would incorporate these mutual obligations into a lease which would be substituted for the present standard-form lease.

The establishment of such a commission or the assumption of these functions by an existing agency[70] would be a long overdue recognition of the significance of the modern residential tenancy. Modifications which must be made in the landlord-tenant relationship can then be made in an ordered manner, instead of haphazardly and interstitially in the ordinary course of the judicial process.

CONGRESSIONAL CONTEMPT POWER IN INVESTIGATIONS INTO THE AREA OF CIVIL LIBERTIES

Newspaper reports of the past year have served to keep the House Committee on Un-American Activities close to the public spotlight.[1] The contempt proceedings against Corliss Lamont,[2] the one-man inquisition of Professor Harlow Shapley by Congressman Rankin,[3] and the threat by the same legislator to investigate "subversive" activities in the American universities[4] again underline the problem of balancing the legislative need for information against the right of the citizen to privacy.

Legislative investigations and investigating committees are an accepted American political institution.[5] While few would question the authority to hold

[70] For example, the duties of the Illinois State Housing Board established by the State Housing Act of 1933, Ill. Rev. Stat. (1945) c. 32, § 504, might well be expanded.

[1] This group operated as a temporary committee during its early years. At the first meeting of each new Congress a resolution continuing the committee had to be debated and adopted. At times extensions were given for limited periods within a given Congress. See H. Res. 282, 75th Cong. 3d Sess. (1938); H. Res. 26, 76th Cong. 1st. Sess. (1939); H. Res. 90, 77th Cong. 1st Sess. (1941); H. Res. 420, 77th Cong. 2d Sess. (1942); H. Res. 65, 78th Cong. 1st Sess. (1943). The committee was made permanent in 1945 with a slight change in name. H. Res. 5, 79th Cong. 1st Sess. (1945). From this time on, continuation of the committee would be effected by the virtually automatic procedure of adopting the rules of the previous House. The recent Congressional Reorganization Act has not altered the status of the committee. S. 2177, 79th Cong. 2d Sess. (Pub. L. No. 601, Aug. 2, 1946).

[2] N.Y. Times, p. 4, col. 5 (June 27, 1946). In pursuance of an investigation of alleged Communist propaganda, the House Committee on Un-American Activities ordered production of all records of the National Council of American-Soviet Friendship, Inc. This organization operated as a relief agency during the war. A subpoena duces tecum was served upon Corliss B. Lamont, president of the corporation, and upon his failure to obey, the committee requested and received a contempt citation against him. 92 Cong. Rec. 7720–29 (June 26, 1946). An identical citation was issued against Richard Morford for the same reason. 92 Cong. Rec. 10710 (July 31, 1946).

[3] N.Y. Times, p. 16, col. 4 (Nov. 15, 1946); Chicago Sun, p. 1, col. 6 (Nov. 15, 1946).

[4] N.Y. Times, p. 11, col. 1 (Dec. 26, 1946); Chicago Sun, p. 5, col. 2 (Dec. 26, 1946).

[5] The first Congressional investigation occurred in 1792. 3 Annals Cong. 493 (1792); 2 Hinds, Precedents § 1725–26 (1907). Since then, Congress has exercised inquisitional power in approximately 500 separate instances. One writer counted 330 investigations in the first 69

an inquiry when information is freely given, opposition is often aroused when an investigating committee seeks to compel disclosure of information that a witness wishes to withhold. Any study of legislative investigatory power must therefore be directed primarily toward a consideration of the contempt powers of the inquiring body. It is the purpose of this note to examine the extent of the contempt power of Congressional investigating committees in relation to the Constitutional sources of the legislative investigatory and contempt powers and in relation to the various limitations imposed by the courts. The discussion will then turn toward the problem presented by the difficulty of securing judicial construction of the legislative investigatory power, and finally to an inquiry into what additional limitations may be placed upon the Un-American Activities committee in particular because of the civil-liberties aspects of the subject matter under its scrutiny

I

Congress has no express grant of power to punish a non-member for contempt.[6] But it is entirely consistent with the previous history of legislative power to suppose that an express grant in addition to a general grant of legislative power was regarded as redundant.[7] Early Congressional debates resulted

---

Congresses. Dimock, Congressional Investigating Committees 57 (1929). Another found 285 over the same period, but included in his figures only those investigations resulting in some type of report. Galloway, Investigative Function of Congress, 21 Am. Pol. Sci. Rev. 47, 48 (1927). The present writer counted 30 inquiries authorized during the 70th Congress. An additional 146 were authorized during the 71st to the 75th Congress inclusive. McGeary, The Developments of Congressional Investigative Power 8 (1940). In the last ten years, investigations have increased so rapidly that during 1944 there were 68 inquiries under way at one time. 90 Cong. Rec. A1860 (1944).

[6] Express power is given each house to punish its own members for contempt. U.S. Const. Art. 1, § 5. At one time in the Constitutional Convention of 1787 an express provision authorizing a contempt power over non-members was urged, the proposal being referred to the Committee of Detail. 2 Farrand, Records of the Federal Convention 341 (1937). Previously, George Mason of Virginia stated in the convention that "the Legislature, besides legislative, is to have inquisitional powers." Ibid., at 199. Why the provision was not incorporated into the Constitution can only be a matter of speculation since existing reports of the convention do not record further action or debate on the subject.

