Congressional Investigations:

THE PROBLEM AND ITS SOLUTION

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I

It is a commonplace of politics that certain parts of a governmental machine may excite little save academic comment until they seem to be misused. In the middle of the 19th century Walter Bagehot—no great believer in democracy—said that the cure for admiring the House of Lords was to go and look at it. Yet, until 1909, the British were indifferent to the anomaly of a powerful hereditary Upper Chamber. When the Peers rejected Mr. Lloyd George's budget, the prompt result was a sharp diminution of their legislative authority.

Before 1917 many complained but no one did anything about the inability of the Senate of the United States to bring debate to a close. Then a filibuster on a bill to arm American merchantmen prevented a vote before the short session of the Congress ended on March 4. "A little group of willful men representing no opinion but their own have rendered the great government of the United States helpless and contemptible," said Woodrow Wilson. The public reaction was intense and a few days after the new Congress assembled in April, the Senate amended its rules so that debate could, under certain circumstances, be brought to an end.

Until a quarter of a century ago congressional investigations attracted little attention. The first Congresses had asserted a right to conduct them and during the first twenty-five years of the Republic there were approximately thirty. Thereafter, inquisitions waned or waxed—as during Grant's administration and later after the activities of Harding's Ohio gang. But of writers on American politics before World War I, Woodrow Wilson was almost alone in stressing the importance of the inquiring function of the national legislature. In his remarkable little book Congressional Government (published in 1885) Wilson argued that Congress was not well equipped to investigate the administration.

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Even the special, irksome, ungracious investigations which it from time to time institutes in its spasmodic endeavors to dispel or confirm suspicions of malfeasance or of wanton corruption do not afford it more than a glimpse of the inside of a small province of federal administration.\(^2\)

But not until the Teapot Dome scandals of the Harding administration and the investigations into them was there any extended discussion of this part of the American machinery of government. Thereafter committee inquiries became one of the most powerful weapons in the congressional armory.\(^*\)

A quarter of a century ago Senator Thomas J. Walsh of Montana was the great inquisitor.\(^3\) His only interest was in searching out malfeasance and corruption. In recent years we have had Dies, Rankin, J. Parnell Thomas, McCarthy and others. Representatives and senators have misused investigations to wreak personal vengeance and to publicize their unattractive figures in headlines, newsreels, and on the wireless. They have been obscenely indifferent to the principle that every man is innocent until he is proven guilty. They have invented a new and horrible doctrine of guilt by association. On occasion they seem to have terrorized our hired men in Washington. At least some competent reporters have described the atmosphere in Washington as one of "panic" with officials unable to give sufficient attention to "policy."

This is not impressive, because Washington is no place for thin-skinned men, and confusion in, or lack of, policy cannot be so simply explained. But the spectacle of congressional inquisitors riding high, wide and un-handsomely makes responsible senators and representatives weary. The press is critical. Bar associations discuss improved procedures. Bills seek-

\(^*\) Consult McGeary, Historical Development, page 425 supra.

\(^2\) Wilson, Congressional Government 271 (1885).

\(^3\) When the controversy was at its height, I entered the lists with a little book, The American Senate (1926), which in William James' phrase obtained a kind of immortality—in footnote citations. I was not concerned with the constitutional questions some of which were then unclear, but all of which have since been settled in favor of Congress. My interest was with politics: with the role that the elected representatives of the people should play. I argued that they must do more than legislate and control expenditure; that when the occasion required they should be inquisitors and act as the High Court of the nation. Noting that the most effective investigations had been by Senate committees—a reversal of the practice of earlier periods when the House had been alert—I asked whether party control and the dominance of the Rules Committee by a few House leaders might not enable the President to choke off inquiries that he thought would be embarrassing to him. That had certainly happened during the Harding administration. The Senate rushed in where the House had been too timid to tread. I suggested that freedom of debate in the Senate—the possibility of filibustering—was desirable in order to prevent a party steamroller from flattening the efforts of minority or insurgent senators to insist on investigations that would be unpalatable to the White House or to party chieftains.
ing to protect those whom committee members may "accuse" are intro-
duced in Congress.* Reforms of procedure are certainly desirable, but
there will always be congressional inquisitors who will allow their con-
sciences to be subservient to their cravings for headlines and to disregard
the obligations of procedures prescribed by law. And there is the danger
that an attempt to curb abuses might make it more difficult, or even
impossible, for investigating committees to probe as deeply as the cir-
cumstances required. For Congress to preserve its inquisitorial powers in
full measure even though it may prostitute them is far more important
than the prevention of reprehensible practices. The ability of the British
Parliament and the American Congress to act as a High Court is one
reason why these legislatures acquired a stature far superior to contin-
ental counterparts such as the French Chamber of Deputies and the
German Reichstag, which had insufficient powers to compel disclosures.4
That superior stature must be preserved.

