts.

⁶⁸ In answer to an inquiry arranged on this occasion by the newspaper *Le Temps*, November 19, 1925.

⁶⁹ *Ibid.*, November 14, 1925.

⁷⁰ *Ibid.*, November 14, 1925, November 15, 19, and 29, 1925.

⁷¹ See, for a similar statement, Herwitz and Mulligan, *supra*, note 4 at p. 6.

fiance of the letter of the Constitution,"⁷² as a course leading to unconstitutional tyranny,⁷³ or as just another example of the fact that a watertight separation of governmental functions does not exist and that the legislative department has always exercised certain judicial powers.⁷⁴

Now, it is undeniable that Congress sometimes exercises judicial functions delegated by the Constitution, e.g., when judging the election and qualification of its own members, or when impeaching officers of the government. But when organizing investigations, Congress acts in fulfillment of its legislative function (either law-making or supervisory). If the legislature is conceded to have, for the efficient conduct of its investigations, the right to punish for contempt,⁷⁵ this right is then purely "ancillary and subordinate"⁷⁶ to the legislative function. The mere fact that contempt powers are more frequently exercised by the courts does not make this right a judicial one when it is exercised by a legislature in pursuance of its legislative function.⁷⁷

This has also been constantly held true by the Supreme Court,⁷⁸ although its decision in regard to the investigating powers has sometimes been interpreted in the light of the separation-of-powers doctrine.⁷⁹

⁷² Eberling, *supra*, note 7, at p. 276.

⁷³ Such complaints were sometimes voiced by a minority in Congress when the use of contempt powers was suggested. See, e.g., 35th Congr. 1st sess. *Globe* 686-689.

⁷⁴ See Whitridge, *Legislative Inquests*, 1 *Pol. Sci. Q.* 85 (1886).

⁷⁵ See *above*, at notes 31 and 32.

⁷⁶ See *Marshall v. Gordon*, 243 U.S. 521, 548 (1917). See also Landis, *supra*, note 9, at p. 160. "Its origin and its exercise are either necessary for the self-defense of the legislature or necessary for its efficient functioning."

⁷⁷ See Wigmore, in a note in 19 *Ill. L. Rev.* 452 (1925): "The compulsion to give testimony is a detail of the judicial power,—but not of the judicial power only. Why it is not also a detail of the legislative power?" 3 Willoughby, *Constitutional Law* 1619 (1929): "In very many cases the propriety of the exercise of a power by a given department does not depend upon whether in its essential nature the power is executive, legislative or judicial, but whether it has been specifically vested by the Constitution in that department or whether it is properly incidental to the performance of the appropriate functions of the department in whose hand its exercise has been given."

⁷⁸ See *Marshall v. Gordon*, 243 U.S. 521, 546 (1917): "The broad boundary line which separates the limited implied power to deal with classes of acts as contempts for self-preservation and the comprehensive legislative power to provide by law for punishment for wrongful acts. . . ." The character of self-preservation is particularly stressed in *Anderson v. Dunn*, 6 Wheat. (U.S.) 204, 227 (1821) and in *In re Chapman*, 166 U.S. 661, 668 (1897).

⁷⁹ This was particularly the case for the discussion aroused by *Kilbourn v. Thompson*, 103 U.S. 168 (1880). See, e.g., Bondy, *supra*, note 6, at p. 114. It is true that the decision denied to a particular investigating committee the right to jail a contemptuous witness because the investigation had violated the principle of the separation of powers. But the court held this to be true because the investigations which the committee was directed to make were judicial in character. For this reason, it was not deemed necessary to discuss the question whether or not the power "attempted to be exercised," e.g., the power to punish a witness, was entrusted only

In American law as well as under other constitutional systems, investigating committees, so long as they gather facts and do not pronounce judgment, are not arrogating judicial rights, even when for the gathering of evidence they use compulsory process. The use of the latter can be regarded only as a matter of self-defense of the legislature. While this right to self-defense was recognized in American constitutional law, its very concept was unknown on the Continent. Had it been otherwise, it would have been impossible to attack the investigative powers in the name of the Montesquieu principle.

