Congressional Investigations:

SIGNIFICANCE FOR THE LEGISLATIVE PROCESS

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WHAT is the right way to approach congressional investigations? An old fable tells of six blind men and an elephant. The first to come upon it touched a leg, and to him the elephant resembled nothing so much as a tree. The second blind man, encountering the tail, concluded that the elephant was like a rope. The third, whose groping hand had found the trunk, was convinced that the beast was much the same as a huge snake. To the others the elephant was like a wall, a great leaf and a sharp spear. Modern "blind men" are still examining and describing "elephants."

The thoughts presented in these paragraphs were influenced most recently by an investigation of the operation of one of the federal government's specialized agencies. The details of this investigation are set forth in Part II of this paper. When used as in the example, the congressional investigation has sometimes been described as "a legislative weapon to control the Executive Branch." The designation connotes a struggle where struggle does not necessarily exist. The purpose of the investigation which furnishes the vantage point was to examine the interpretations of the law employed by the agency under investigation with a view to the possibility that new interpretations or new laws might be needed.

I

Whatever else it may appear to be, a congressional investigation is primarily a search for information which it is believed is needed in order to solve a governmental problem. So far as the Congress is concerned, governmental problems are mainly legislative problems. The activities of the Congress, at least in theory, are directed toward the maintenance, the completion and the perfection of the statutory fabric which is necessary or desirable for the orderly conduct of the nation's affairs. The problems of legislation are the problems of repair, enlargement or alteration of this fabric. It is the function of all congressional investigations to ascertain

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whether such problems exist, to ascertain the true nature of the problems and to determine the best possible solution.

Necessarily, these investigating activities bring congressional committees into contact with officials of the executive branch whenever the inquiries concern the administration of the government's affairs.* When they concern the relationships between the government and its citizens the investigations bring the committees into contact with private individuals as well. In all of these contacts there are claims that the committee is endeavoring to expose human failure, skulduggery, plotting, scheming, corruption and the like. This witch-hunt theory is so widely held that the members of committees sometimes feel the need to announce publicly that they entertain no such intentions. When authorizing a new research project, the members of Congress will, on occasion, go to great lengths to draw distinctions between what they are willing to call investigations on the one hand, and on the other, such projects as inquiries, studies, hearings on legislative proposals, hearings on official appointments and other fact-finding assignments. Such distinctions pay tribute to the popular misconception. They imply that the word "investigation" may indeed merit some sinister connotation.

In the popular conception, startling exposures, charges and countercharges or strong controversy may generally be expected if a congressional investigation is undertaken in that name. If another name is employed the implication is that this sort of thing is not to be expected. In fact any congressional fact-finding mission is a congressional investigation. The differences which distinguish one from the other do not lie in the names by which they are called. They arise from an endless variety of other circumstances which are ever present.

The Range of Motivation and Subject Matter

The power to investigate is one of the most important attributes of the Congress. It is perhaps also the most necessary of all the powers underlying the legislative function. The power to investigate provides the legislature with eyes and ears and a thinking mechanism. It provides an orderly means of being in touch with and absorbing the knowledge, experience and statistical data necessary for legislation in a complex democratic society. Without it the Congress could scarcely fulfill its primary function.

This fundamental necessity is fairly well recognized today. The only practical limitations applied in recent years have been those necessary to

* Consult Morstein Marx, *Significance for the Administrative Process*, page 503 *infra*.

preserve the fundamental three-way division of governmental power, and to preserve the constitutional rights of individual citizens. To legislate effectively the Congress must have virtually unlimited access to information—and it has.

In order to investigate effectively, a congressional committee must have within the field of inquiry assigned to it a virtually unrestrained delegation of this vast congressional power. As a practical matter this means that the power to investigate is wielded by individuals, not by institutions. It means that the wisdom, the judgment and the balance with which it is wielded are the wisdom, the judgment and the balance of individual people, ordinary people, working, perhaps, substantially without restraint. This is inescapable in a democratic system, and it is at once both the weakness and the strength of our legislative processes. It is also the source of most of the criticism directed at congressional investigations, much of which seeks ways to protect the participants in their varied roles.

