Congressional Investigations:

PROPOSED REFORMS

GEORGE B. GALLOWAY†

THE SCOPE and conduct of congressional investigations have been subjects of controversy throughout the history of the Republic. Their powers and procedures have been bitterly attacked and vigorously defended from the earliest days down to the present time. It is now well settled that the congressional committee of inquiry is a device appropriate for use in the performance by Congress of its legislative, supervisory, and informing functions. Public opinion has long accepted this device as a legitimate tool of our national legislature and the courts have sanctioned its use in aid of legislation.

As a rule, congressional committees of investigation over the years have conducted their inquiries with due consideration of the public interest and with fairness to the organizations and individuals concerned. Unfair investigations have been the exception rather than the rule. But there have occasionally been conspicuous departures from this pattern. The practices and procedures of a few committees have given rise to widespread criticism of the alleged abuses of the investigative function. This criticism has been voiced by bar associations, jurists, and law school professors; by newspaper editors and students of government, and by members of Congress itself. It has found expression in law reviews and lay journals. As a result of public criticism of the alleged "degradation of the investigative process," several bills designed to reform committee procedures and to protect the rights of witnesses under investigation have been introduced in both houses of Congress since 1945.

CRITICISM OF INVESTIGATIONS

Although recent developments have brought congressional investigations under heavy and concerted attack, criticisms of them can be traced back for many years. Twenty-three years ago, the present writer summed

† Senior Specialist in American government in the Library of Congress.


2 In 1885 Woodrow Wilson wrote:

"Even the special, irksome, ungracious investigations which it [Congress] from time to time
up a survey of the work of almost three hundred congressional investigating committees by pointing out the advantages and disadvantages of the inquisitorial function. Under the latter head he found first that there are serious limitations of procedure so that many "months often elapse between the inception of the committee and its disposition by the house ... when the facts are finally and fully determined, the matter has lost its news interest for the public." Secondly, and reminiscent of more recent events, it was also found that the traditionally hostile attitude of Congress toward the executive impaired the fairness of investigations. Proceedings frequently took on a sensational character which Walter Lippmann characterized as "that legalized atrocity, the congressional investigation, where congressmen, starved of their legitimate food for thought, go on a wild and feverish manhunt, and do not stop at cannibalism."

The third defect of the investigative function is that they have imposed "an unnecessary burden upon the time of the executive and have been a

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. Hostile or designing officials can always hold it at arm's length by dexterous evasions and concealments. It can violently disturb, but it cannot often fathom, the waters of the sea in which the bigger fish of the civil service swim and feed. Its dragnet stirs without cleansing the bottom. Unless it have at the head of the departments capable, fearless men, altogether in its confidence and entirely in sympathy with its designs, it is clearly helpless to do more than affright those officials whose consciences are their accusers." Wilson, Congressional Government 271 (1885).

And he went on to say:

"Congress cannot control the officers of the executive without disgracing them. Its only whip is investigation, semi-judicial examination into corners suspected to be dirty. It must draw the public eye by openly avowing a suspicion of malfeasance, and must then magnify and intensify the scandal by setting its committees to cross-examining scared subordinates and sulky ministers. And after all is over, and the murder out, probably nothing is done. The offenders, if any one has offended, often remain in office, shamed before the world, and ruined in the estimation of all honest people, but still drawing their salaries and comfortably waiting for the short memory of the public mind to forget them. Why unearth the carcass if you cannot remove it?" Ibid., at 278.

In a special message to the Senate in 1924 President Coolidge contended that:

"The constitutional and legal rights of the Senate ought to be maintained at all times. . . . But these rights ought not to be used as a subterfuge to cover unwarranted intrusion. . . . Under a procedure of this kind the constitutional guaranty against unwarranted search and seizure breaks down, the prohibition against what amounts to a Government charge of criminal action without the formal presentment of a grand jury is evaded, the rules of evidence which have been adopted for the protection of the innocent are ignored, the department becomes the victim of vague, unformulated, and indefinite charges, and instead of a government of law we have a government of lawlessness. Against the continuation of such a condition I enter my solemn protest. . . ."

