Congressional Investigations:

HISTORICAL DEVELOPMENT

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The history of congressional investigations in the United States is a record of a slowly but steadily broadening implied power of the national legislature. Although the authority of Congress to conduct inquiries and to compel the disclosure of information has at times suffered setbacks—including a serious rebuff from the United States Supreme Court in 1881—any ground lost has been recovered and eventually even extended.¹

The investigatory power

In 1792, within three years of the establishment of the new United States government, the House of Representatives provided for the first congressional investigation. A special committee of seven members, with power to send for persons and papers, was directed by a resolution to inquire into the reasons for the failure of the northwestern expedition led by Major General St. Clair against the Indians.²

The members of the House did not doubt their power to conduct this investigation. Precedent for such inquiries, they felt, was readily available both in the British Parliament and in the legislatures of the American colonies.³ They believed that the power to appropriate implied the power to determine how appropriations were spent.

It is reasonable to estimate that during the century and a half since the St. Clair inquiry, as many as six hundred investigations have been conducted.⁴ For several decades the House of Representatives was the chief

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¹ "Congressional investigations," as used in this paper, are inquiries that are conducted, in pursuance of a resolution or statute, by congressional committees or subcommittees. Both standing and select committees are employed.

² 2 Annals Cong. 490 (1792).

³ Potts, Power of Legislative Bodies To Punish for Contempt, 74 U. of Pa. L. Rev. 691, 708 et seq. (1926).

⁴ No writer has made a complete tabulation of investigations to date. Dimock, however, found 330 concluded between 1792 and 1928. From 1929 to 1938, 146 more were authorized. Dimock, Congressional Investigating Committees (1929); McGeary, The Developments of
inquisitor; in the first forty years the House conducted seven or eight times as many inquiries as the Senate. In the 1920's, however, it could be said that the Senate had become the principal inquisitor; one writer went so far as to label the House as "impotent." This predominance of the role of the Senate, especially evident in the 1920's and 1930's, can be traced to the absence of effective cloture in that body inducing the approval of investigations sponsored by a minority. Although a tightly led majority in the House may throttle some inquiries, this, at present, by no means reduces the House to a minor role; in each of the last four sessions of Congress (1947-50), for example, the House has authorized more investigations than the Senate.

For almost a hundred years following the St. Clair investigation, congressional inquiries were subject to little supervision or control by the judiciary. And although the Senate got a later start than the House, both chambers frequently used the investigatory power, not only to inquire into the honesty and efficiency of the executive branch of the government, but also to obtain information to assist Congress in its task of legislating wisely and intelligently. In addition, a number of inquiries aided one or the other house to perform duties relating to its own members, such as judging the qualifications and conduct of individuals elected to Congress, and punishing persons attempting to bribe members.

Little opposition ever developed in Congress itself to its right to authorize investigations into the administration of the law or into "membership" matters. But there were differences of opinion concerning the legality of inquiries directed at obtaining information to help in the enactment of laws. It was not until 1827 that the House established the precedent of vesting in a committee the power to compel witnesses to testify in a law-making investigation. When the resolution providing for this extension of the investigatory power was being considered in the House, considerable opposition arose. Following lengthy debate, however, the victory went to those representatives who argued that only through the compulsion of testimony could the necessary facts be learned. The acute

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Congressional Investigative Power (1940). For earlier history the writer has leaned heavily on Dimock and also on Eberling, Congressional Investigations (1928).

5 Eberling, Congressional Investigations 272 (1928).

6 Rogers, The American Senate, c. VI at 202 et seq. (1926).

7 The Senate did not authorize any investigation until 1818.

8 The House, moreover, in impeachment proceedings conducts what essentially is a congressional investigation.
division of opinion was nevertheless revealed in the vote of 102 for the resolution and 88 against.⁹

Investigations to aid in legislating also were strenuously opposed in the Senate, where no inquiry of this type was approved until 1859,¹⁰ at which time the upper house established a special committee to inquire into the facts "attending the late invasion and seizure of the armory and arsenal at Harper's Ferry."