Criticism strikes too at the motivation of the investigators.* Perhaps it would be fair to distinguish between the official and the unofficial motivations behind congressional investigations. In a given case the unofficial motivation would be the force which actually drives the leading investigator. If it coincides in every respect with the official motivation the investigation will probably be an objective one. If the two diverge anything can happen.

How then can people be protected from the weaknesses of their elected representatives? Only by restraint of power. But where the delegation of power must be complete, the hazards of abuse are heightened because the restraints must be imposed by those who also wield the power. It is difficult—perhaps impossible—to insulate against the ideas by which people are motivated.

Aside from this sometimes troublesome human factor, the most important circumstance determinative of the character of a particular investigation is the governmental problem which makes the investigation necessary; that is, the official motivating influence. Since almost any problem may be a governmental problem these days, it can be quite generally agreed that there are no limits to the fields with which Congress may concern itself. It would follow that there is no limit to the ideas which may officially motivate an investigation.

Another important circumstance which bears on the character of a particular investigation is the nature of the facts which it seeks to uncover.

* Consult Voorhis, *Inner Workings*, page 455 *infra*.

While these will vary from case to case, there are few governmental problems which cannot be approached from one of many points of view. This being so, there is usually plenty of room in any investigation for discrimination among the facts to be examined. Some discrimination is necessary whether it be according to an individual's viewpoint or other more objective criteria, else the investigation would bog down of its own weight. In theory, the facts singled out in an investigation should be those most illuminating with respect to the problem.

It could be argued, on a theoretical basis, that the governmental problem and the facts which surround it are uncontrollable factors determining the character of a congressional investigation. It could be argued, that is, that these factors are fixed by circumstances and cannot be altered by the investigating committee. But it must be at this point, in a Congress made up of people, that theory and practice diverge.

The Tools: Organization and Presentation

Whether regarded from the theoretic or the practical standpoint, there are two important variable factors bearing on the character of a congressional investigation which come within the control of the investigating body and can be adjusted to meet its requirements. These are the principal subjects of this discussion. The one is organization, the other, presentation. They are the principal tools of the investigation and are, therefore, the principal means for arriving at the objective—the accomplishment of the legislative purpose.

The Object: Legislation

Legislation, in some form or other, is generally the object of the investigation. This does not necessarily mean that a law must be framed, debated and enacted as the outgrowth of each investigation. Nor does it mean that the investigation has miscarried if it does not yield a bill. Instead of a law, the investigation may produce a policy statement serving as the interpretation or the reinterpretation of existing law. It may result in the finding that existing law is satisfactory and in this way yield intelligent restraint from legislative action. It may bring about a desire for the repeal or amendment of existing laws. Sometimes the congressional investigation results only in public disclosure—or exposure. When this is the case, the results may be regarded as an appeal to public opinion, an invitation to the people to say whether or not they discern the need for legislation which the legislators themselves have not yet seen fit to

enact. Any of these things, or their combination, may be the object and the product of a congressional investigation.

The power to investigate and the power to report are potent tools of government in a democratic society. They are deeply respected both in and out of the government, not only because of what they have been used for in the past, but also because of what they may be used for on a future occasion. For this reason, their mere possession by the Congress, quite apart from their use, has important indirect effects on the administration of both the internal governmental processes and the laws which affect the citizens directly. Their presence eases the flow of information to the Congress even when no formal investigation is in process, and it undoubtedly prevents abuses of administrative authority which might otherwise constitute a considerable governmental hazard. Without doubt we have better government because of the mere existence of these powers than we would have if they were throttled.