That Berthélémy and Duguit regarded the *French* statute of 1914 as unconstitutional for its alleged violation of the principle of the separation of powers was extraordinary for a twofold reason: (1) The principle of separation of powers is stated nowhere in the French Constitution of 1875. Nor is there implied any strict delimitation between the various functions of government.⁸⁰ (2) In France, the courts never claimed the right to pass upon the constitutionality of the laws,⁸¹ accordingly the majority of writers rejected the very idea of such a control by the courts.⁸² Only the "Rochette law" and the incidents of 1925 induced the raising of the question; to such an extent did this statute providing the parliamentary committees with a very modest investigating power seem opposed to the fundamentals of French law.

to the judicial department, or could also be exercised by the legislature. It was added (at 193) as a dictum that in the court's opinion this power was judicial, and not legislative. See, however, the decisions quoted *supra*, note 78. For a more detailed discussion of *Kilbourn v. Thompson*, see below at notes 104 et seq.

⁸⁰ 2 Duguit, *Traité de droit constitutionnel* 535-6 (1923), himself had stated that nothing warranted the belief that the constitution intended to embody the "metaphysical theory of the division of sovereignty into distinct powers." Coumoul, *Traité du pouvoir judiciaire, De son rôle constitutionnel et de sa réforme organique* 222 (1911), speaks of the separation of powers as a "principle invoked in support of certain causes, but actually handled with much looseness." (Nonetheless this author is quoted by Berthélémy, *supra*, note 65, at p. 357 in behalf of his thesis.) Joseph-Barthélémy, *Essai sur le travail parlementaire et le système des commissions* 248 (1934), speaks of the separation of powers under the conditions prevailing in France as but a "recipe of political art, that everybody interprets in his own fashion." Accordingly Barthélémy declared that there could be no doubt about the constitutionality of the statute of 1914.

⁸¹ Therefore Duguit, in 4 *Traité de droit constitutionnel* 400 (1924), still concluded that whatever one might think of the Rochette law, it was enacted and valid. Arnitz, *supra*, note 7, at p. 228, in spite of his hostility to the law of 1914, did not conceal that, once enacted, its constitutionality could not be questioned by the courts. How weak the thesis of unconstitutionality was is best demonstrated by Coustis de la Rivière, *supra*, note 28. His doctoral dissertation was evidently written in order to prove the right of the courts to disregard the statute. But his argumentation was extremely contradictory and proved practically nothing. See especially pp. 94-98 and 131-136.

⁸² See 1 Esmein, *Éléments de droit constitutionnel français et comparé* 640-8 (1928); Desfougères, *Le Contrôle judiciaire de la constitutionnalité des lois* 92-121 (1913).

In accordance with long-established practice, the courts however then deemed it necessary to comply with the request of the investigating committee for punishment of the witnesses.⁸³ But this was done only after the attorney general had expressed to the defendants his admiration for their refusal to testify before the committee, and his regret at being forced to ask for the application of the law.⁸⁴ The judgments imposed fines of 300 (inflated) francs upon the wealthy defendants. As these judgments became definite only in the second half of 1926, while the inquiring committee had started its investigations almost two years earlier, it is evident that even the much criticized statute of 1914, by failing to give contempt powers into the hands of the committees, had not actually secured efficient means of discovery. When, in 1926, the witnesses had to pay the fines, the parliamentary majority had again shifted, and nobody wished to importune prominent members of the new majority with questions about the financial sources of the election campaign.

The second occasion on which a committee wished to apply the rights afforded by the statute of 1914 arose during the investigation of the so-called Oustric Scandal. Although the committee had been granted those rights,⁸⁵ it met from the very outset with difficulties which very often could not be overcome. The witnesses frequently complained that they were forced to testify under oath before the commission about the same facts for which they were threatened with criminal prosecution. They spoke of "torture," a journalist of an "intellectual grill-room."⁸⁶ When, finally, one of the witnesses refused to take the oath, and the committee asked the local court to punish him according to the law of 1914, the court refused on the ground that the witness was already under indictment for embezzlement: as a defendant always has the right to refuse any declaration or even to alter the truth, the committee was not entitled to impose any duty of disclosure upon him.⁸⁷ This decision, never over-

⁸³ *Billiet v. Ministère publique*, Cassation, June 11, 1926. *Dalloz-Hebdomad.* 378 (1926), in accordance with the lower courts.