[7] Such powers had been familiar to British Parliament and the Colonial legislatures long before 1787. Dimock, Congressional Investigating Committees 46–56 (1929); Eberling, Congressional Investigations 13–30 (1928); Potts, Power of Legislative Bodies to Punish for Contempt, 74 U. of Pa. L. Rev. 691 (1926); Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 159–68 (1926). Furthermore, according to the rules of documentary interpretation as then understood, the express grant of a power to punish non-members in certain situations might have been interpreted as excluding it in all situations not enumerated. Absence of an express grant, when it was included under a general grant, would be construed as creating a power coextensive with the general power. 2 Rutherforth, Institutes of Natural Law 424 (2d American ed., 1832). Rutherforth's work was well known in this country in 1803. See Bl. Comm. 61 (Tucker's ed., 1803). Undoubtedly the rules it set out were familiar to English-speaking lawyers during the periods of the framing and early interpretation of the Constitution. The express grant to punish members for contempt was probably necessary because the principle of Congressional immunity might have excluded such a power from the general grant of legislative power.

in the acceptance of the position that the legislative power includes a contempt power over non-members.[8]

Despite the unchanging claim of the legislature during its entire history for maximum investigatory and contempt powers, the courts have recognized that the power is not unlimited. The Supreme Court has emphasized that "no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and . . . . that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen."[9] The courts have recognized two broad purposes within the jurisdiction of legislative investigation.

Inquiry into activities that impair the integrity or the internal functioning of Congress is a legitimate exercise of the investigatory power, and persons who impede such an investigation are subject to contempt proceedings.[10] Lack of that power would leave the legislature "exposed to every indignity and interruption, that rudeness, caprice, or even conspiracy, may mediate against it."[11]

Congress can also inquire into facts concerning possible future legislation.[12] It is not necessary for the resolution authorizing an investigation to specify that it is in aid of legislation, although such a statement is desirable. The chief requirement for validity where no statement of such purpose is present seems to be sufficient definition of the area of investigation. When a resolution does set out the purpose of an investigation, the statement need not be comprehensive nor precise, since a committee can hardly know what facts its inquiry will produce until after the inquiry has been completed.[13] As a matter of routine

[8] Contempt proceedings against William Duane in 1800 provided opportunity for a battle over the investigatory power. 10 Annals Cong. 69–88 (1800). The position of Charles Pinckney in opposition to a broad power at that time was particularly interesting since the proposal in 1787 for inclusion of an express contempt power in the Constitution was ascribed to him. 2 Farrand, Records of the Federal Convention 341 (1937). As a result of victory for proponents of a broad power, Duane was prosecuted. 2 Hinds, Precedents § 1604 (1907).

[9] Kilbourn v. Thompson, 103 U.S. 68, 190 (1880).

[10] Anderson v. Dunn, 6 Wheat. (U.S.) 204 (1821); In re Chapman, 166 U.S. 661 (1897).

[11] Anderson v. Dunn, 6 Wheat. (U.S.) 204, 228 (1821).

[12] McGrain v. Daugherty, 273 U.S. 135 (1927). In addition, two other categories have been urged; investigations of the executive department, and investigations for the informing of the public. McGeary, The Developments of Congressional Investigative Power 23 (1940); Dimock, Congressional Investigating Committees 59 (1929); Eberling, Congressional Investigations 8 (1928); Potts, Power of Legislative Bodies to Punish for Contempt, 74 U. of Pa. L. Rev. 780, 811 (1929). The Supreme Court failed to approve the investigation of the executive as a field of investigation when squarely presented with an opportunity to do so, although it found the inquiry in question proper because it was in aid of legislation. McGrain v. Daugherty, 273 U.S. 135 (1927). There is a dictum that the court may recognize power to investigate solely to inform public opinion. See Electric Bond and Share Co. v. SEC, 303 U.S. 419, 437 (1938). Since investigatory and contempt powers were given to Congress in order to protect its integrity and force as a legislative body, exercise of those powers should be confined to that purpose. It is submitted that the broad scope of legislative purpose as interpreted by the Daugherty case has given Congress sufficient opportunity to inform the public.

[13] McGrain v. Daugherty, 273 U.S. 135 (1927). This case is a landmark not only because it is the outstanding exponent of a broad power to investigate, but because it attempts to define

practice, present day resolutions include a statement that the purpose of the investigation is in aid of legislation. However, it is not certain that a court will accept such a statement without inquiry into the actual purpose of the investigation.[14]

Should the inquiries of the House Committee on Un-American Activities be challenged, it is possible that the courts may find that the investigations conducted by that group do not fall within the constitutionally granted power. Although the resolution creating the committee contains an expression that the purpose is to investigate in aid of legislation,[15] the statement, because of its routine nature, should be of little value as a criterion of the legality of its investigations. For, should the courts refuse to go behind this routine statement, they would recognize in effect the legality of an unlimited purpose of Congressional investigations. But an unlimited purpose has been declared to be unconstitutional.[16] An inference tending to rebut the avowed purpose of the Un-American Activities committee may be drawn from the fact that in the almost nine years of its existence the committee has issued no recommendations of legislation.[17] Even if the courts should accept the mere statement of purpose to aid legislation, another problem to be met is whether the resolution authorizing the committee indicates an area of investigation with sufficient clarity to satisfy the Supreme Court of its constitutionality. In a recent case the Court looked askance at evidence produced by the committee, and observed that the word "subversive" has never been defined by Congress or the courts.[18] Since it is a