II

As was stated earlier, these ideas were influenced by a particular investigation. This was a study by a Senate Subcommittee of the operation of the Reconstruction Finance Corporation. This examination of the RFC, the government's business lending agency, came in response to two separate recommendations. One was from the Subcommittee's predecessor which had issued a statement of broad policy and purpose for the agency two years before, and at the same time had proposed that the agency's operations be re-examined periodically. The other recommendation came from the Hoover Commission, which was concerned over economy, efficiency and integrity in the conduct of the government's business-type activities. The Hoover Commission saw fit also to caution that the direct lending programs be re-examined lest they impair the maximum utilization of the nation's normal channels of credit.

The governmental problem in this investigation was deemed to be one of accounting, using the term in its broad dictionary sense. On behalf of the Senate, the Subcommittee sought to exact from the RFC an accounting which would show: (1) whether or not the governmental function assigned to the RFC was being discharged faithfully and with satisfactory judgment and integrity; and (2) whether or not that governmental function should be redefined in law in response to changes in economic or other circumstances. The facts to be dealt with in this investigation were, first, the policies actually employed in the RFC's lending operations; second,

the financial facts which made up the operations in the period since the Congress revised and announced its basic policies two years before.

Lack of Staff Work in Earlier Investigation

The study was undertaken in February of 1950. In the summer of 1949, the Subcommittee's interest in certain RFC policies had been aroused by press comments on the circumstances surrounding a number of loans. Hearings had been held in an effort to learn what the agency's policies and practices actually were. These hearings were more or less "by ear." They were not preceded by extensive staff work to guide the Subcommittee's members, and the general feeling, when they were over, was that they had yielded no great results. There was reason to feel that the most important shortcoming was the lack of staff work.

The agency's officials who appeared before the Subcommittee responded to the hearings in what may perhaps be best described as a defensive manner. They gave policy explanations in broad and sweeping terms, and engaged in discussions of general principles designed to "justify" what the agency had done. Objectionable transactions were described generally as unavoidable deviations from normal practice necessitated by special circumstances which could not have been altered. Objectionable general aspects of the operations were characterized as the reflection of problems even then in the process of correction. The Subcommittee was not equipped to probe behind these general explanations.

Moreover, the agency's officials showed little inclination to broaden the field of discussion beyond the limits imposed by the information already at the Subcommittee's disposal. They showed little inclination to go more deeply into the significance of the agency's business decisions than they were forced by questions which the Subcommittee was able to ask. The background thus severely limited, these questions were not overly penetrating. These facts are not reported here in criticism. They seem to be typical of the appearances which officials of the executive branch make before the committees of the Congress. No doubt the reasons why they are typical are good and sufficient.

The 1950 Study's Avoidance of This Weakness

The investigation undertaken in February 1950 sought to avoid the weakness of the hearings held the preceding summer. Emphasis was placed on staff work. The hope was that when hearings were held the Subcommittee members would be as well informed with respect to the subject of discussion as were the agency's officials participating in the

hearings. If this could be accomplished, it was felt, there would be some chance of coming to an understanding on fundamentals.

The first step in organizing the 1950 study was the preparation of a work program in outline form. This outline continued a complete summary of the policy expression formulated by the 1948 Subcommittee so that the new project could be established on a sound foundation and the continuity of the Subcommittee's effort might be preserved. Using it as a guide, the Subcommittee staff examined a group of loans made by the RFC in the period since the policies had last been laid down.

The first loans for examination were taken more or less at random, the hope being that this approach would yield a representative sample and show up the areas in which further study was required. The sample loans were examined with reference to the application of the policies formulated by the predecessor Subcommittee. This review was made on the basis of the accounting records, correspondence and document files and other official records of the lending agency. The first examination of each loan was a cursory one. It sought to determine whether or not a more detailed check could be expected to develop useful or interesting information.

Where the cursory review gave indications that a policy problem might be present, the examination was expanded in scope. It went into the complete detail of the loan negotiations in order that the Subcommittee might be advised of exactly how the RFC and the borrower had reacted to them. These detailed studies were finally organized into written loan résumés. The résumés highlighted the significant facts so that they could be considered quickly and easily and apart from the mass of detail contained in the agency's records and the Subcommittee's working-paper files. As more and more was learned about how the agency's basic policies had been applied, the fields for further review became more and more readily apparent. The loans taken for review later in the study were selected because they furnished case-study material bearing on the specific problems which had been encountered.