⁸⁴ *Le Temps*, October 25, 1925. The episode is also related by Barthélémy, *supra*, note 80, at p. 248.

⁸⁵ Had not the decision granting them been worded very carefully, the government would have rejected the inquiry and asked for a vote of confidence. See session of November 21, 1930, *J. O. Débats Ch.* 3527 et seq. (1930): "... decided to respect the separation of powers and to leave it to the courts to determine the penal responsibilities involved, decided also to discover the whole truth. . . ." It soon proved difficult to reconcile the two goals.

⁸⁶ See Barthélémy, *supra*, note 80, at p. 249. The oath of the defendant had been abolished in all of Continental Europe at the turn of the 19th century. See Esmein, *A History of Continental Criminal Procedure with Special Reference to France* 225-6, 398 (1913).

⁸⁷ *Paradis*, *Tribunal Correctionnel Seine*, March 16, 1931, *Gazette du Palais* 1931, I, 853-4. The decision is approvingly quoted by Joseph-Barthélémy and Duez, *Traité de droit constitutionnel* 697 (1933), authors who do not question the validity of the statute of 1914. They argue

ruled, brought the 1914 statute to almost complete collapse in a wide range of cases.⁸⁸

Also in the *United States* the privilege against self-incrimination has often been regarded as having a restraining effect on the investigative power of the legislatures. A state court rejected the English rule that the common law privilege against self-incrimination does not relate to the investigations undertaken by Parliament.⁸⁹

Congress had sought relatively early to eliminate this check on its power by introducing in the statute of January 24, 1857,⁹⁰ a provision which fully pardoned witnesses on account of every act to which they testified before the houses of Congress or their committees. By this full immunity the requirements of the Fifth Amendment were undoubtedly fulfilled.⁹¹ It is evident that it was the purpose of this Act to put the strengthening of the powers for the discovery of the truth above all other considerations. But in practice it soon became obvious that this section of the Act of 1857 had overreached itself.⁹² It led to disastrous results in that criminal offenders frequently arranged to be questioned before a Congressional committee about their criminal actions, whereupon the courts had to discharge them from all liability.⁹³ A modification of the statute, passed in 1862, restricted the immunity and provided only that no testimony given during a Congressional investigation should be used as evidence in any criminal proceedings. It was also said that no witness was privileged "to refuse to testify to any fact, or to produce any paper . . . upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous."⁹⁴

that those who are threatened by indictment can, according to the general principles of modern criminal law, never be forced to disclose the truth. Therefore the law of 1914 concerning "witnesses" simply does not apply to them.

⁸⁸ The decision in the *Paradis* case and the general attitude of the courts as described *supra* in the text apparently are not taken sufficiently into account by Galloway when he asserts, *supra*, note 29, at p. 253, that the French legislation provides the least protection to witnesses testifying before investigating committees.

⁸⁹ *Henry Emery's Case*, 107 Mass. 172, 184 (1871). The court argued that while Parliament was above common law, the Massachusetts legislature was under the Constitution.

⁹⁰ See above, at note 50.

⁹¹ *Hale v. Henkel*, 201 U.S. 43, 67 (1906): "The interdiction of the Fifth Amendment operates only where a witness is asked . . . to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply."

⁹² See Eberling, *supra*, note 7, at p. 323. For a detailed history of the statute and its modifications, see *ibid.* Chapter V *passim*.

⁹³ 37th Congress, 2d sess. Globe 431.

⁹⁴ Amd. 12 Stat. 333; 24 Jan. 1862, c. II. For a new embodiment of the statute, see *supra*, note 50.