Although not all congressional investigating committees need the power to compel the attendance and testimony of witnesses, numerous inquiries would be fruitless if the power to compel disclosure were not exercised. Both the House and Senate, accordingly, from the early days of their inquisitorial careers, have granted to many investigating committees the power to send for papers and persons. For some decades Congress enforced this authority by means of its common-law power to punish for contempt. Witnesses who remained recalcitrant when brought before the bar of the Senate or House were on occasion imprisoned and also fined. But the length of a prison sentence could not extend beyond the close of the legislative session during which the contempt occurred.¹¹

Partly because of this limitation, Congress in 1857 enacted a statute providing that a witness who, having been summoned, refused to appear or to answer pertinent questions or produce papers before an investigating committee, was guilty of a misdemeanor, punishable by "a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."¹² Whenever a witness failed to obey a summons, a statement of the facts was to be certified by the President of the Senate or the Speaker of the House, as the case might be, to the "appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."

If either house of Congress finds it difficult or undesirable to seek punishment of a witness by means of this statute in the courts, it can fall back on its own common-law authority to punish. Moreover, the United States Supreme Court has held that both forms of punishment can be inflicted on the same individual.¹³

The 1857 contempt statute was not used extensively at first. Three

⁹ 4 Cong. Deb. 889 (1827).
¹⁰ Eberling, op. cit. supra note 4, at 282.
¹¹ Anderson v. Dunn, 6 Wheat. (U.S.) 204 (1821). There is a record of one instance in which a prisoner was detained beyond the close of the session.
¹³ In re Chapman, 166 U.S. 661, 672 (1897).
years after its enactment, for example, when the Senate chose to punish one Thaddeus Hyatt for his refusal to appear before the committee investigating the raid on Harper's Ferry, it invoked its own inherent power, not the statute, to commit the witness to jail.14 After the United States Supreme Court in 1880 decreed that the courts could review the congressional power to punish for contempt, however, both houses made increasing use of the statute. At the present time, therefore, when either house wishes to punish a recalcitrant witness, the usual procedure calls for a certification of the facts for court action. That Congress still occasionally relies on its own power is illustrated by the action of the Senate in jailing a Washington lawyer who, after being served with a subpoena ducem for papers relating to air mail contracts, first allowed clients to remove several letters from his files.15

**KILBOURN V. THOMPSO\N AND AFTER**

The congressional investigating power, after almost a century of relatively calm sailing, during which time it was shored up by a mass of precedent and by a number of contempt cases in the courts, suddenly ran into a serious judicial storm. In *Kilbourn v. Thompson*, one of the two major pronouncements on the power of congressional investigation, the Supreme Court sharply narrowed the scope of the power.

The occasion for this decision was an inquiry by a special House Committee into the nature and history of a “real estate pool” and transactions involved in the bankruptcy of Jay Cooke & Co. The House resolution, which granted the Committee the power to compel testimony, stressed the government's interest in the case as a result of “improvident deposits” of public money having been made with the London branch of the bankrupt company. The manager of the pool, Hallet Kilbourn, who had been brought before the Committee to testify concerning the pool, refused to produce certain papers and declined to answer the question: “Will you state where each of the five members reside, and will you please state their names?”

Kilbourn, arrested by the sergeant-at-arms of the House of Representatives, was brought before the bar of the House where he still refused to comply with the Committee's requests. The House thereupon approved a resolution declaring him to be in contempt and directed that he be kept in custody until he was ready to produce papers and answer the question.

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15 Kilbourn v. Thompson, 103 U.S. 168 (1880).
Remaining in the common jail of the District of Columbia for forty-five days, he then was released in habeas corpus proceedings by the Chief Justice of the Supreme Court of the District of Columbia. After unsuccessfully suing the sergeant-at-arms, as well as the Speaker of the House and members of the Committee, for false imprisonment, Kilbourn appealed to the United States Supreme Court.