II

There is one simple "reform" that Congress never seems to have
thought of—to consider its investigating committees in the light of the
homely maxim, "what is sauce for the goose is sauce for the gander."

In 1946 Congress passed the Administrative Procedure Act.5 It was de-
signed to compel administrative agencies—particularly the independent
regulatory commissions—to reform their procedures so that parties ap-
pearing before them could not complain that they had been dealt with
"unfairly" or in a capricious or arbitrary fashion. One of the requirements
of the statute is that no person engaged in the performance of investiga-
tive or prosecuting functions for any administrative agency shall influence
or advise on the decision that is handed down. His participation can be
only as a counsel in public proceedings or as a witness. In other words,
Congress, so far as the independent regulatory commissions are concerned,
considered that the commingling of investigation with decision was plainly
undesirable. It made provision for hearing officials, who, in the language
of the Senate report, "must conduct the hearing in a strictly impartial
manner rather than as the representatives of an investigative or prosecut-
ing authority." The report added that the hearing officials would "have

* Consult Galloway, Proposed Reforms, page 482 infra.
4 Ehrmann, The Duty of Disclosure in Parliamentary Investigation: A Comparative Study,
the authority and duty—as a court does—to make sure that all the necessary evidence is adduced and to keep the hearings orderly and efficient.6

If Congress really wished to reform its own investigating procedure it need only pass a statute applying to its committees the principles of the Administrative Procedure Act. Such a statute would declare that members of investigating committees were to be judges and not inquisitors; that each committee must have counsel charged with the responsibility of preparing and presenting the evidence on the matters to be inquired into; and that the committee members should not participate in the examination or cross-examination of witnesses. Members of a committee could, as judges do, ask clarifying questions and, when necessary, protect witnesses. The statute should (but would not) provide that any member of a committee who departed from the role of a judge and attempted to be an inquisitor would be in contempt of the branch of Congress of which he was a member—to be dealt with by that branch as it saw fit.

If committee members did no more than preside at hearings, listen to testimony, and then, when the hearings were over, prepare their report, it might be possible to exclude evidence that irrelevantly “smears” and to permit witnesses to be represented by counsel. The investigating staff would know in advance the evidence it was going to present, and with the approval of the presiding committeeman could keep out of the record that which related to innocent bystanders.7

I have no hope that Congress will take such action, or that if it did, committeemen would be content with playing the role of judges. But even in the unlikely event that an investigating committee functioned in the manner that Congress has prescribed for an independent regulatory commission, there would remain the problem of partisan reports in which the public has insufficient confidence. This is part of a larger problem: congressional investigations are inefficient and will continue to be so. Hence I propose a substitute for them which would make the national legislature more effective as a high court, permit its members to perform their legislative tasks more effectively, and at the same time eliminate most of the abuses.

7 Under the present procedures, several members of a committee vie with each other to ask questions, and counsel to the committee is permitted to examine only the witnesses who are unimportant and whose testimony is not likely to result in headlines. Hence, facilities for counsel of persons being smeared to cross-examine the smearers would make hearings more of a shambles than they now are. But if the principle of the Administrative Procedure Act were followed, counsel for interested parties could be allowed to appear.
During the spring of 1950 the proceedings before a congressional committee were the most grotesque that Washington had ever witnessed. Senator Joseph R. McCarthy, Republican, of Wisconsin, made loud but vague charges of "communist infiltration" in the State Department. A subcommittee of the Senate Foreign Relations Committee began to inquire into his allegations and, when it endeavored to find out what supporting evidence he had, Senator McCarthy cried out that the senators on the Democratic side who interrogated him were tools of the State Department and were endeavoring to "cover up."