3 Galloway, op. cit. supra note 1, at 66–69.

4 Quoted in Galloway, op. cit. supra note 1, at 66–69.
nuisance to the bureaus." The fourth and greatest disadvantage of investigative activities is that the executive agencies may escape penalty for wrong-doing where the majority of the committee members are politically sympathetic to the administration or where the opposing party fears retaliation. 6

Criticisms of congressional investigations prior to 1940 were largely academic in origin and were chiefly aimed at their defects as a means of legislative control of the executive branch, as well as at their partisan and personal motivation and their inefficiency and incompetence for fact-finding purposes. Attacks on congressional investigations since 1940 have focussed mainly on their alleged invasion of individual rights, as a result of the methods pursued by certain committees, especially the House Committee on Un-American Activities; and they have come, in large part, from bar associations, newspaper editors, leaders of civic groups, and members of Congress. Many witnesses have refused to answer questions of the Un-American Activities Committee and have challenged the constitutionality of its procedures in the courts.

The new attacks on investigating committees allege that they can assume the aspects of a trial without the safeguards to the individual of regular court proceedings; that legislators appear in the role of judges and combine the functions of prosecuting and judging which should be separated; that as a result of the publicity of committee hearings witnesses may be exposed to such penalties as dismissal from their jobs, loss of pension payments, character assassination, or injury to their reputations; that exposure through public hearings can be substituted, in certain types of cases, for regulation by law, enforced by the courts; that this process of control by exposure before an investigating committee is not subject to special rules of procedure laid down by Congress; that the legal rights of individuals, guaranteed by the Bill of Rights, are in practice abridged by congressional investigations; and that conformity to prevailing ideas is enforced by fear of censure. The question is raised whether some investi-

6 Ibid., at 67-68. "Secretary Mellon advised President Coolidge to this effect during the early stages of the Couzens inquiry into the Bureau of Internal Revenue." Ibid., at 70.

6 Ibid., at 68 n. 36. After a similar study of all of the investigations since 1789, Professor Marshall Dimock reported in 1929 that the most common criticisms of congressional committees of investigation were that "they are used for political purposes," that "they travel to distant parts of the country," that they waste time and interfere with members' legislative duties, that "they do not include technical experts among their personnel," that "the inordinate cost of inquiries . . . is disproportionate to their net accomplishments," and that "they are not bound by any of the accepted rules of evidence. The constitutional rights of the individual are thereby transgressed." Dimock, Congressional Investigating Committees 164-69 (1929).
gations are not imposing that "tyranny of the prevailing opinion and feeling" which John Stuart Mill believed to be a danger to democracy—that "tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them."

On the other hand, in answer to the charge that congressional investigations invade the right of privacy it is contended that "exposure is the surest guard not only against official corruption and bureaucratic waste, inefficiency and rigidity but against private malpractices, divisive movements, and antisocial tendencies in the body politic." And the criticism that investigations are chiefly used as platforms for aspiring politicians is claimed to be offset by their educational value in creating a public opinion favorable to the acceptance and enforcement of new legislation. Certain public questions are viewed as more suitable for investigation by legislative committees than ad hoc commissions because of the greater publicity which Congress commands and it is felt that the practice should be continued of compelling private persons to testify before congressional committees on matters upon which legislation may be adopted, subject to certain minimum standards.

Resentment at the methods employed by certain congressional investigating committees led to a study of the subject by the Committee on the Bill of Rights of the Bar Association of New York City. In its December 1948 report, which was adopted by the Association, the Committee found that most complaints embodied the idea that inquiries into witnesses' personal affairs violated "some right of the individual to immunity from official inquisition or some right in the nature of a 'right of privacy.'" Most complaints were also found to involve charges that investigations resulted in serious damage to personal reputations. The Bar Association Committee felt that some of the conditions complained of are inherent in the conduct of the legislative process or are due to the shortcomings of particular individuals concerned in making the investigation. Much of the criticism, however, the Committee considered justified and it felt that certain rules could be adopted which would insure to a much greater degree the observance of ordinary principles of fairness and justice.