Mr. Justice Miller, speaking for the Court, vigorously attacked the House resolution. "To inquire into the nature and history of the real estate pool," he exclaimed, "[how] indefinite!" He denounced the resolution as containing no hint of any intention of final action by Congress on the subject. . . . Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country.

The Court argued that the House had assumed a "clearly judicial" power which "could only be properly exercised by another branch of the government." And, to drive home further the point that Congress' investigative powers are limited, the Court refused to "concede that the Houses of Congress possess this general power of punishing for contempt. The cases in which they can do this are very limited." Kilbourn's imprisonment, said the Court, had been unlawful.

The Kilbourn decision, therefore, required of all investigations a clear and precise constitutional purpose. At the same time it seemed to support the thesis that a broad area of the private affairs of citizens is immune from congressional scrutiny.17 Even more important, perhaps, the Court doubted the existence of a power to inquire and punish for contempt "to enable either House of Congress to exercise successfully their function of legislation. . . ." The issue was side-stepped, however, when Justice Miller explained that "[t]his latter proposition is one which we do not propose to decide in the present case, because we are able to decide it without passing upon the existence or nonexistence of such a power in aid of the legislative function." The net result of the decision, therefore, was that for almost half a century serious doubt was cast on the very existence of a congressional power to compel testimony for the principal purpose of obtaining information to assist Congress in drafting legislation.18

17 Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926).

In spite of this grave doubt, both houses of Congress zealously continued to investigate. In most instances the motives of the inquiries were mixed. Many investigations continued to have the principal purpose of helping the legislature to discharge its function of holding administrative officers to a strict accountability; such inquiries ranged all the way from a deliberate attack on an administrator or an executive agency to an ascertainment of the needs of a department. An administrator's knowledge that at some future time he and his activities might be subjects of congressional investigation has probably been the principal external deterrent to wrong-doing in the executive branch. Probably the bulk of the inquiries, however, were conducted for the principal or supplementary purpose of obtaining facts which would suggest to the legislators what, if any, legislation was desirable. Moreover, as means of mass communication developed throughout the nation, congressmen became increasingly aware of the potentialities of investigations as useful tools for disseminating facts and ideas and for moulding public opinion. This shaping of opinion, which generally is an aim collateral to the effort of Congress to enact legislation or to supervise the executive branch, may sometimes remedy any wrongs exposed without the necessity of passing legislation. In any event, many committees conduct their investigations in such a way as to try to generate public opinion behind recommended statutes. While congressional committees have always made use of inquiries to shape opinion, the techniques of doing so were most fully developed in the twentieth century.

INVESTIGATION AND ADMINISTRATION

The first major high point of congressional investigative activity had occurred in the Grant Administration when free-flowing charges of corruption had brought a surge of investigation into the executive branch. An- other period of swell came in the latter part of Woodrow Wilson's Administration, when the majority of Congress was of a different party than the President; during the last two years of Wilson's second term, fifty-one inquiries were in progress. It was in the days of the Teapot Dome scandals during the Harding Administration, however, that congressional investigations reached heights of importance and public attention which have never been exceeded. Led by men like Senators Walsh and Wheeler, the Senate occupied the predominant role in this inquisitorial epoch.