The Subcommittee staff conducted its study of loans as openly as possible so that the RFC and its officials were kept fully informed of its areas of operation. The written loan résumés in cases designated for discussion in public hearings were furnished to the agency so that they might be checked over in detail and agreed to as complete and accurate factual presentations. In this way the Subcommittee gained assurance that its

hearings could proceed with an orderly discussion of lending policies unimpeded by argument over details of time, place and circumstance.

The Framework of the Hearings

The hearings on RFC lending during 1950 were of two types. To use a graphic expression, there were hearings organized vertically and hearings organized horizontally. The former dealt with individual loans, principally those involving large amounts of money. On some loans there was one hearing, on others a series. They were concerned with every aspect of policy reflected in the loans, and inquired extensively into the public interest served by the grant of government financial assistance to the borrower. They then examined in some detail the salient characteristics of the loan application, the negotiations, the conditions agreed upon and the experiences encountered in working out the particular borrower's problem.

These hearings presented a careful analysis of the government's experience in the cases discussed. They also provided the opportunity for both the Subcommittee members and the lending agency officials to "second guess" the loan negotiations and the other circumstances found in these cases. The printed record contains what should be a well-considered appraisal of the government's experience.

So much for the vertical studies. The other hearings were organized into an orderly discussion of lending policy according to an outline prepared in advance. Seven separate hearings were scheduled and the file for discussion in each was laid out beforehand so as to insure a natural development of the subject. To guard against the aimless discussion of broad generalities which occurred in the summer of 1949, the hearings on lending policy were based on specific case studies which were inserted at appropriate points in the program. In this way it was possible to review each major policy with reference to its specific application in one or more actual loans of relatively recent vintage.

The factual loan résumés prepared by the Subcommittee's staff and checked by the lending agency served as the medium for introducing the case studies into the record. In addition, at appropriate points, the policy expressions of the previous Subcommittee were reviewed and discussed in the light of the sample cases. Some twenty-five individual loans were discussed during the seven hearings, each with reference to a particular aspect of policy, but none of them exhaustively.

The Skeleton: Prepared Questions

Through the general organization of the hearings according to outlines prepared in advance, the Subcommittee was assured that the public presentation of its study would cover all aspects of policy considered worthy of public discussion. It was assured also that they would be covered in an orderly fashion. So that each aspect of policy would be probed to a sufficient depth, the hearings were organized in detail as well as in their general outline. The primary tool for this part of the preparatory work was a list of questions carefully composed and keyed into the several factual loan résumés or case studies. A card file was used by the chairman in conducting the hearings. The questions were set up in a series designed to get to the core of each policy problem by a process of logical reasoning.

In order to be sure that the question series would hold together in the hearings it was necessary, of course, that most of the answers be ascertained in advance to the fullest possible extent. It was necessary also that the answers be indicated in the card file. The actual public hearings thus became the formal presentation of the results of the study, but, more important, the confirmation of those results through the testimony of top ranking officials in the lending agency.

III

A truly scientific congressional investigation is not possible. Neither is there any scientific method for displaying results to the Congress or to the public. The only reliable rule of thumb is that there is no substitute for thorough preparation: preparation both by marshalling the motivating ideas and gathering the basic factual data.

The human shortcomings of congressional investigations lie largely in the abuse or misuse of the investigative power. There is little likelihood that they can ever be eliminated by procedural devices, rules or regulations. The prevention of power abuses is certainly desirable in any situation, governmental or private, but the curtailment of a necessary power is an excessively costly way to curb the abuse. The real hope lies in education, understanding and the development of an ever improving tradition. Above all, it must be realized that there can be no Congress without the free and unrestricted power to investigate.