8 Wyzanski, Standards for Congressional Investigations, N.Y. City Bar Rec. 103 (1948).
9 Ibid.
All this public criticism had its repercussions and echoes in Congress where, beginning with the Hook bill in the 79th Congress, there was introduced a series of a dozen bills intended to prescribe the procedures of investigating committees and to protect the rights of witnesses. In the House of Representatives, Representative Holfield (D., Cal.) introduced a resolution to create a select committee to make an investigation of the conduct of investigations by committees of the House. This resolution and the House bills mentioned above were referred to the Committee on Rules which took no action upon them from 1945 to 1950.

In the Senate the then majority leader, Senator Scott W. Lucas (D., Ill.), took the lead in calling attention to the abuses of investigation. He introduced resolutions in both the 80th and 81st Congresses for the reform of committee procedures. The Senate Committee on Rules and Administration held hearings on his resolution in July 1949, at which Senator Lucas testified that he was shocked that no code of conduct governed the committees. While the tactics of most Senate investigating committees during his service in the upper body had been above reproach, he cited the methods employed by the joint committee to investigate the Pearl Harbor disaster and the Howard Hughes "fiasco" of the Senate War Investigating Committee as the immediate cause of the introduction of his resolution.

"I came to the conclusion," continued Senator Lucas, from many expressions of public opinion, "that the time had become ripe for the necessary reform of committee procedures." In his resolution he had "tried to strike a balance between the protection of witnesses from committee abuse and the imperative necessity of going forward with the important work of congressional investigating groups."

Later, Senator H. Alexander Smith (R., N.J.) addressed the Senate on the defects in its investigative procedures, apropos of the current investigation of disloyalty in the State Department by a subcommittee of the Committee on Foreign Relations. "The procedure for investigating such suspicions," he said, "must be effective in identifying the guilty; it must not implicate or injure the innocent by premature publicity; and it must under no circumstances become an..."
instrument for personal or partisan advantage." Senator Smith questioned whether present techniques of investigation in Congress are sufficiently fair to the innocent. He urged the careful review of present procedures and the adoption of protective reforms. He also suggested the possibility of conducting investigations through an independent body.16

Finally, Senator Wayne Morse (R., Ore.), in an eloquent Senate speech on April 24, 1950, asserted that

[w]e must be on guard that we ourselves do not follow procedures which jeopardize or endanger the freedom of the individual . . . What real protection is there to a citizen in the United States today if the executive and legislative branches of our Government proceed in the guise of a Senate investigation to do irreparable damage to the reputation of individual citizens?247

PROPOSED REFORMS

During the past twenty years, many proposals for reforms in the conduct of congressional investigations have been made. These proposals may be grouped into four principal categories: (1) the delegation of certain types of inquiries to various outside agencies; (2) a ban on the creation of special investigating committees of Congress; (3) the voluntary adoption of codes of fair conduct by congressional committees; and (4) the imposition of mandatory standards of fair play upon investigating committees either by statute or by standing rules.

DELEGATION OF INVESTIGATIVE FUNCTION

While conceding the necessity of the investigative function, several close students of the problem have recommended the delegation of certain types of inquiries to bodies outside of Congress. They suggest that the delegation be made to ad hoc committees set up for the specific purpose of conducting a particular investigation. Such bodies could be composed of government officials or private persons or both; the delegation might also be made to a permanent government agency. Professor Dimock pointed out in 1929 that Congress had already given administrative commissions broad powers of investigation. He suggested that the next logical step would be to create commissions composed of congressmen and experts along the lines of the English Royal Commissions.18 Such commissions have since been occasionally resorted to. The Temporary National Economic Committee (1938) and the Hoover Commission (1947) are examples.