The Senator demanded that the President permit the inspection of the Department's loyalty files and thus risk the "smearing" of persons whose probity had been established. If the President refused, Senator McCarthy could claim that his charges were not disproved. If the President complied and the charges blew up, Senator McCarthy could boast that he, single handedly, had won a victory in a battle that Congress has consistently lost since its defeat by the first President—that he had won the right of access to executive papers when the President thought that their disclosure would be "incompatible with the public interest."

Such a spectacle, unfortunate under any circumstances, was appalling at a moment when the State Department, facing tasks as delicate and important as ever before in its history, needed the full support of American public opinion, the complete confidence of friendly states, and the healthy respect of the communist bloc. Moreover, everyone knew that when the subcommittee concluded its investigation, its report was not likely to be unanimous. Representatives and senators, though they pose as judges, are still politicians who are mindful of advantages for themselves and their political parties. If, after a committee has affrighted underlings and angered persons in high places, it reports that all the smoke came from a very small fire, some will suspect political whitewash. If a committee ferrets out and proclaims wrongdoing, some will refuse to believe that there was no more and some will cry "foul."

The business of inquiring into dark corners is not a simple one, and

* Consult McGeary, Historical Development, page 425 supra.

8 In the case of Senator Tydings' Subcommittee, Senator Henry Cabot Lodge, Jr., presented a temperate minority report which pointed out that the investigation had not been searching enough to justify the conclusions of the majority that there was nothing in Senator McCarthy's charges. State Department Employee Loyalty Investigation, Sen. Rep. No. 2108, Part 2, 81st Cong. 2d Sess. (1950). Senator Tydings must regret that he chaired the Subcommittee, for dissatisfaction with the way he conducted the inquiry was at least a contributing factor to his defeat in the Maryland senatorial contest.
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part-time amateurs cannot handle it successfully. Investigations must be speedy so that witnesses have less time to plan dissimulations. Inquisitors must deal with masses of factual detail so complicated that their mastery requires not only conscious thought in the hearing room but subconscious thought in moments of leisure. Cross-examination must be carefully prepared and ruthlessly conducted. "The many possible deficiencies, suppressions, sources of error, and untrustworthiness which lie underneath the bare untested assertion of a witness may be best brought to light and exposed by cross-examination," wrote Wigmore. "Cross-examination is beyond doubt the greatest legal engine ever invented for the discovery of truth."9

How can senators or representatives be efficient inquisitors when, save exceptionally, they are able to devote only parts of mornings to the job and then must turn to legislative tasks and constituents' entreaties? They never have the time to master the detail of any but the simplest kind of case, and hence, with rare exceptions, cross-examination is ludicrously feeble. In the "Five Percenter Inquiry," for example, the committee allowed counsel to do most of the questioning of the less prominent witnesses. He had not sufficient time to prepare himself fully, but so long as senators did not interrupt, his cross-examination, if not searching, was workmanlike. When Major General Harry H. Vaughan, the President's Military Aide, was the witness, larger headlines were naturally in prospect. Counsel was told to take a rest, and six senators questioned General Vaughan extemporaneously and repetitiously. At one point Senator McCarthy said that it was "unfair to the other members of the committee" for him to take up so much time. He had planned "on asking the junior and senior lady of the Senate to take over before" (Senator Margaret Chase Smith, of Maine). "I think we will continue to rotate," said Senator Hoey, the Chairman, "and see if anybody on this side [that is, the Democratic side] wants to ask questions."

What a way to conduct an inquiry! And what a lack of dignity to discourse to witnesses and to the public the chief interest—that is, publicity—of at least some of those whom the Congress permits to conduct in its name investigations into matters of urgent public importance.10

11 The day following his examination of General Vaughan, Senator McCarthy made certain corrections in the record:

"Senator McCarthy. Mr. Chairman, before Mr. Larson's testimony, I would like to get the
For many years senators and representatives insisted that they were competent to draft the laws Congress passed. A representative only twenty-eight years ago cried:

I am unwilling to make the admission that if I have a piece of legislation that I think ought to become the law, that I am incapacitated, that the people who are elected in other districts are incapacitated, to do their own thinking and prepare their own bills. I am unwilling to make the admission that the House of Representatives must have an expert legislative bill drafter to whom to go to draft bills.12

But even the lawyers in Congress began to realize that drafting required a particular kind of competence. At first Congress was willing to authorize only a skeleton staff, whose senior members were trained in the Columbia University Legislative Drafting Bureau by Professor Joseph P. Chamberlain. Now the national legislature is well served by draftsmen and no senator or representative would dream of trusting his own skill in preparing any important bill that he hoped to have enacted into law.

committee's permission to make some corrections in the record of yesterday. I was going over the record last night and I was greatly disturbed to find some mistakes in it.