A somewhat subtle change in the emphasis of congressional investiga-

20 Rogers, op. cit. supra note 6, at 202.
tions took shape in the 1930's after the election of President Roosevelt. From the very first inquiry in 1792, one purpose of many investigations had been to embarrass the Administration or to hold it in check. Congressmen, when they investigated the executive branch, not infrequently were politically motivated; they sought electioneering ammunition with as much earnestness as they delved for information to aid in legislating. Chief Executives, on their part, had always been aware of the possibilities of using sympathetic committee investigators as "vehicles of vindication" for the Administration. A peak for investigations calculated to curb the Administration was reached in the 1920's when malfeasance and misfeasance had entered administration. But the early days of the New Deal—when, in contrast to the previous decade, a strong congressional majority, led by the President, was committed to a program of social change—witnessed a demonstration of the possibilities of direct aid to an Administration by means of investigation. Thus some inquiries were neatly arranged to reinforce recommendations by the President concerning major legislation. The exposures in 1933 and 1934 by the Senate committee investigating stock exchange practices and banking, for example, contributed markedly to the enactment of such Administration-supported legislation as the Banking Acts of 1933 and 1935, the Securities Act of 1933, and the Securities and Exchange Act of 1934. Other possibilities of co-operation between an investigating committee and the Administration were suggested when the Senate Committee on Interstate Commerce conducted an inquiry into the financing of railroads partly for the purpose of acquiring information which the Interstate Commerce Commission felt it did not have the power to obtain.

SELECT AND STANDING COMMITTEES

A change in investigative technique may also be mentioned at this point. Until 1827 Congress had conducted investigations only by means of select committees, but in that year a standing committee was granted power to send for persons and papers. Select committees were preferred for many years, however, partly because of the feeling that at least in some instances a select committee could be expected to conduct a more penetrating investigation than a standing committee which possibly might have had close working relations with the executive agency or the pri-

1 The term "Administration" is used in capitalized form to include the President and those who work with him in formulating as well as carrying out general governmental policies.
2 Eberling, op. cit. supra note 4, at 142.
3 McGeary, op. cit. supra note 4, at 34-45.
4 S. Res. 84, 72d Cong. 1st Sess. (1932).
5 Dimock, op. cit. supra note 4, at 58.
vate organization being investigated. Although in the twentieth century an increasing number of investigations were entrusted to standing committees or their sub-committees, select committees continued to be utilized for many of the major inquiries.

By the time the Legislative Reorganization Act of 1946 was enacted numerous members of both houses were convinced that too many committees existed in Congress. Moreover, there was some recognition of a weakness in investigative machinery resulting from the practice of choosing as chairman of a select investigating committee the senator or representative who brought the original charges and request for the inquiry; if the chairman has already made serious accusations on the floor of Congress, he may be so eager to prove the validity of his charges that the impartiality of the investigation may suffer. One of the major purposes of the 1946 Act was to reduce drastically the number of committees in each house. But when the Senate agreed that investigations should be conducted only by regular standing committees, and inserted in the Act a prohibition against special investigating committees, the House eliminated this proviso. It is interesting to note, however, that although the outlawing of select investigating committees was not accomplished in the Act, both the Senate, and the House to a somewhat lesser degree, have tended to reduce the number of such committees to a minimum. Thus, in the rash of investigations that broke out in the first session following the election of the Eightieth (Republican) Congress during President Truman's term, only six of the forty-six inquiries were conducted by Senate or House select committees and two by special joint committees.27

**McGrain v. Daugherty and After**

One of the inquiries of the 1920's provided the occasion for the United States Supreme Court to record its second major opinion on the subject of the congressional investigative power. The doubts which had existed as a result of the Kilbourn case, as to the right of the legislature to unearth facts to assist in the framing of legislation, were dispelled by McGrain v. Daugherty.28

* Consult Galloway, Proposed Reforms, page 489 infra.
*7 96 Cong. Rec. 8734 (June 15, 1950). Of course, there will always appear some subjects for investigation which will cross standing-committee lines. Section 134 (a) of the Act gives subpoena power to all standing committees of the Senate and authorizes them to make all investigations into any matters within their jurisdiction.
The controversy in this case arose in the course of an investigation by a Senate Select Committee into the administration of the Department of Justice under ex-Attorney General Harry Daugherty. The Senate resolution providing for the inquiry referred to the alleged failure of Mr. Daugherty to prosecute and defend cases wherein the government of the United States was interested. The appellee in the case was Mally S. Daugherty, the president of an Ohio bank and the brother of Harry Daugherty. During the hearings the Committee served a subpoena on Mally Daugherty requiring him to appear and testify and to bring with him certain of his bank's records. When he failed to appear, a second subpoena ordered him to come before the Committee, but made no reference to records or papers. Again the witness did not comply; nor did he offer any excuse.