Also, after this enactment the Senate sometimes denied to a witness the right to refuse an answer which would incriminate him. "We are investigating you and not trying you," replied a committee to a witness who had sought the protection of the Fifth Amendment.⁹⁵ However, an attempt (made in 1876 when another witness tried to thwart an investigation) to return to the original statute was adversely reported by the Senate and acted upon no further.⁹⁶

Since then, an uncertainty has prevailed as to whether the provisions enacted in 1862 suffice to deprive witnesses of the right granted by the Fifth Amendment.⁹⁷ The Supreme Court has never passed on the question explicitly. While it has been frequently ruled that, e.g., in cases of investigations conducted under authority of the Interstate Commerce Act, the immunity must be "complete" in order to permit unrestricted examination,⁹⁸ it has not been discussed whether the Act of 1862 provided a sufficiently "complete" immunity.⁹⁹

This uncertainty has undoubtedly led to a reluctance of Congressional committees to press their demand for testimony from criminal offenders. It seems indeed a more and more generalized practice to do without such testimony.¹⁰⁰ On the other hand, when in an important investigation conducted by the New York state legislature, the issue was faced either to do away with the limitations of the New York Constitution of 1846, Art. I § 6, or to see the investigation blunted, the Assembly did not hesitate to enact legislation providing for the necessary immunity and thus forcing the witnesses to testify.¹⁰¹

Thus the situation regarding the limitations imposed by the privilege against self-incrimination is still strikingly different in France and the United States. In France, the parliamentary committees saw themselves flatly denied the right to question witnesses about facts incriminating them. In the United States, legislative attempts were never abandoned

⁹⁵ 3 Hinds' Precedents 57 (1907).

⁹⁶ 44th Cong. 1st sess. Record 1546-1572.

⁹⁷ See Bryce Hamilton, *The Inquisitorial Power of Congress*, 23 A.B.A.J. 563 (1937).

⁹⁸ See, e.g., *Counselman v. Hitchcock*, 142 U.S. 457, 586 (1892).

⁹⁹ Eberling, *supra*, note 7, at p. 390, doubts the constitutionality of the statutory provisions, which, however, had been sustained in *In re Chapman*, 166 U.S. 661 (1897). What actually seems questionable to this author is probably whether the statute provides sufficient protection to make the Fifth Amendment inapplicable. It is true that a similar provision granting immunity to witnesses before legislative committees, in a Massachusetts statute of March 8, 1871, c. 91, had not been held sufficient protection to make the 12th article of the Massachusetts Declaration of Rights (corresponding to the Fifth Amendment) unavailable (*Henry Emery's Case*, 107 Mass. 172, 185, 186 (1871)).

¹⁰⁰ See Dimock, *supra*, note 7, at p. 157, and Eberling, *supra*, note 7, at p. 339, n. 1.

¹⁰¹ See the Statute of August 28, 1931, (N.Y. Laws Extraord. Sess. c. 773, p. 2367) enacted on the occasion of the investigations of the Hoffstadter Legislative Committee. See also Gal-
loway, quoted *supra*, note 29, at p. 252.

to arrive at least at a balance between the need for accurate information and the privilege against self-incrimination. Very often this balance seems definitely to have been in favor of the investigating powers.

In *France* another witness appearing before the committee investigating the Oustric Scandal declared that he did not wish to testify about personal and private matters. Reminded by the committee that he had taken the oath, he replied that it did not refer to those personal matters,¹⁰² whereupon the matter was pursued no further. Hence it was understandable that when the results of the Oustric investigation were discussed, the president of the committee had to confess that only "in regard to a certain number of questions" had the discovery of the truth been furthered. He added that should another committee on that subject be organized, it should be provided with more powerful means of discovery than its predecessor had had.¹⁰³

The question of "privacy" raised by one of the witnesses before the Oustric committee apparently has been the main issue in the American discussion on the investigative powers. The delimitation of the sphere of legitimate investigation from that of the protected sphere of privacy has repeatedly been attempted by the courts. There are in relation to Congressional investigations sweeping dicta to the effect that neither House "possesses the general power of making inquiry into the private affairs of the citizen,"¹⁰⁴ that "few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."¹⁰⁵ Actually, however, it has never been determined how far this sphere of privacy extended.¹⁰⁶ In a wavering line of decisions,¹⁰⁷

¹⁰² See *Le Temps*, January 10, 1931.