"I notice that I constantly referred to General Vaughan as 'Mr. Maragon.' It was not done purposely. I just have an inexcusable habit, while I am cross-examining a witness, of concentrating on my thoughts, and my thoughts apparently sometimes get ahead of my tongue, which is bad.

"I referred to General Vaughan often as 'Mr. Vaughan,' which is unfair to him. It should be General Vaughan.

"I referred to General Vaughan as 'Colonel Vaughan,' which is in the same category. And I would like to have the record corrected in every case where I referred to 'Colonel Vaughan' and have it be made 'General Vaughan,' and wherever I referred to him as 'Mr. Maragon,' it be made 'General Vaughan,' and the 'Mr.' changed to 'General.'

"Senator Hoey. The corrections will be made.

"Senator McCarthy. I noticed one other mistake which disturbed me very greatly. In referring to Milton Kronheim's liquor company, I referred to it as 'Schenley.' I did that a number of times in the record. Now, Mr. Kronheim has nothing to do with Schenley. His company is the National Distillers Products Corp.

"There is a Mr. Kahn connected with Schenley's. I do not know Mr. Kahn and know nothing of his activities, and it was an extremely unfortunate mistake. If I have done Schenley some damage, and I do not know that I have, I am certainly sorry for it. I would like to have the record corrected.

"Of course this is not as simple a matter as the other, because if this record is ever used in a possible perjury case, or something like that, we do not have the liberty to change the record. I would like to have it noted, however, wherever I refer to Kronheim's company as 'Schenley,' that be corrected so it will appear very clearly it should be National Distillers Products Corp.

"As I say, it is extremely unfortunate, and I know everyone here knows that I have the inexcusable habit of calling men by their wrong names when I am concentrating on cross-examination. But anyone who reads the record will realize that, I am sure. I would like to have that, as I say corrected. I do not believe we have any right, in fairness to the witnesses, to merely pick out one word and put another word into a question. I think it merely must be noted that this should have been National Distillers and not Schenley.

"Senator Hoey. That correction will be made."

Ibid. at 597. On this, any comment would be an anticlimax.

Congress should now decide that it wishes investigations handled competently. In determining the means best suited to this purpose, Congress should look at practices in Albany and London, whose office-holding inhabitants are spared the abuses complained of in Washington. Moreover, New York’s Moreland Commissioners* and Great Britain’s Tribunals of Inquiry** are able to convince the public that they are reporting accurately and without partisanship on what they have found in the dark corners that they investigate. The Moreland Commissionership and the British Tribunal of Inquiry have much in common. Is there any reason why a similar plant would not thrive in Washington’s political climate? Certain grafts might be necessary to cater to congressional sensibilities and to quiet extreme suspicions, but it should not be difficult to breed a satisfactory hybrid.

IV

Section Eight of the New York Executive Law (the Moreland Act) empowers the governor, whenever he so desires, to appoint a commissioner or commissioners “to examine and investigate the management and affairs of any department, board, bureau, or commission of the State.” The commissioner can subpoena persons and records and swear witnesses. He can employ counsel and investigators. The legislature assures the governor a free hand by making continuing appropriations for the payment of the commissioners and the expenses they incur. Reports go to the governor for submission to the legislature.

Since 1907, when the Act was passed, there have been more than seventy commissions issued to more than sixty different persons. Rarely, if ever, has the legislature been able to charge that the governor selected as commissioner a partisan or a nonentity, to criticize the methods of investigation, or to maintain that a report did not carry conviction. Practically all of the commissioners have been men who had reputations that they wished to preserve. They have been judges like Frederick E. Crane and John V. McEvoy; journalists and educators like John H. Finley, Henry L. Stoddard and Edward Lee Thorndyke; lawyers like George W. Alger and George Gordon Battle; and public servants like Robert Moses and John H. Delaney. Such men were careful to provide themselves with

* Consult Galloway, Proposed Reforms, page 486 infra for a complete discussion of the Moreland Commission.

** Consult Finer, The British System, page 561 infra.

13 This statute was originally enacted as N.Y.L. (1907) c. 539, and amended by N.Y.L. (1928) c. 131.
efficient investigators and counsel and did not seek headlines. Their inquiries have ranged over the whole field of New York State’s administration.