---

the limits of that power. Legal writing at the time indicated virtually unanimous approval of the decision rendered. In only one instance, out of at least sixteen comments in the law reviews, was any disapproval expressed, when Professor Wigmore, in commenting upon another case, attacked Congressional procedure in the Daugherty investigation. 19 Ill. L. Rev. 452 (1925). For notes approving the position of the Supreme Court see 15 Geo. L. J. 344 (1927); 73 U. of Pa. L. Rev. 60 (1924); 38 Harv. L. Rev. 234 (1924). It seems remarkable in view of the approval that greeted McGrain v. Daugherty, and the clear necessity for investigation in the particular case that the Court felt it necessary to state that a "witness rightfully may refuse to answer where the bounds of power are exceeded or the questions are not pertinent to the matter under inquiry." Ibid., at 175.

[14] The Supreme Court has indicated that its "concern is with the substance of the resolution," not its form. See McGrain v. Daugherty, 273 U.S. 135, 179 (1927).

[15] H. Res. 5, 79th Cong. 1st Sess. (1945); Legislative Reorganization Act of 1946, § 121(b)(1)(q)(2), S. 2177, 79th Cong. 2d Sess. (Pub. L. No. 601, Aug. 2, 1946).

[16] Marshall v. Gordon, 243 U.S. 521 (1917); Kilbourn v. Thompson, 103 U.S. 168 (1880). See Jurney v. MacCracken, 294 U.S. 125, 144 (1935); McGrain v. Daugherty, 273 U.S. 135, 173 (1927); In re Chapman, 166 U.S. 661, 668 (1897).

[17] The committee was first authorized May 26, 1938. H. Res. 282, 75th Cong. 3d Sess. (1938). From then until June, 1946, no recommended legislation had been offered by the committee. 92 Cong. Rec. 7723 (June 26, 1946).

[18] United States v. Lovett, 66 S. Ct. 1073 (1946). A subcommittee of the House Appropriations Committee, using evidence produced largely by the Dies Committee, found the views of the respondents to be subversive. This subcommittee had defined "subversive" as follows: "Subversive activity in this country derives from conduct intentionally destructive of or in-

word of many meanings, it can be argued that its use in the empowering resolution[19] has in effect given the committee an unlimited power to investigate.[20]

The searches and seizures clause and the privilege against self-incrimination provide additional limitations —which operate upon the subpoenas issued in connection with an investigation—against legislative power to punish for contempt. Many of the cases construing these limitations involve administrative inquiries, but administrative and legislative investigatory bodies are subject to the same Constitutional restrictions in these respects.[21]

A broad subpoena may violate the searches and seizures clause.[22] Such subpoenas have been held invalid even though some limitations as to time and subject of inquiry were indicated.[23] While early cases involving administrative agencies tended to restrict the scope of the subpoena, the recent tendency is for the courts to allow wider latitude.[24] In general, a subpoena will be enforced if

---

imical to the Government of the United States—that which seeks to undermine its institutions, or to distort its functions, or to impede its projects, or to lessen its efforts, the ultimate end being to overturn it all." Ibid., at 1077 n. 3.

[19] "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." Legislative Reorganization Act of 1946, § 121(b)(1)(q)(2), S. 2177, 79th Cong. 2d Sess. (Pub. L. No. 601, Aug. 2, 1946).

[20] Elimination of vagueness in an enabling resolution is not entirely a problem of draftsmanship. Often, vagueness is a result of meanings read into the resolution by actions of a committee operating under its authority. If the House Committee on Un-American Activities had confined its investigations to disloyal activities within the country, adopting in practice a fairly narrow definition of "subversive," the Supreme Court would probably not have gone out of its way to condemn the committee and the vagueness of the authorizing resolution. Drafting of a less vague resolution may be ineffective without a corresponding restriction of investigation under that resolution.

[21] See Electric Bond and Share Co. v. SEC, 303 U.S. 419, 437 (1938). It is significant to note that the area within which administrative agencies may investigate covers those "activities which are within the range of Congressional power." Ibid., at 437. Compare the language in Kilbourn v. Thompson, 103 U.S. 168, 190 (1880). Thus the purpose of both administrative and legislative investigations is also limited by the same formula.

[22] Boyd v. United States, 116 U.S. 616 (1886). The Court reasoned that any proceeding which forced a man to produce documents in violation of the privilege against self-incrimination was also an unreasonable search and seizure. Subsequently the Court conceded that a broad subpoena might violate the searches and seizures clause even though the privilege against self-incrimination was not in issue. See Hale v. Henkel, 201 U.S. 43, 69 (1906).

[23] Federal Trade Comm. v. American Tobacco Co., 264 U.S. 298 (1924); Hale v. Henkel, 201 U.S. 43 (1906); Boyd v. United States, 116 U.S. 616 (1886).