Professor McGeary after an intensive study of 146 congressional investigations in the decade of the 1930's made a strong case for the frequent

15 96 Cong. Rec. 4159-61 (March 27, 1950).
16 Ibid.
17 Ibid., at 5665-69 (April 24, 1950).
18 Dimock, op. cit. supra note 6, at 172.
delegation of Congress' fact-finding authority. He concluded that research investigations might easily be delegated either to permanent staffs of advisory experts attached to the standing committees, to legislative councils like those in the states, to a national economic council like the National Resources Planning Board, to ad hoc commissions like the British Royal Commissions,* or to departmental committees. Inquisitorial investigations, he suggested, might be delegated by resolution of Congress to the regulatory commissions.\textsuperscript{19} McGeary thought that Congress should retain for its own committees the conduct of supervisory investigations of the executive and that investigations of "hot" subjects such as civil liberties and organized crime should also be conducted by congressional committees because of their prestige and full inquisitorial powers. He concluded, however, that fact-finding investigations could be delegated to outside agencies which could submit their reports to the appropriate congressional committee. The committee in turn would hold public hearings on the report and then submit its own findings to Congress, perhaps in the form of a bill.\textsuperscript{20}

Impressive arguments are advanced for the delegation of certain inquiries to outside bodies. Congressmen are already overburdened both by more pressing legislative duties and by the cares of their constituents.** Inquiries by outside persons would avoid the frequent complaint that congressional committees combine the roles of prosecutor, jury, and judge. More frequent delegation would relieve Congress of the unfavorable publicity which some investigations incur and eliminate duplicating inquiries by House and Senate committees. It would also avoid the interruptions now caused by election campaigns and defeats at the polls. Finally, delegation would dispense with the practice of borrowing administrative personnel in order to staff investigating committees, a practice which has been criticized in Congress and restricted by the Legislative Reorganization Act of 1946.\textsuperscript{21}

** Consult Shils, The Legislator and His Environment, page 571 infra.
\textsuperscript{19} McGeary, The Developments of Congressional Investigative Power 128-40 (1940).
\textsuperscript{20} Ibid., at 158-60. A current illustration of such a procedure is afforded by an item in the General Appropriation Act for 1951 which provides $200,000 for the Senate Committee on Interstate and Foreign Commerce "to enable the Committee ... to engage by contract the services of private firms or corporations for making a survey of certificated interstate, overseas, and foreign air carrier operations, with a view to drafting legislation requiring the separation of mail compensation from any Federal subsidy payments. ..." 83rd Cong. 2d Sess. 2-3 (Pub. L. No. 759, Sept. 6, 1950). The Committee has retained the firm of Ernst and Ernst.
On the other hand, it is recognized that there are large political and psychological obstacles to delegation of the investigative function: the attendant loss of publicity to committee chairmen who may win national renown and higher public office from their leadership of great inquiries, the traditional legislative jealousy of the executive, the belief that committees are better sounding boards than other bodies, the alleged deficiencies of other investigative agencies and lack of confidence in their personnel, or a conflict of political and economic philosophy between Congress and the executive. The questions are also raised whether Congress does not have broader investigative authority than administrative agencies and whether Congress can delegate its full power of inquiry, although it is believed that Congress can grant the regulatory commissions adequate powers to conduct any investigation it so desires.22

Numerous precedents can be found for the congressional delegation of the investigative function. Congress has occasionally requested agencies like the Federal Trade Commission, the Interstate Commerce Commission and the Tariff Commission to make inquiries in their respective fields. In the Budget and Accounting Act of 1921,23 Congress authorized the Bureau of the Budget to make detailed investigations of the organization and activities of the departments and agencies with a view of securing greater economy and efficiency in the conduct of the public service. In the Government Corporations Control Act of 1945,24 Congress assigned to the General Accounting Office the task of auditing the financial transactions of government corporations.25 Thus, the General Accounting Office and the Budget Bureau are available to assist Congress in the investigation of the financial affairs and the administrative management of executive agencies. It has also been suggested that Congress might well delegate the investigation of un-American activities to the Federal Bureau of Investigation, and the investigation of election contests and campaign expenditures to a judicial tribunal.26 Investigation of the feasibility of individual "pork barrel" projects has long been delegated by Congress to the Corps of Army Engineers.27