Rarely has the state legislature been hostile to investigations ordered by the governor. Indeed, there have been cases when legislative committees which had already started to probe matters yielded the field to a Moreland Commissioner. The “absurdities and difficulties which inhere in a race to subpoena witnesses and documents,” said the Assembly Speaker on one occasion, “require us to restrict our activity.”4 If there were a federal Moreland Act, senators and representatives might in time be willing to restrain themselves in the same fashion and to wait for a report. But Congress is not likely to want a federal Moreland Act. It would not trust the President to appoint commissioners who would care so much for their own reputations that they would not care where the political chips fell. And curiously enough, Franklin Roosevelt, who, as Governor of New York, had used the Moreland Act successfully, was unwilling to propose a federal counterpart. When it was suggested by his Committee on Administrative Management (1937) he would have none of it.

V

In Great Britain, a Tribunal of Inquiry is the usual machinery for inquiring into scandals. As will appear the principle is substantially the same as that of the Moreland Act—an inquiry authorized by the legislature but conducted by persons whom the executive appoints. Its operation may be described by recounting the circumstances under which it was last used.

During the summer of 1948 rumors began to circulate in Great Britain that ministers of the Crown and other government servants had received or had been offered bribes in respect of the withdrawals of prosecutions and the granting of various licenses. The rumors reached the President of the Board of Trade, who consulted the Chancellor of the Exchequer (the Prime Minister was absent) and they asked the Lord Chancellor (the highest judicial officer of the Crown) to inquire into the allegations. The Metropolitan Police were informed, but they were already making inquiries on their own initiative. When the Prime Minister learned of the

4 This forbearance no one appreciated more than myself, for I was then (1928) a Moreland Commissioner investigating widely publicized charges of fraud in the Bureau of Workmen's Compensation. Message of the Governor (Franklin Delano Roosevelt) transmitting the Report of Commissioner Lindsay Rogers, appointed to examine and investigate the Administration of the Department of Labor; legislative document 49 (1929).
matter he decided that an inquiry was necessary, and as soon as Parliament met in October he moved that the matter be referred for investigation to a tribunal clothed with all the powers granted under the Tribunals of Inquiry (Evidence) Act of 1921. The House promptly agreed and in a manner which will seem incredible to representatives and senators: there was no partisan debate. The ministers in question were members of the House whose honor was at stake. As leader of the Conservative opposition, Winston Churchill counselled that until the Tribunal had finished its investigation and made its report, members of the House should abstain from "gossip." I do not need to enlarge on some marked differences between the political climates of Westminster and Capitol Hill.*

In introducing his resolution, Mr. Attlee said that the Government's attention had been drawn to four specific matters: a license to import a quantity of amusement machinery; an application for a building license; a request to issue capital stock for the formation of a public company operating football pools; and the withdrawal of a prosecution for contravention of a paper control order. The Government, however, desired that the Tribunal have wider terms of reference, and the resolution instructed it to inquire whether there is any justification for allegations that payments, rewards or other considerations have been sought, offered, promised, made, or received by or to ministers of the Crown or other public servants in connection with licenses, or permissions required under any enactment, regulation or order or in connection with the withdrawal of any prosecution, and if so, in what circumstances the transactions took place and what persons were involved therein.

These terms of reference, however, limited the inquiry to transactions involving ministers of the Crown or other public servants. The Tribunal was not supposed to interest itself in transactions which did not directly affect public officials. Thus private citizens whose names were brought in incidentally were not called to testify in their own defense unless their acts had some connection with the acts of ministers and civil servants.

Since the matter inquired into was of high importance, the Tribunal was chaired by a judge of the High Court, Sir George Justin Lynskey, and associated with him were two well-known barristers. Precedent was followed when the Treasury Solicitor put his services at the disposal of the Tribunal to "take such steps as they may direct him to take for the pur-

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* Consult Finer, The British System, page 561 infra for a complete description of the Tribunals of Inquiry.

pose of bringing before the Tribunal all the evidence which the Tribunal
thinks is relevant to the Inquiry." The Attorney General (with two
"learned friends") acted as counsel, placed the facts before the Tribunal,
called the witnesses and cross-examined them. Statements were taken
from all prospective witnesses before determining whether they should be
called. The Attorney General led the witnesses through their statements
(which were available to the Tribunal) and then conducted his cross-
examination. Counsel representing witnesses (there were nineteen of
them) were permitted to cross-examine on evidence directly affecting
their clients.