¹⁰³ Session of November 17, 1932. *J. O. Débats* Ch. 3068 (1932).

¹⁰⁴ *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880). "This case," Justice Field later said, "will stand for all time as a bulwark against the invasion of the right of the citizen to protect him in his private affairs against the unlimited scrutiny of investigations by a Congressional committee." See *In re Pacific Railway Commission*, 32 Fed. 241, 253 (1887).

¹⁰⁵ See *Sinclair v. United States*, 279 U.S. 263, 292 (1929). In similar terms the investigating powers of the Interstate Commerce Commission were delimited in *Interstate Commerce Comm. v. Brimson*, 154 U.S. 447, 479 (1894).

¹⁰⁶ As to the vagueness of a general constitutional immunity from investigation into the private sphere, see Mr. Justice Cardozo, dissenting, in *Jones v. Securities and Exchange Comm.*, 298 U.S. 1, 32-3 (1936). Coudert, *supra*, note 39, at p. 342, who is an ardent defender of the right to privacy as opposed to Congressional investigation, concedes that "it may be difficult to define the content of this right," but speaks of "a doctrine of theory and of precedent which has created a domain of individual right against all organs of government."

¹⁰⁷ Cousins, *The Purpose and Scope of Investigations under Legislative Authority*, 26 *Geo. L. J.* 905, at 929 (1938), endeavored to explain the frequent vacillations by the Supreme Court's attitude toward certain changing issues of economic policy.

the only matter clearly defined has been as to which investigations are to be considered legitimate.

The narrowest view was taken by the Supreme Court in the *Kilbourn v. Thompson* case.¹⁰⁸ The matter had come up to the courts upon the refusal of a witness to answer "personal questions" and his subsequent punishment for contempt. The Court held that every investigation, as to which it was not clear from the outset that it could result in "valid legislation," was "fruitless." Since a committee was not entitled to look into the personal affairs of individuals in the course of a "fruitless" investigation, no contempt power could be exercised for such a purpose. The decision was criticized by many, defended by some.¹⁰⁹ It undoubtedly marked the low level of investigative powers. Although the Court never explicitly abandoned its rulings of 1881, cases decided in the succeeding half-century so greatly widened the legitimate scope of investigation that it has been said that *Kilbourn v. Thompson* "may fairly be regarded as overruled."¹¹⁰ In *McGrain v. Daugherty*,¹¹¹ the Supreme Court did not hesitate to declare an investigation legitimate in spite of the fact that the terms of the resolution authorizing it did not disclose a legislative purpose. The Court thought that in cases where the subject to be investigated was a department of the executive (the Department of Justice) the "presumption should be indulged" that the real object was aid in legislating.

It is true that this case also, by clinging to the concept "aid in legislating," did not fully determine the possible scope of investigation. Since then, the scope of what is to be considered a legitimate investigation has been extended slightly;¹¹² also those inquiries are approved that aim to arouse public opinion and draw wide attention, whether or not an immediate legislative action is envisaged.¹¹³ It appears likely, therefore, that

¹⁰⁸ 103 U.S. 168, 195, 196 (1880).

¹⁰⁹ The most substantiated criticism has been given by Landis, *supra*, note 9, at p. 215-8, who explains that a court wholly inexperienced in questions of constitutional law decided on the issue. See also Potts, *supra*, note 14, at p. 820-1; Herwitz and Mulligan, *supra*, note 4, at p. 9. Substantially in agreement with the decision is Coudert, *supra*, note 39, at p. 543, and Flynn, *Senate Inquisitors and Private Rights*, 161 *Harper's* 357, at p. 362 (1930). The latter is regretfully forced to acknowledge that the practice of the investigating committees does not follow the principles expounded in the decision.

¹¹⁰ Cousins, *supra*, note 107, at p. 918.

¹¹¹ 273 U.S. 135 (1927).

¹¹² See e.g., *Sinclair v. United States*, 279 U.S. 263, 294-5 (1929) and the comment on the decision in McGeary, *supra*, note 7, at p. 97-100.