A step in the direction of mitigating the burdens of investigating com-

-- "Ibid., at 149-58.
-- Section 206 of the Legislative Reorganization Act, 60 Stat. 837 (1946), 31 U.S.C.A. § 60 (Supp., 1950), directs the Comptroller General to analyze the expenditures of each executive agency. This section, if enforced, would eliminate the need for many congressional investigations.
-- Consult Dimock, op. cit. supra note 6, at 70, 171; McGearry, op. cit. supra note 18, at 145 n.
mittees was taken by the Senate in January 1928, when it adopted a resolution "that the President of the Senate be, and he hereby is, authorized, on the request of any of the committees of the Senate, to issue commissions to take testimony within the United States or elsewhere." This resolution gave the Vice-President authority to appoint commissions, and to hold hearings for any Senate investigating committee in any part of the country or abroad. There is no record of this authority ever having been used. Its use would relieve Senators of the necessity of taking long investigative "junkets" away from Washington while Congress is in session.

The practice of some state and foreign governments also suggests some substitute devices that might be employed in Washington to avoid the abuses charged to congressional investigation. The Moreland Act in New York, for example, 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 gives the governor a free hand by making continuing appropriations for the compensation of the commissioners and their expenses. Reports go to the governor for submission to the legislature.

The Moreland commissionerships are reported to have worked well in New York. Lindsay Rogers states:

[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 non-entity, 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. ... Such men were careful to provide themselves with efficient investigators and counsel and did not seek headlines.]

Hostility on the part of the legislature has been rare. Indeed, there have been cases when legislative committees which had already started to probe matters yielded the field to a Moreland commissioner. ... 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.²³

²² Sen. J. 125 (1928).
²³ Harold Lasswell suggests that Congress can use "civilian panels," composed of part-time, expert advisers, to assist it in connection with questions in need of special study. Lasswell, National Security and Individual Freedom 26 (1950).
²⁴ N.Y. Exec. Law § 8.
As an alternative device, Professor Rogers suggests that Congress enact a statute modelled in part on the British Tribunals of Inquiry (Evidence) Act of 1921, under which it would delegate its investigative function to commissions to be appointed by the Chief Justice of the United States Supreme Court. An investigating commission with full inquisitorial powers would be set up whenever Congress passed a concurrent resolution calling for an inquiry into any matter. The rights of witnesses would be safeguarded by appropriate procedures. The British tribunals of inquiry have worked well, it is said, for thirty years; they have proved to be fair and efficient agencies of investigation; and they have been free from the abuses attributed to congressional committees.

Recurring criticisms of congressional investigations and various suggestions for reform recently led Senators Thomas (D., Utah) and Ives (R., N.Y.) to propose a bill establishing congressional investigating commissions, to inquire into governmental and other matters of public importance upon the passage of a concurrent resolution of both houses of Congress. The commissions are to be composed of two senators, two representatives, and three other persons to be selected jointly by the President of the Senate and the Speaker of the House from a panel appointed by the President and the Senate. The commissions are to have the power of issuing subpoenas, which may be enforced by the federal courts. An immunity provision prohibits any person from refusing to testify on grounds of self-incrimination. Witnesses are to be afforded the same immunity from defamation suits as witnesses in United States district courts.