[24] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Newfield v. Ryan, 91 F. 2d 700 (C.C.A. 5th, 1937), cert. den. 302 U.S. 729 (1937); McMann v. SEC, 87 F. 2d 377, (C.C.A. 2d, 1937), cert. den. 301 U.S. 684 (1937). The Supreme Court does not seem inclined to extend the applicability of the searches and seizures clause to new situations. Thus a summary of records is not protected, Isbrandtsen-Moller Co. v. United States, 300 U.S. 139 (1937), nor is wire tapping a violation, Olmstead v. United States, 277 U.S. 438 (1928).

the documents sought are sufficiently relevant to the matter under investigation so as to be "not out of proportion to the ends sought."[25] The proper "proportion" may vary with the attitude of the court toward the purpose of the investigation itself.[26] Thus a subpoena issued in an investigation of which the court disapproves may be invalid as the tool of a "fishing expedition,"[27] while a similar order in connection with a more favored inquiry is recognized as proper.[28]

Few subpoenas have been so broad[29] as one recently issued by the House Committee on Un-American Activities which demanded "all books, records, papers, and documents showing all receipts and disbursements of money . . . . and all letters, memoranda, or communications from, or with, any person or persons outside and within the United States of America."[30] Even in the recent cases which recognize the validity of broad subpoenas, the courts have always found some restriction as to time or subject matter. Here there is none. In at least two instances, the courts have indicated that legislative as well as administrative subpoenas are subject to invalidation if too broad in scope or unreasonable in demand.[31] It should occasion little surprise, then, if the subpoena used by the Un-American Activities Committee were to be declared invalid if tested in an appropriate action.

The privilege against self-incrimination offers more limited protection than the searches and seizures clause, although it extends to both oral testimony and documentary evidence.[32] Corporations are not entitled to immunity,[33] nor can corporate officials refuse production of company documents because as individuals they may be incriminated.[34] But before an individual can be compelled to testify or produce documents he must be given some immunity from prosecution, although the extent of the required protection is not clearly de-

[25] McMann v. SEC, 87 F. 2d 377, 379 (C.C.A. 2d, 1937), cert. den. 301 U.S. 684 (1937).

[26] "The requirement of reasonableness, including particularity in 'describing the place to be searched, and the persons or things to be seized,' . . . . comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily . . . . this cannot be reduced to a formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry." Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946).

[27] See Federal Trade Comm. v. American Tobacco Co., 264 U.S. 298 (1924).

[28] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Brown v. United States, 276 U.S. 134 (1928).

[29] Only one Supreme Court case has been found involving a subpoena equally broad. It was declared invalid. Hale v. Henkel, 201 U.S. 43 (1906).

[30] 92 Cong. Rec. 7718 (June 26, 1946).

[31] Strawn v. Western Union (Sup. Ct. D.C., 1936). The oral opinion is reported in N.Y. Times, p. 1, col. 4 (March 12, 1936), noted in 36 Col. L. Rev. 841 (1936) and 45 Yale L.J. 1503 (1936). See Hearst v. Black, 87 F. 2d 68 (App. D.C., 1936).

[32] Boyd v. United States, 116 U.S. 616 (1886).

[33] Hale v. Henkel, 201 U.S. 43 (1906).

[34] Wilson v. United States, 221 U.S. 361 (1911); see United States v. White, 322 U.S. 694, 699 (1944).

fined. A statute governing hearings before an administrative agency worded similarly to the one protecting a witness in a legislative investigation was declared unconstitutional.[35] It was held that the statute did not give protection against prosecution based on information uncovered through clues obtained in the testimony, although it did prevent use of the actual testimony presented.[36] A subsequent statute[37] that extended protection to all matters covered by the testimony regardless of the source of the particular evidence used in the prosecution was found to be constitutional.[38] The desirability of a privilege against self-incrimination has been questioned,[39] and there is some judicial authority for the proposition that it will be narrowly construed.[40] Hence, while precedent indicates that the present statute concerning Congressional investigations is unconstitutional, there is some reason to doubt that under the recent trend the immunity presently granted Congressional witnesses would be found insufficient.

The methods adopted by the particular men conducting the investigation may influence the courts in determining the constitutionality of an investigation or of a subpoena. Congress has usually been regarded as the judge of appropriate procedure in conducting an investigation.[41] It is conceded that judicial methods are not required in such inquiries. They would in fact be quite undesirable.[42] But the alternative to a judicial type of procedure is not necessarily an unfair or partial procedure. Irresponsible statements, both written and oral, by committee-members, and the grossly unfair treatment accorded witnesses questioned by these legislators have been the source of much of the criticism of Congressional investigations.[43] Criticism of the Committee on Un-American

[35] The statute protecting witnesses before Congressional committees provides that "No testimony given by a witness . . . . shall be used as evidence in any criminal proceeding against him in any court." 52 Stat. 943 (1938), 28 U.S.C.A. § 634 (Supp., 1946). The statute protecting witnesses before the Interstate Commerce Commission, which was declared unconstitutional read, "that no answer or other pleading of any party, and no discovery or other evidence obtained . . . . from any party or witness . . . . shall be given in evidence, or . . . . used against such party . . . . in respect to any crime." 15 Stat. 37 (1868).