¹¹³ See, e.g., *Townsend v. United States*, 303 U.S. 664 (1938) where the court denied certiorari after the conviction of Townsend, who without permission had left the House committee investigating the subject of old-age pensions (see 95 F. 2d 352 (1938)). This was rather an investigation in aid of no legislation because it was meant to destroy the growing and threatening popularity of the legislative proposals of the generous doctor. The same decision stated how

were the question squarely raised, the power of Congress would be affirmed in the wide range of investigations it has been undertaking.¹¹⁴

Now, as long as an investigation was legitimate, even the narrowest decisions did not hold a search for evidence an intrusion into the private sphere of the witness. The private domain, if it existed, commenced only where the lawfulness of the investigation ceased. Just as little as private knowledge exists where the cause of justice requires the investigation of the truth by the courts,¹¹⁵ just so little does there exist a private sphere in the case of just, e.g., legitimate, Congressional investigation. The committee, in its pursuance, has the right to gather all the evidence which seems relevant, and no witness is entitled to withhold it.¹¹⁶

Moreover, it seems hardly fortuitous that the courts had no occasion to rule more often and with more precision on the question.¹¹⁷ The Congressional committees almost never permitted a witness to cloak his knowledge with the assertion that he declined to testify about personal matters.¹¹⁸ It has been described how "ruthless" use was made by the committees of personal letters and statements, in what an "insulting" and "Star Chamber" manner the investigations proceeded, in order to

broadly the rights of a committee to gather evidence from witnesses were conceived: "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." Other cases in which investigations with the aim of informing public opinion have been upheld are quoted by Cousens, *supra*, note 107, at p. 918. The second Progress Report of the American Political Science Association's Committee on Congress (see *supra*, note 2) at 1097 speaks about the many investigations conducted during the 77th Congress, in pursuance of whose findings "no major piece of legislation was enacted." Nevertheless the legitimacy of these investigations was never challenged.

¹¹⁴ See Willoughby, 2 *Principles* 178. Cousens, *supra*, note 107, at p. 917 remarks, "The purposes for which investigations may be conducted . . . cover almost the widest possible range of objectives."

¹¹⁵ See Wigmore, 8 *Evidence* (3d ed. 1940) § 2192.

¹¹⁶ Landis draws this analogy between court and committee proceedings (*supra*, note 9, at p. 219): "The efficient exercise of judicial power imposes upon private citizens a duty to submit their conduct to its scrutiny. The interests of privacy are there overruled by the interest in efficient government. That efficiency should be accorded judicial power and withheld from legislative power is contrary to the dictates of public policy as well as inimical to a theory of separate but equal government powers." In a similar vein, Frankfurter, *supra*, note 4, at p. 331.

¹¹⁷ "... bareness of judicial precedents contrasts strangely with the abundant use of investigation committees by Congress." Landis, *supra*, note 9, at p. 212.

¹¹⁸ See, e.g., 3 *Hinds' Precedents* 195 (1907). As early as in 1842 a House committee stated, when it had to overcome difficulties obstructing investigation, "The interests of individuals are made to give way to the paramount interest of the community." In our day Lippmann, *supra*, note 39, at p. 131, explained the unyielding attitude, during one of the lobbying investigations, of a Senator usually an eager defender of civil liberties by the fact that the threat of the lobbies must seem to a man on the spot more important than the "nice recognition of individual rights."

get at the facts.¹¹⁹ Since, in view of the state of public opinion and the tendency of the courts to broaden the investigative powers, a witness almost never thought it wise to resist the "inquisitorial questions," the matter was seldom brought before the courts. But the investigations continued unhampered by that claim to privacy which in France was successfully opposed to an effective investigation.