In introducing his bill Senator Thomas told the Senate that while he thought that fact-finding investigations should continue to be conducted under congressional auspices, his scheme was designed to remove investigations from the domain of party politics, which gave rise to suspicions and misgivings in the minds of the public. Senator Thomas went on to explain that the proposed bill contemplated no abdication of responsibility of the standing committees which would continue to carry on routine inquiries, but would enable these committees to perform their historic functions more adequately. There were numerous precedents, he said, for the

* xi Geo. V, c. 7 (1921).
* For a full account of this suggested remedy and the advantages claimed for it, as well as a description of a recent tribunal of inquiry in England, see series of three articles by Lindsay Rogers entitled "When Congress Fumbles for Facts." N.Y. Herald Tribune, p. 22, col. 5-7 (Mar. 29, 1950); ibid., p. 26, col. 5-7 (Mar. 30, 1950); ibid., p. 24, col. 5-7 (Mar. 31, 1950).
* Sen. 3,775, 81st Cong. 2d Sess. (1950).
creation of *ad hoc* commissions, such as the Wickersham, TNEC, and Hoover Commissions; his bill would merely standardize and formalize that procedure. Adoption of the proposal would reduce the workload on Congress and eliminate frequent overlapping and duplication of investigation of similar subjects between the two houses.  

Senator Ives, co-sponsor of the bill, claimed that the proposal would remedy many of the defects in existing investigative practices, while retaining initiative and responsibility in Congress. He added that the commissions to be created under this bill would also be able to look into exceptional administrative problems which were beyond the jurisdiction of standing congressional committees. The addition of three members of the public at large to the investigating group would minimize the excesses of political motivation, increase its perspective, and reduce the workload on an over-burdened Congress. The bill was offered, said Senator Ives, as "a truly bipartisan approach to the entire problem of congressional investigations of the executive branch."  

Elsewhere, the Senator claimed that a new approach to the problem of legislative investigations was badly needed. The existing system had worked satisfactorily for routine inquiries, but "the ordinary congressional committees have neither the time, the technical competence, nor the capacity for impartiality" which major questions demand. He rejected current proposals for the substitution of presidential commissions because Congress must have its own first-hand information and is jealous of its powers and prerogatives. Special commissions authorized by Congress and appointed by the Chief Justice, along the lines of Lindsay Rogers' suggestion, might lack legislative membership and their selection by the Chief Justice had its objections.

**BAN ON SPECIAL INVESTIGATING COMMITTEES**

Prior to the 80th Congress it had long been the custom of both the House and the Senate to create special or select committees to conduct special investigations. In the early years of our national government Congress referred its business to a legion of select committees. For every bill and petty claim a separate special committee was set up. In the Third Congress, there were 350 such committees in the House alone. But their number rapidly declined with the development of the standing committee system. During the 79th Congress only a dozen special committees were established. Although many famous investigations have been con-

---

36 Ibid., at 8738 (June 15, 1950).
ducted by special committees, the Joint Committee on the Organization of Congress recommended on March 4, 1946, that special committees of investigation be abandoned. The Senate approved this recommendation in the Legislative Reorganization bill on June 10, 1946, but this prohibition was struck from the bill before it reached the House floor and did not appear in the final act. Although creation of special investigating committees is contrary to the spirit, if not the letter, of the Legislative Reorganization Act of 1946, eight of these committees were established during the 80th Congress and nine during the 81st Congress.

The argument against the use of special committees for investigative purposes, as made by Senators Thomas, Morse, Holland (D., Fla.), Donnell (R., Mo.) and others, runs as follows. The jurisdiction of the standing committees has been so comprehensively described in the 1946 Act as to cover every conceivable subject of legislation. Therefore, to create a special committee is to trespass upon the assigned jurisdiction of some standing committee. The standing committees of Congress have been authorized by the Legislative Reorganization Act to exercise continuous oversight of the execution of the laws by the administrative agencies within their respective jurisdiction. They have been equipped with professional staffs and expert investigators to assist them in performing their oversight function. The investigative function of Congress should be performed, therefore, by its standing committees which have been empowered and equipped for the purpose, instead of relying upon special investigating committees which are sporadic in nature and cannot introduce legislation to give effect to their recommendations.