[36] Counselman v. Hitchcock, 142 U.S. 547 (1892).

[37] The re-enactment provided that "No person shall be prosecuted or subjected to any penalty . . . . on account of any transaction . . . . concerning which he may testify, or produce evidence." 27 Stat. 443 (1893), 49 U.S.C.A. § 46 (1929).

[38] Brown v. Walker, 161 U.S. 591 (1896).

[39] Carman, A Plea for the Withdrawal of Constitutional Privilege from the Criminal, 22 Minn. L. Rev. 200 (1938).

[40] Cf. United States v. White, 322 U.S. 694 (1944); Heike v. United States, 217 U.S. 423 (1910).

[41] U.S. Const. Art. 1, § 5; see Townsend v. United States, 95 F. 2d 352, 361 (App. D.C., 1938); cf. United States v. Smith, 286 U.S. 6 (1932); United States v. Ballin, 144 U.S. 1 (1892).

[42] See Townsend v. United States, 95 F. 2d 352, 361 (App. D.C., 1938); Frankfurter, Hands Off the Investigations, 38 New Republic 329, 330 (1924).

[43] Dimock, Congressional Investigating Committees 162 (1929).

Activities has been particularly strong in this regard,[44] there being indications[45] that individual members have been using the subpoena and contempt powers of Congress as weapons against opponents of their personal philosophies,[46] rather than as a means to further a legislative purpose.

Against this abuse of power there is no direct remedy. Congressmen are expressly immunized by the Constitution from prosecution for statements made on the floor of either house.[47] It is true that the private citizen probably has the remedy of injunction available against committee agents who do most of the investigating,[48] and possibly against the Congressman acting outside his legislative capacity. However, no injunction can issue against the actions of the legislator when he is sitting on an investigation committee.[49] Yet, it is at this time that protection is most needed since the private citizen under subpoena often must provide the very information that may be used against him in a

[44] Typical criticism can be found in Congressional debates. 83 Cong. Rec. 7567–86 (1938); 84 Cong. Rec. 1098–1128 (1939); 86 Cong. Rec. 572–605 (1940); 87 Cong. Rec. 886–900 (1941); 88 Cong. Rec. 2282–97 (1942); 89 Cong. Rec. 721–29, 795–810 (1943); 91 Cong. Rec. 10–14 (1945); 92 Cong. Rec. 7720–28 (June 26, 1946). Two studies of the committee during its earlier years have been made. Ogden, The Dies Committee (1944); Gellermann, Martin Dies (1944).

[45] Remarks of Mr. Rankin are illustrative: "Now, let us get back to this man Lamont..... He came before the Committee on Un-American Activities at a time when traitors in this country, and in Canada, were trying to steal the secrets of the atomic bomb..... We found evidence that this group here headed by Mr. Lamont was in alliance with them. We brought Mr. Lamont before the committee, and of all the squirming I have ever seen, he did it..... You have some Communists going down South stirring up trouble among the Negroes..... Look what they did at Columbia, Tenn. It was nothing in the world but a little Communist movement sent there to stir up trouble..... They almost brought on a riot. I want to pay my respects to.... Governor McCord of Tennessee for calling out the highway patrol, for calling out the state guard, and to them for surrounding and taking care of those poor Negroes who were being agitated and stirred up by these Communists sent there for that purpose." 92 Cong. Rec. 7728 (1946). Cf. Vincent Sheean's account of the Columbia, Tenn., incident and trial, Chicago Sun (Sept. 29, 30, Oct. 4, 7, 10, 1946).

[46] It may be proper for Congressmen to use the legislature as a forum to expound their individual philosophies. But it is a different matter to force a private citizen to divulge private information for the purpose of aiding political views of hostile Congressmen.

[47] U.S. Const. Art. 1, § 6.

[48] See Hearst v. Black, 87 F. 2d 68, 71 (App. D.C., 1936).

[49] Hearst v. Black, 87 F. 2d 68 (App. D.C., 1936). It might be argued that under the doctrine of Ex parte Young, 209 U.S. 123 (1908) the present statute governing legislative contempt procedure is unconstitutional, because it imposes on the witness penalties so severe as to effectively deter a judicial challenge of legislative orders of doubtful validity. The Supreme Court has indicated that it would apply the doctrine of Ex parte Young to penalties for the non-disclosure of information to an administrative investigatory body. See National Gas Pipeline Co. v. Slattery, 302 U.S. 300, 310 (1937). One writer has concluded that penal provisions preventing a test of constitutionality will be declared invalid not only where the penalty is so excessive as to be unreasonable, but also where the provision exacts immediate compliance making litigation impossible. Constitutionality of Penalties as to Litigants Challenging Substantive Provisions of Legislation, 44 Yale L.J. 1216 (1935). However, some federal courts have indicated that the Ex parte Young doctrine will be limited to rate-making cases. Bartlett Frazier Co. v. Hyde, 65 F. 2d 350 (C.C.A. 7th, 1933), cert. den. 290 U.S. 654 (1933); United States v. Clyde S.S. Co., 36 F. 2d 691 (C.C.A. 2d, 1929), cert. den. 281 U.S. 744 (1929).

manner which would give rise to actionable libel or slander if it were not for Congressional immunity. While the Supreme Court has never declared a Congressional investigation illegal because of the use of improper methods, where the constitutionality of the purpose is already in question, propriety of methods may become a decisive factor.