After its first meeting, the Tribunal adjourned for a fortnight. It did
not wish to hear witnesses until all the statements had been examined and
counsel had his case prepared and knew what he hoped to bring out. A
previous tribunal of inquiry had proceeded more expeditiously and had
encountered difficulties which the Lynskey Tribunal wished to avoid.\(^6\)

After the fortnight for preparation it sat for twenty-six days between
November 5 and December 21. On twenty-two days it heard testimony.
On four days counsel made their arguments. One month later the Tribunal
issued its report. This was a document of eighty pages and made a de-
tailed analysis of the evidence.\(^7\)

The case the Tribunal had heard was both fascinating and tawdry but
the story is not pertinent here save to the extent that it discloses the ex-

\(^6\) That had happened in 1936 when there had been a leakage of budget secrets (the "Jimmy" Thomas case) and some friends of the minister had insured themselves against losses as a result of the tax increases in prospect. The report of the Thomas tribunal lamented the fact that because there had been no counsel to prepare the case, "the testing of the witnesses' stories by way of cross-examination or otherwise has necessarily been undertaken by the mem-
bers of the Tribunal themselves, with the resultant possibility of creating the impression
that they were from the start hostile to some of the witnesses who appeared before them." Moreover, because the outlines of the case were not known in advance, "it happened that per-
sons whose conduct was the subject of the closest scrutiny were not represented before the Tri-
bunal until some days had elapsed" and counsel "who appeared to represent such persons were
hampered by the inability to object to the reception of evidence in the nature of hearsay and
prevented from presenting the case of their clients in the manner in which they would have
ordinarily presented it before a court of law in this country."

In hearing the bribery evidence, members of the Tribunal intervened infrequently and rarely
seemed hostile to a witness. Some hearsay evidence had perforce to be admitted: the Inquiry
was an investigation and not a trial. As the chairman explained: "While we feel ourselves
entitled to use any evidence once it has been given although it would strictly not have been
given in the course of the prosecution of an individual whose conduct has been under con-
sideration, at the same time, when considering the case of any individual, we propose as far as
lies within us to put aside all evidence of a hearsay nature and only apply as it comes to that
individual such evidence as would strictly be evidence against him."

\(^7\) Tribunals of Inquiry (Evidence) Act, 1921: Report of the Tribunal Appointed to In-
quire into Allegations Reflecting on the Official Conduct of Ministers of the Crown and Other
Public Servants, Cmd. 7616 (1949).
A British Tribunal of Inquiry can throw light into dark corners and carry conviction when it announces what, in its view, merits the attention of the Public Prosecutor, what, for holders of political office or civil servants, has been culpable conduct; and what actions have been innocent, indiscreet or entirely blameless. The Tribunal found that a liquor merchant had made presents of wine and spirits "for the purpose of securing favorable and expeditious treatment by the Board of Trade of his applications for licenses to import Sherry casks" and the Parliamentary Secretary had received these gifts "knowing the purpose for which they were made and in return for these gifts intervened to secure the grant of the licenses." The Parliamentary Secretary had accepted a gold cigarette case, a suit of clothes, and much hospitality, knowing that the benefactions had been made "for the purpose of securing expeditious and favorable consideration by the Board of Trade and other ministries of any application made by any person whom" the donor may introduce. The Tribunal was "convinced" he had acted in the hope of "material advantage to himself," although in fact all that he "received, apart from some trivial gifts, was a present of a suit of clothes." There was, however, no evidence of the gift of large sums as rumor had reported. A prominent trade union official who had become a director of the Bank of England had been offered the chairmanship of a proposed new company "as a consideration to induce him to assist in obtaining from the Treasury upon the recommendation of the Capital Issues Committee permission for a public issue" of shares to float a new company. The Rt. Hon. Hugh Dalton had a few unpleasant moments on the witness stand explaining that his secretary was responsible for the "Dear Stan" salutation of a letter he had written to Sydney Stanley, *n* Kohsyzcky, alias Rechtand, an undischarged bankrupt—the principal present giver in the case. But in respect of Mr. Dalton and other ministers and certain civil servants who testified, the Tribunal expressed itself as "satisfied that there is no foundation" for allegations or suggestions of wrongdoing.