Moreover, the reformed rules limit members to service on one or two standing committees each, with minor exceptions, so that they can meet their legislative responsibilities more effectively. If, in addition, members are appointed to serve on special committees, the burden of committee work will be correspondingly multiplied and the old evils of poor attendance and scattered attention will return. Use of special committees might also lead to a revival of the use of staff personnel borrowed from downtown departments with all the disadvantages of that practice. Creation of special committees to deal with subjects already assigned to standing committees would also be a burden to, and impair the efficiency of, the

---


39 In the 81st Congress the subjects covered were small business, organized crime, roof and skylights in the Senate; and small business, lobbying, use of chemicals, campaign expenditures, veterans education, roof and skylights in the House.
executive agencies of the government by requiring their officials to repeat their testimony on the same subjects before several congressional committees.

Furthermore, sporadic inquiries by select committees lack continuity and fail to provide the members of standing committees with direct knowledge of the information gathered. In cases where legislative action is indicated, standing committees find it necessary to do much of the work over again. Special investigations should be conducted by the subcommittees of the reorganized standing committees having jurisdiction of the subject matter involved. This has been done, for example, in the field of national defense, where the old Truman-Mead select committee has been replaced by a new "watchdog subcommittee" of the Senate Armed Services Committee.* Modernization of the congressional committee structure, achieved by the Legislative Reorganization Act, was the keystone in the arch of congressional reform. To set up a series of special committees would be a regressive step that might lead to the ultimate destruction of this reform. A subcommittee of a standing committee can accomplish as much good work as a special committee, given adequate leadership, powers, and personnel. Finally, it is argued that the diffusion of energy and responsibility among many standing and special committees, with overlapping jurisdictions, is not conducive to the formulation of coherent and consistent legislative policies. Nor is it conducive to the development of a well-recognized and continuing relationship with executive agencies.40

VOLUNTARY ADOPTION OF PROCEDURAL RULES

A third proposed reform in the conduct of congressional investigating committees is that they voluntarily adopt rules of procedure to govern the conduct of their hearings and treatment of witnesses. During the past three years three subcommittees of Congress have taken this step. The first was the Procurement and Buildings Subcommittee of the House Committee on Expenditures in the Executive Departments. On April 8, 1948, Representative George H. Bender (R., Ohio), Chairman of this Subcommittee, made public seventeen rules of procedure which had been drafted by its chief counsel, Mr. Henry H. Glassie, and unanimously adopted. They relate to such factors as the manner in which hearings are to be

* Consult Cook, Senate Preparedness Subcommittee, page 634 infra.

PROPOSED REFORMS

held, transcripts of hearings, the right to counsel, subpoenas, and final reports. These rules were designed primarily to assure all persons a fair hearing and to avoid cluttering the record with irrelevant testimony and baseless defamatory remarks. It is required that evidence be kept within reasonable bounds of relevancy. Witnesses are permitted to read sworn statements into the record, and any person who believes that evidence given to the Subcommittee is defamatory of his reputation may file into the record a statement in regard to such evidence.

The second subcommittee to adopt self-imposed rules was the Investigations Subcommittee of the Senate Committee on Expenditures in the Executive Departments, of which Senator Ferguson (R., Mich.) was Chairman. These rules provide that no major investigation shall be undertaken, and no public hearings held, without unanimous approval of the Subcommittee or majority approval of the full Senate Committee. A transcript of all hearings is to be kept, which in the case of executive hearings is not to be released without approval of a majority of the Subcommittee. Unless a majority of the Subcommittee determines otherwise, all witnesses have the right to be advised by counsel. In public hearings, persons being investigated are permitted to cross-examine any other witness whom the Committee calls.41

In its first annual report the Investigations Subcommittee stated that it had been the practice at the opening of executive or public hearings for the chairman to make a statement for the record concerning the subject and purpose of the specific case under investigation. It had also been the policy of the Subcommittee, in those cases in which public testimony was given which affected adversely the reputation of a person or otherwise defamed him, to give that person reasonable opportunity to call witnesses in his own behalf and otherwise to answer adequately the charges made against him. In view of the many different situations which might possibly arise, it was deemed impracticable, according to the report, to set down any rigid rule for application in all cases involving the reputation of a person under investigation.