II

The difficulty of testing the legality of Congressional investigations presents an urgent practical problem. Congress, acting under its contempt power, has developed two methods of dealing with contempt cases. The first is essentially that used by the British Parliament prior to 1776.[50] Under this procedure, the accused is placed on trial before an entire branch of the legislature.[51] Imprisonment is the sole type of sentence that may be imposed and no person may be held longer than the remainder of the legislative session during which he was convicted.[52] The second method of contempt procedure was enacted in an attempt to create a more efficient procedure. Commission of contempt is made a misdemeanor punishable by imprisonment or fine,[53] and imprisonment is not limited by the length of the legislative session.[54] When an alleged contempt is committed, the facts are certified by the offended house to the district attorney who brings the matter before the grand jury.[55] From this point, the procedure is like that in any other criminal case.

A contumacious witness may be prosecuted under either or both procedures, and conviction under one does not preclude subsequent conviction under the other.[56] Good faith of a witness in believing that he has a right to refuse testi-

[50] Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 159 (1926); Potts, Power of Legislative Bodies to Punish for Contempt, 74 U. of Pa. L. Rev. 691 (1926).

[51] See Chapman v. United States, 5 App. D.C. 122, 129 (1895).

[52] See Anderson v. Dunn, 6 Wheat. (U.S.) 204, 231 (1821).

[53] Punishment was set at $100 to $1000 fine and one to twelve months in jail. 11 Stat. 155 (1857), 2 U.S.C.A. § 192 (1927). A later amendment specifically provides that refusal to testify before a joint committee of both houses is also a misdemeanor. 52 Stat. 942 (1938), 2 U.S.C.A. § 192 (Supp., 1946). Another change provides that refusal to testify or produce papers after appearing in obedience to a subpoena shall constitute contempt. 52 Stat. 942 (1938), 2 U.S.C.A. § 194 (Supp., 1946).

[54] Since sentence is set by a court acting under the statute and imprisonment is by authority of a court, it is not subject to the limitations peculiar to legislative imprisonment.

[55] 11 Stat. 156 (1857), 2 U.S.C.A. § 194 (1927). The procedure was held constitutional. In re Chapman, 166 U.S. 661 (1897). Construction of the statute indicates that bringing a citation before the grand jury is mandatory on the district attorney. See Ex parte Frankfeld, 32 F. Supp. 915 (D.C., 1940). But there are indications that the district attorney, in fact, does exercise his discretion as to which citations indicate an indictable offense. 92 Cong. Rec. 7723 (June 26, 1946). The President of the Senate or the Speaker of the House may certify contempt charges to the district attorney, without prior action of either house, when Congress is not in session. 52 Stat. 942 (1938), 2 U.S.C.A. § 194 (Supp., 1946).

[56] In re Chapman, 166 U.S. 661 (1897).

mony is no defense to a contempt citation.[57] Retraction of his refusal will not save him from punishment, even though it is no longer within his power to comply with the original subpoena,[58] or even though he may have removed the offending obstruction to the investigation. Compliance and immediate subsequent testing of the legality of the order is of little aid to the witness since the judiciary cannot restrain Congressional use of material or information after it has fallen into legislative hands, even though the court could have refused to enforce an invalid subpoena.[59] Hence the only method by which a witness can effectively test the legality of a subpoena is to refuse obedience and then after indictment defend the case on its merits in a criminal action. If contempt proceedings before a house are instituted, the accused must, in a realistic sense, wait until he becomes the convicted and then petition for a writ of habeas corpus.[60]

The result is a practical inability to test the legality of Congressional action without being subjected to a prison sentence for a wrong guess. Perhaps the legislative need for information is sufficiently important to justify such a lack of remedy when the investigation concerns graft in government or misuse of economic power by business.[61] But where investigations are into matters of opinion and speech the utility of speedy, unchallengeable investigation is outweighed by a tradition of protection to civil liberties. The Supreme Court has been reluctant to uphold legislation that infringes upon freedom of speech or of the press despite the well-known presumption that legislation is constitutional until clearly proven otherwise.[62] The analogous presumption that the legislature will remain within the limits of constitutionality when conducting an investigation[63] may likewise not be pertinent when the investigation is into matters involving

[57] Sinclair v. United States, 279 U.S. 263 (1929).

[58] Jurney v. MacCracken, 294 U.S. 125 (1935).

[59] Hearst v. Black, 87 F. 2d 68 (App. D.C., 1936).

[60] A person on trial before an entire house under the common-law procedure may speak in his own defense. This privilege is of little help to the accused since an impartial determination of constitutional or legal questions by a numerous and untrained body such as a house of Congress is hardly possible, especially where the body acts as both judge and prosecutor.