An aroused Senate thereupon approved a resolution ordering that Daugherty be brought before the bar of the Senate to answer questions pertinent to the investigation. "The appearance and testimony of the said M. S. Daugherty," stated the resolution, "is material and necessary in order that the committee may . . . obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper."

Following the arrest of Daugherty by John J. McGrain, deputy sergeant-at-arms of the Senate, however, the Cincinnati federal district court in a habeas corpus proceeding discharged Daugherty from the custody of the deputy.

The Supreme Court, although it heard the case argued late in 1924, did not hand down its decision reversing the lower court until early 1927. The unanimous opinion, written by Mr. Justice Van Devanter, brushed aside the contention of Daugherty that the Kilbourn case strongly intimated, if it did not actually hold, that neither house of Congress has power to make inquiries and exact evidence in aid of contemplated legislation. The justices recognized Congress' power of investigation by clearly approving inquiries conducted to help Congress legislate. "The power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function," insisted Mr. Justice Van Devanter. Either house of Congress has power, through its own processes, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution. . . . The power is so far incidental to the legislative function as to be implied.
The Court declared that the administration of the Department of Justice, which was the subject of the investigation in question, was "[p]lainly [a subject] on which legislation could be had." The original resolution creating the committee did not expressly state a legislative intent and the justices believed such a statement was unnecessary.

*McGrain v. Daugherty* did not grant to Congress an unfettered power of investigation. Justice Van Devanter carefully pointed out that limitations do exist. He affirmed *Kibboun v. Thompson*, for example, by agreeing that "neither house is invested with general power to inquire into private affairs and compel disclosures," and that "a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry." These limitations, however, have been employed very little by courts in recent years to restrict congressional investigating committees.

The courts, in the instances where they have had occasion to discuss the congressional investigative power, have been liberal in allowing committees to proceed unmolested; and, almost without exception, they have supported the committees in their contests with witnesses. Still it has never been determined precisely how far a committee may search into the private affairs of a citizen. The Fourth and Fifth Amendments to the Constitution of course serve as checks on the methods used by committees, but courts seem to be increasingly unwilling either to refuse to sustain a committee's actions or to interfere with inquiries in any way.

That the courts are now holding only loose rein on congressional investigators is nowhere more clearly demonstrated than in the opinion by Justice Holtzoff in *United States v. Bryan*. The case resulted when Helen R. Bryan and three other persons refused to produce papers subpoenaed by the House Committee on Un-American Activities. In the opinion are interesting comments relating to the general power of Congress to investigate. Justice Holtzoff readily acknowledged that Congress cannot compel

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the divulgence of information for the purpose of learning whether a crime was committed, to be used as a basis for a criminal prosecution; but he went on to explain that if the same information is wanted for use in connection with legislation, Congress has a right to demand it.

If the subject under scrutiny may have any possible relevancy and materiality, no matter how remote, to some possible legislation, it is within the power of the Congress to investigate the matter. Moreover, the relevancy and the materiality of the subject matter must be presumed. The burden is on one who maintains the contrary to establish his contention. It would be intolerable if the judiciary were to intrude into the activities of the legislative branch of the Government, and virtually stop the progress of an investigation, which is intended to secure information that Congress deems necessary and desirable in the proper exercise of its functions, unless the lack of materiality and relevancy of the subject matter is clear and manifest [emphasis supplied].

If this quoted paragraph can serve as an accurate delineator of the congressional power of investigation, it is difficult to conceive of many subjects which would not be valid fields for inquiry. It is a well known fact that the powers of Congress enumerated in the Constitution, especially the commerce power and the spending power, have been so drastically expanded by court interpretation as to permit national legislation in fields of almost boundless variety. And each time that Congress' power of legislation is broadened, it follows that the power of investigation is similarly expanded. If, in accordance with the Bryan case, Congress may secure information "unless the lack of materiality and relevance of the subject matter is clear and manifest," and if the Senate and House are permitted to make inquiries into subjects "no matter how remote" their relevancy to legislation, the restrictions on the permissible fields of inquiry are extremely loose.