The Parliamentary Secretary resigned without waiting for the report of the Tribunal and vacated his seat in the House of Commons. The director of the Bank of England resigned. Moreover (there may be no connection), the names of two men whom the Tribunal cleared and who were re-elected to the House of Commons were dropped from the Labor Government when Mr. Attlee reorganized it after the election in February 1950. The men who were blamed by the Tribunal did not like its report, but there was no criticism of its proceedings or its findings from any other quarter. An efficient body had inquired into a dark corner of British poli-
tics and had closed the door on it. If Congress wishes to make its investigations more efficient and conclusive it need only pass a statute modelled on the British Tribunals of Inquiry Act.

VI

Neither the New York nor the British method of conducting investigations would be satisfactory to the Congress of the United States. In New York the initial responsibility is the governor's but I can recall no instance of his refusing to act when the legislature wished him to do so. In Great Britain, while it is Parliament that calls a tribunal into being, the Executive appoints its members. Law officers of the Crown place themselves at its service. Congress is too distrustful of the President to let him do the appointing and would not have sufficient confidence in the Attorney General. I think that Congress is too suspicious. A President would realize the risk of losing public esteem through appointments which Congress (and the country) could not applaud. Congress, however, takes a different view of the matter. The problem therefore is this: How should the members of a commission or tribunal be appointed?

On June 15, 1950, Senators Elbert Thomas of Utah and Irving M. Ives of New York introduced a bill "to provide for the establishing of Congressional investigating commissions." The powers would be similar to those possessed by a British Tribunal of Inquiry but the bill proposes a method of appointment that would be cumbersome and a commission that would be unwieldy.

"By and with the advice and consent of the Senate" the President would appoint "a panel of thirty commissioners from private life to be available to serve on investigating commissions" brought into being by concurrent resolutions of Congress. When a commission was set up, it would be composed of two senators appointed by the President of the Senate and two members of the House of Representatives appointed by the Speaker—one in each case from each of the two major political parties. Three members of the panel of thirty would be appointed jointly by the President of the Senate and the Speaker with not more than two from the same political party.

But a commission of seven is too large. Three members are ample. Nor should a commission include members of Congress. They would be amateurs and would, as they do now, wish to publicize themselves. One important advantage of the Moreland Commissionership or the British Tribunal is that it frees legislators from tasks that reduce the amount of time avail-

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able for their legislative work which is always in arrears.

There is little likelihood of an early passage of the Thomas-Ives bill. Sooner or later, however, Congress will conclude that it acts incompetently and frequently fails in its important task of compelling disclosures. Congress will realize that it fails completely in convincing the public that the disclosures are complete. In the employment of competent agencies to investigate, it is to be hoped that Congress will not delay as long as it did in employing competent people to do its legislative drafting.

VII

In recent years Congress has been much discussed. Books have declared that it is "on trial" and have asked whether our national legislature is competent to do its job. No one has stressed what to my mind is the principal fault: that Congress is an entity which violates the proposition of the mathematicians that the sum is equal to the whole of its parts. The congressional sum is less than the whole of its parts. A committee is not the servant of Congress but an independent satrapy that does as it pleases; and a member of a committee can ignore committee decisions and do as he pleases. Individual senators and representatives are tails that wag the congressional dog.

If Congress attempted to implement the principle that its own members must not be contemptuous of it, then it might have to chafe less frequently because it does not occupy the place that it wishes to hold in the public esteem. It is probably too much to expect that either the Senate or the House would cite for contempt a senator or representative who purported to disclose what a committee wished to keep secret. The British House of Commons does this. If Senator McCarthy had been a member of it and had persisted in antics similar to those that the American public has witnessed, he would doubtless have been expelled.

But each house of Congress might consider amending its rules so that it would be out of order to discuss the proceedings of committees or of the proposed congressional investigating commissions before a report had been made. That is the rule in the House of Commons and members do not thereby feel that their freedom of speech has been limited. They do not believe that they are justified in seeking to debate matters that are sub judice. And if in a speech to constituents a member reflected on the fairness of a British Tribunal of Inquiry or attempted to influence its judgment, he would be in contempt of it and of the house which had joined in its creation. If senators and representatives stuck to their legislative knitting they might rate fewer headlines than they get as investigators but the blow to them would be a boon to Congress and the country.