[61] Dimock, Congressional Investigating Committees (1929); Eberling, Congressional Investigations (1928); Black, Inside a Senate Investigation, 172 Harper's 275 (1936); Bronaugh, Power of Congress to Punish for Contempt, 30 Law Notes 207 (1927); Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926); Frankfurter, Hands Off the Investigations, 38 New Republic 329 (1924).

[62] "The usual presumption supporting legislation is balanced in our system by the preferred place given in our scheme to . . . . freedoms secured by the First Amendment." Thomas v. Collins, 323 U.S. 516, 530 (1945). West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Bridges v. California, 314 U.S. 252 (1941).

[63] Such a presumption in favor of the legislature was enunciated early in the history of the Court. Anderson v. Dunn, 6 Wheat. (U.S.) 204 (1821). Cf. McCrain v. Daugherty, 273 U.S. 135, 178 (1927).

freedom of speech and the press. The Supreme Court has recently shown a tendency to limit judicial contempt power where freedom of the press is involved even though evidence of interference with the effective functioning of the judiciary was present.[64] If the courts will impose such limitations upon themselves, little reason appears why legislative contempt power should not be subject to a more restricted exercise when used in connection with civil liberties than when used in other areas of investigation.

Proponents of a broad power to investigate urge that risk of abuse along with actual abuse are the price that must be paid for effective investigation.[65] But when the investigation is into the civil-liberties area such a price seems unreasonably high in light of the fact that activities entitled to civil-liberties protection can be curtailed or suppressed by direct legislation only when their existence constitutes "a clear and present danger" to the government.[66] The guarantees of the First Amendment seem rather hollow if a citizen cannot express unpopular economic or political opinions without the danger of Congressional interference. It is also argued that the self-restraint and political responsibility of Congress offer sufficient protection against abuse since Congress can always withdraw power that is oppressively exercised and the people through the ballot can oust abusive Congressmen.[67] Whether the substance of this argument is that the investigations are illegal but that no remedy outside Congressional responsibility exists, or that the investigations are legal because of majority approval, the significant fact is that majority rule is not adequate protection[68] and that Con-

[64] Pennekamp v. State of Florida, 66 S. Ct. 1029 (1946). In this case the Court reversed a judgment of the Supreme Court of Florida which had affirmed a conviction for contempt of court for publishing editorials reflecting on some Florida circuit court judges. The Court held that the danger to fair judicial administration was not of the "clearness and immediacy necessary to close the door of permissible public comment." Ibid., at 1039.

[65] "There is no power on earth that can tear away the veil behind which powerful and audacious and unscrupulous groups operate save the sovereign legislative power armed with the right of subpoena and search." Black, Inside a Senate Investigation, 172 Harper's 275, 276 (1936); Frankfurter, Hands Off the Investigations, 38 New Republic 329, 331 (1924).

[66] Thomas v. Collins, 323 U.S. 516 (1945); Bridges v. California, 314 U.S. 252 (1941); cf. Schenk v. United States, 249 U.S. 47 (1919).

[67] Black, Inside a Senate Investigation, 172 Harper's 275 (1936); Frankfurter, Hands Off the Investigations, 38 New Republic 329 (1924).

[68] According to the Supreme Court, "the right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend upon the outcome of no election." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639 (1943).

"To presume that responsibility is attained by the fact that the executive again requires the endorsement of the nation at large two or three years later, when the very abuse has been forgotten or, if remembered, has been lost in the shuffle of other and larger issues, is idle." Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 220 (1926). The argument of Landis against establishing executive immunity has equal force when applied to the legislature. In addition individual Congressmen, unlike the executive, are elected by a small proportion of the nation's population. Yet, in an investiga-

gressional responsibility has not offered any remedy in the face of continuing abuses.

III

More effective methods of testing the constitutionality of the various aspects of Congressional investigations—other than by a defense to a statutory contempt prosecution or by a writ of habeas corpus after imprisonment by Congress —are clearly desirable. To be effective any method which might be suggested should provide for a determination of the issues before any contempt proceedings can be brought. Otherwise, even when refusal to obey a subpoena is justified and trial would end in acquittal, the burden of conducting a defense will deter many persons from asserting their rights. It is readily conceded that the delay attendant such pre-contempt determination might seriously impede the efficiency of the investigatory process, and hence it is suggested that such methods be used only in investigations into matters of opinion and speech.[69] It is conceded that this civil-liberties area is not sharply delineated, and that particular peripheral instances may present difficult problems of judicial interpretation. But the line-drawing problem in civil-liberties controversies is not novel with this suggestion. The fact that any particular investigating committee has been guilty of abuse in its treatment of witnesses should not be ignored by the court in a determination of the constitutionality of the investigation or the subpoena, although abuses per se could hardly be said to make the investigation unconstitutional. Abusive treatment of witnesses cannot be justified in any investigation including those into areas not involving civil liberties. Conceivably, some kind of judicial relief might be forthcoming to prevent mistreatment of witnesses, although here it must be recognized that the traditional dogma of the separation of powers would make it difficult for the courts to justify the granting of conventional injunctive relief against the abuses of the legislative branch.