Although the courts frequently reiterate that the congressional power of inquiry is not unrestricted, they appear to be most reluctant to hold that a particular investigation has gone beyond proper bounds. A majority of the United States Court of Appeals of the District of Columbia, for example, in holding that a congressional committee could require an individual to answer whether he was a believer in communism or a member of the Communist Party, waved aside evidence which was critical of the behavior of the House Un-American Activities Committee:

The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people. . . . The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded.32

The "bounds of power and pertinency" are so indistinct, however, that congressional committees can apparently now conduct investigations with little fear that the courts will throw a tight harness over them. Yet it is not true that committees always obtain the information they seek. Some refusals by witnesses to testify or to produce subpoenaed papers pass without serious challenge. A committee may choose not to press for an answer because the same information is available from another source or because the members decide that the procurement of the information from the witness is hardly worth the time and trouble of obtaining Senate or House approval of a resolution providing for coercive or punitive proceedings. A committee which insists, however, likely will get the information it seeks or will have the satisfaction of seeing the recalcitrant witness punished.

THE SEPARATION OF POWERS LIMITATION

There is one major exception, however, to the general rule that a persistent congressional investigating committee can pry loose the information it seeks. Because of the separation of powers, it is not entirely clear how far Congress can go in requiring testimony and papers from the executive branch of the government. On occasion, when a committee runs into a direct collision with the President, the former returns empty handed. Such conflicts are relatively infrequent, but American history has been spotted with them from Washington to Truman. The first President's cabinet set precedent, when called upon for papers, by asserting "that the executive ought to communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public." When Congress asks for information the executive branch usually complies; to do otherwise might create unnecessary and damaging suspicion of the motives of the administrator. Moreover, Congress, through its control over appropriations, can exert powerful pressure on an administrator to submit requested information. But Wolkinson, in an admittedly incomplete compilation, lists refusals by seventeen Presidents and their heads of departments to comply with requests from Congress or its committees for information and papers. When a President declines to divulge information, it has become customary for him to state that the disclosure

33 At least one President admitted that the House could obtain information in a formal proceeding for impeachment. Eberling, op. cit. supra note 4, at 146.

34 Binkley, President and Congress 41 (1947).

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"would not be compatible with the public interest." Such replies may not satisfy the Senate or the House; angry legislators may rise to the floor to blast the Chief Executive or other administrators. But although both houses of Congress have always asserted their right to procure information from the executive branch, they have never forced a final showdown on their power by persisting in their demands. Actually, the question involved here may not be justiciable.

Although a number of Presidents on occasion have declined to submit information to Congress, such refusals, as has been seen, have been relatively rare. Probably no one President stands out as the chief withholder, although Andrew Jackson's refusal to supply requested information remains one of the more significant incidents. It is of interest in the present day, therefore, that at least one Senator currently complains that "the number of occasions in which Congress has met with executive rebuff has greatly increased in recent years." This situation is in direct contrast to the 1930's and President Roosevelt's first two terms, when, as has been noted, congressional inquiries were directed more at aiding than at supervising the Administration. Under President Truman the emphasis of some investigations shifted partially to an attempt to embarrass or discredit the Administration. In such an atmosphere the Administration on several occasions refused to comply with congressional requests for information. Most, if not all, of the requests that were turned down were aimed at obtaining copies of reports by the Federal Bureau of Investigation and other investigative agencies of the executive branch concerning the loyalty of certain government employees. The President, early in 1948, clarified his position in a memorandum to all officers and employees of the executive branch:

36 94 Cong. Rec. 4778 (1948).
37 For opposing viewpoints as to the right of Congress to procure information from the executive see Landis, op. cit. supra note 17, at 72, and Wolkinson, op. cit. supra note 35.
38 Ehrmann, op. cit. supra note 29, at 194.
39 Prompted by complaints against Jackson's alleged wide extension of the spoils system, a House committee was created in 1837 to "inquire into the condition of the various executive departments, the ability and integrity with which they have been conducted..." This Committee in turn adopted resolutions requesting from the President and heads of departments information of various kinds such as lists of appointments made without the consent of the Senate and information on executive "innovations, not authorized by law (if such exist)." President Jackson, in characteristically strong language, replied to the committees, in part: "For myself, I shall repel all such attempts as an invasion of the principles of justice, as well as of the Constitution; and I shall esteem it my sacred duty to the people of the United States to resist them as I would the establishment of a Spanish inquisition." The report of the Committee, including the full text of Jackson's letter, is found in 13 Cong. Deb. Appendix 189 (1837).
40 94 Cong. Rec. 10194 (1948).
The efficient and just administration of the employee loyalty program, under Executive Order No. 9835 of March 21, 1947, requires that reports, records, and files relative to the program be preserved in strict confidence. This is necessary in the interest of our national security and welfare, to preserve the confidential character and sources of information furnished, and to protect Government personnel against the dissemination of unfounded or disproved allegations. It is necessary also in order to insure the fair and just disposition of loyalty cases.

For these reasons, and in accordance with the long-established policy that reports rendered by the Federal Bureau of Investigation and other investigative agencies of the executive branch are to be regarded as confidential, all reports, records, and files relative to the loyalty of employees or prospective employees (including reports of such investigative agencies), shall be maintained in confidence, and shall not be transmitted or disclosed except as required in the efficient conduct of business.

Any subpoena or demand or request for information, reports, or files of the nature described, received from sources other than those persons in the executive branch of the Government who are entitled thereto by reason of their official duties, shall be respectfully declined, on the basis of this directive, and the subpoena or demand or other request shall be referred to the Office of the President for such response as the President may determine to be in the public interest in the particular case. There shall be no relaxation of the provisions of this directive except with my express authority.41

This statement of policy has formed the basis for refusals of information to at least three congressional investigating committees.42

The alleged power of the chief executive to decide whether the disclosure of a specified report or other information is or is not compatible with the public interest represents in practice an important limitation on the congressional power of inquiry.

THE NEED FOR RESTRAINT

Although the executive branch may erect troublesome road blocks on the paths of congressional investigations, those committees which seek information from private citizens apparently may pursue their courses with a minimum of judicial control. True, the Bill of Rights of the United State Constitution has not been repealed. But if the resolution providing for an inquiry expressly states or at least implies a legislative intent, however remote, the restrictions which remain on the congressional investigatory power seem to be almost meaningless.

Even casual observers of American government are aware of the barrage of criticism that in recent years has been hurled at the procedures of

congressional investigating committees. While a portion of this censure is of the sore-head variety, much of it is thoughtful and obviously justified. Many committees conduct their inquiries with a proper amount of decorum and with concern for the rights of those citizens who are being investigated, but a minority of the investigations deserve strong condemnation for their excesses. In some inquiries, for example, no effort is made to establish the credibility of witnesses, and an accused person has no opportunity to present evidence in his own behalf.43

It has become increasingly evident since the case of *McGrain v. Daugherty* that the major responsibility for preventing misuse of the power of investigation rests on Congress itself. Among some senators and representatives there appears at the mid-century to be increased concern over the injuries which unbridled investigations are inflicting on the prestige and dignity of Congress. Members of Congress as well as outside observers have offered a variety of proposed codes of procedure to govern Senate and House investigators. Whether or not such a code is enacted, however, some reliance must always rest on the sense of justice and restraint of individual investigators.

43 Consult, for example, Judge Edgerton’s dissent in *Barsky v. United States*, 167 F. 2d 241, 252 (App. D.C., 1948).