Although it is evident from what has been said that even with the powers given by the 1914 statute, inquiries were not powerful means of discovering the truth, the French government once countered the request of the parliament for the granting of those powers to a committee by asking for a vote of confidence. The powers were then denied by the majority.¹²⁰ Significant also was a discussion in which the government opposed every kind of parliamentary inquiry even before the question of investigating powers was raised. Herriot and Daladier had almost implored the government to "permit" an investigation into the very troublesome situation prevailing in Indo-China. Herriot not only invoked the example of the Great Revolution. He also emphasized that a genuine collaboration between parliament and government could never be obtained by means of inefficient and convulsive interpellations, that only a thorough parliamentary inquiry could yield desirable results.¹²¹ The Prime Minister, Tardieu, refused by asking once more for a vote of confidence. To accept the proposal of the Chamber, he declared, would be dishonorable for the government.¹²²

A move to reduce the applicability of the 1914 statute was also made by the Senate when it tried, though without success, to provide for the grant of the broader investigating powers only upon the agreement of both houses.¹²³

When, in 1933, the president of the permanent Committee on Insurance and Social Security requested the "right of inquiry," he evidently sought to obtain the powers of the statute of 1914 in order to get a "more complete and more correct picture." The Minister of Labor understood it the same way, and violently opposed the request. But the president of the Chamber explained to both sides that the request for "the right to

¹¹⁹ See, e.g., Flynn, *supra*, note 109, at p. 359-61.

¹²⁰ See sessions of November 17 and 23, 1927, J. O. Débats Ch. 3043, 3203 (1927). The committee under discussion was the Navy Committee, which was attempting to investigate conditions in the harbor of Toulon.

¹²¹ For a similar view expressed by a German writer, see below at note 151.

¹²² Session of June 27, 1930. J. O. Débats Ch. 2770 (1930).

¹²³ See J. O. Doc. Sén. 855 (Annexe No. 249) (1925). A similar attempt had already been made in 1914, during the Rochette affair. See session of March 20, J. O. Débats Sén. 453 (1914).

inquire" by no means embraced any right to compel witnesses. To the somewhat astonished deputies he declared calmly, "Gentlemen—this is the rule."¹²⁴ An agreement was reached on this basis. But when, a year later, the Stavisky affair came into the open, the president of the committee complained¹²⁵ that if he had obtained "judicial" powers for his inquiry in 1933, it might have been possible to uncover in time a scandal which almost cost the life of republican institutions in France.

In accordance with these experiences, some deputies tried to obtain more powers for the committee investigating the Stavisky affair. Recalling the helplessness of the committee which had had no powers other than to punish recalcitrant witnesses with ridiculously low fines, the Socialist group asked the granting of the powers which the bill of 1914 had proposed before it had been mutilated by the Senate. To the perennial reproach that such competences would mean the confusion of powers and the abolishment of individual liberties, the deputy Lagrange replied that the only real danger for the liberty of France was the confusion born of impotence and abandonment. But in vain. The proposal was defeated by an overwhelming majority.¹²⁶ The Stavisky committee, as well as the inquiry organized to uncover the responsibility for the events of February, 1934, in Paris,¹²⁷ obtained only the powers of the 1914 statute. The final report on the Stavisky affair, though generally satisfied with the results of the investigation, stated that the value of the testimonial evidence was impaired by the "insufficient authority of the interrogations," by the difficulty of inducing the testimony of "men and especially women, who want to keep silent and know how," and by the impossibility of verifying the findings by search and seizure.¹²⁸

Until the end of the Third Republic, no other inquiry committee obtained even the weak competences to compel testimony afforded by the law of 1914.†

¹²⁴ Session of May 29, 1933, J. O. Débats Ch. 2677 (1933). A similar interpretation had been given in the session of December 8, 1926, J. O. Débats Ch. 4189 (1926). Even Barthélémy in his excellent essay, *op cit.*, *supra*, note 80, makes an error concerning the meaning of the "droit d'enquête," when he states that the committee mentioned obtained the investigating powers of the 1914 statute on May 29, 1933. It did not.

¹²⁵ Fié at the session of February 16, 1934, J. O. Débats Ch. 488 (1934). This does not detract from the fact that in 1933 Fié had not been particularly insistent on the granting of broader powers.

¹²⁶ Session of February 16, 1934, *ibid.* 489-95 (1934).

¹²⁷ Session of February 19, 1934, *ibid.* 512-15 (1934).

¹²⁸ Rapport Lafont, *supra*, note 23, at p. 5.

† This article will be concluded in a forthcoming issue of the *Review*.