One device that might be employed for the protection of the witness is the declaratory judgment. This remedy has been used for testing the constitution-

---

tory position they can exercise great control over persons from all sections of the country. It is futile to urge the ballot as protection against abuse of authority by an individual Congressmen or even by a small group of Congressmen. The injured citizen may never be afforded an opportunity to vote for or against a member of that group.

[69] The position advanced here may be vulnerable to the charge that government security will be seriously endangered by any delay to the Congressional investigatory process in the "subversive" activity area. The answer to this argument is that empirical observation indicates that the matters investigated have not generally been such as to constitute a "clear and present danger," and that if they are so serious, means of security other than the Congressional contempt power are also available. Thus, when Gerhard Eisler, alleged No. 1 Communist in the United States, refused to testify under oath before the Un-American Activities committee, the committee voted to ask the Department of Justice to charge Eisler with perjury, conspiracy to overthrow the United States government, evasion of income tax, and falsification of passport as well as contempt of Congress. Chicago Sun, p. 1, col. 7 (Feb. 7, 1947).

ality or applicability of certain types of criminal statutes.[70] It has been employed in England and Australia, and under the Federal Declaratory Judgment Act[71] for testing the legality of requests for information by executive and administrative officers.[72] Substitution of the declaratory action for the humiliation of a public criminal prosecution has been proposed for crimes which do not involve moral turpitude but arise from regulations whose scope or constitutionality is uncertain.[73] It is submitted that in the case of legislative investigations the declaratory judgment[74] would protect the witness against the stigma of prosecution and at the same time, by affording a relatively speedy decision, minimize the effect of possible dilatory action on the part of the witness. Should, in fact, the court find that the witness has taken advantage of the delay attending the procedure to remove or suppress evidence which was rightfully requested, the witness would then be subject to the legislative contempt power. Under the present law the contempt power has similarly been used to penalize other obstructionist tactics.[75] But where the declaratory action is brought bona fide, regardless of the manner in which the court determines the submitted question, the witness should be protected from subsequent punishment for delay. In any case the legislative contempt power should be suspended pending the declaratory action. A safeguard against spurious argument by the witness lies in the courts' admitted discretion to decline jurisdiction of any declaratory action.[76]

[70] The declaratory action has been used to determine freedom from penalty provisions, among others, in tax statutes, Curry v. Feld, 238 Ala. 255, 190 So. 88 (1939); in criminal statutes adopted under the state police power, Harrodsburg v. Southern Ry. Co., 278 Ky. 10, 128 S.W. 2d 233 (1939) (ordinance governing safety devices at intersections) and Stewart v. Robertson, 45 Ariz. 143, 40 P. 2d 979 (1935) (application of the Pharmacy Act); in zoning ordinances, Moore v. Pratt, 148 Kan. 53, 79 P. 2d 871 (1938).

[71] 48 Stat. 955 (1934), 28 U.S.C.A. § 400 (1946).

[72] In Dyson v. Attorney-General, [1911] 1 K.B. 410 (1910), [1912] 1 Ch. 158 (1911), the plaintiff sued for a declaration that certain forms issued by the tax authorities and requiring under penalty the return of some information, were illegal. In holding that the form of action was proper the court remarked: "It would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty." [1911] 1 K.B. 410, 421 (1910). This case has been applied in other situations to test the legality of the demand for information by various administrative agencies. Burghes v. Attorney-General, [1911] 2 Ch. 139, [1912] 1 Ch. 173 (1911); Smeeton v. Attorney-General, [1920] 1 Ch. 85 (1919); Attorney-General v. Foran, [1916] 2 A. C. 128 (1915), aff'd [1915] 1 Ch. 703; Colonial Sugar Refining Co. v. Attorney-General, 15 C.L.R. 182 (Australia, 1912); Groves v. Jacobs, 30 F. Supp. 995 (Cal., 1940).

[73] Borchard, Declaratory Judgments 1022–23 (1941).

[74] The language of the federal act seems sufficiently broad to permit challenge of a legislative investigation: "In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations . . . . whether or not further relief is or could be prayed. . . . ." 48 Stat. 955 (1934), 28 U.S.C.A. § 400 (1946).

[75] Jurney v. MacCracken, 294 U.S. 125 (1935).

[76] The Federal Declaratory Judgment Act has been construed as giving the courts discretion to entertain suits thereunder. United States Fidelity & Guaranty Co. v. Koch, 102 F. 2d

The investigatory activities of the House Committee on Un-American Activities rest upon rather insecure constitutional foundations. By conducting inquiries of undefined scope into an area guaranteed particular protection from governmental interference, the committee may be exceeding its power to investigate. The use of unlimited subpoenas and the harsh treatment of witnesses do not contribute to the strength of the committee's constitutional position. Should the committee's investigations be challenged by declaratory action or by the traditional procedures, it may be expected that courts which have consistently refused to uphold statutes abridging civil liberties will be no less vigorous in refusing to sanction Congressional conduct that it would not sanction in the form of a statute.

---

288 (C.C.A. 3d, 1939); Aetna Casualty & Surety Co. v. Quarles, 92 F. 2d 321 (C.C.A. 3d, 1939); Continental Casualty Co. v. Nat'l Household Distributors, 32 F. Supp. 849 (Wis., 1940); Borchard, Declaratory Judgments 312–13 (1941).