The third subcommittee to set up “certain guideposts of conduct” was the “watchdog subcommittee” of the Senate Committee on Armed Services. Although this Subcommittee did not go as far as the Bender and Ferguson subcommittees in adopting voluntary rules of procedure, the statement of its chairman, Senator Lyndon B. Johnson (D., Tex.), regarding its policies and procedures, showed a commendable spirit of self-restraint. He asserted that the Subcommittee had no intention of hunting

headlines; its work would be conducted primarily in executive sessions. Politics would be left at the committee-room door. The committee would be very diligent not to become "a Monday morning quarterback club, second-guessing battle-front strategy... Especially, I have confidence," said Senator Johnson, "that the subcommittee will, in all its inquiries and recommendations, be frank, impartial, and straightforward—blunt but not unfair, zealous but not persecuting, helpful but not compromising."4

IMPOSITION OF MINIMUM STANDARDS

The final and most frequent proposal in recent years for the reform of congressional investigations is the imposition, by statute or rule, of minimum standards of committee conduct. This proposal has found expression in bills and resolutions introduced in the 80th and 81st Congresses by Senator Lucas and Representatives McCormack (D., Mass.), Sabath (D., Ill.), Holifield (D., Cal.), Carroll (D., Colo.), Buchanan (D., Pa.), Javits (R., N.Y.), Douglas (D., Cal.), and Klein (D., N.Y.). Specific codes of fair play have also been advocated by various spokesmen for the legal profession, including a group of forty-five law school deans and professors, Judge Wyzanski, the New York City Bar Association, Messrs. Henry H. Glassie and Thomas M. Cooley—former committee counsel and practicing attorneys. The American Civil Liberties Union has also offered a bill to establish fair hearing procedures, and the Washington Post has set forth a code of ten rules which it thinks Congress should adopt.43

Comparative analysis of these proposed mandatory codes, made by the writer, shows that upwards of two score separate safeguards for the rights of individuals have been suggested. The number of proposed safeguards ranges from three in the Wyzanski suggestions and four in the Arnold-Fortas-Porter proposals to eighteen in the Glassie-Cooley code and nineteen in the Holifield bill. There is, of course, a good deal of duplication in the specific suggestions. Altogether, forty-one distinct safeguards are found in the fourteen proposed codes under review. The reader's attention is invited to the comparative tabular analysis of the fourteen proposed mandatory codes in the Appendix. In support of mandatory minimum standards it is argued that as long as investigating committees are free to make their own rules of procedure, and change or disregard them at will, the danger of abuse will not be removed. The investigative process is so vital an adjunct of legislative effectiveness that Congress ought not to al-

42 96 Cong. Rec. 11537 (July 31, 1950).
43 In a series of twelve editorials entitled "Turning on the Light" between January 12 and March 9, 1948.
low its perversion to publicity-seeking or vindictive ends. The prestige and good functioning of the Congress are the real stake, and no half-way measure should stand in the way of congressional action to establish rules of proper procedure for all its investigative units.

When he was President of the Senate (1797-1801) Thomas Jefferson made a suggestion which indicates that legislation on this subject may be long overdue. "Perhaps Congress," he wrote, in their care for the safety of the citizen, as well as that for their own protection, may declare by law what is necessary and proper to enable them to carry into execution the powers vested in them, and thereby hang up a rule for the inspection of all, which may direct the conduct of the citizen, and at the same time test the judgments they shall themselves pronounce in their own case.44

The bills introduced in the House for the reform of committee procedures were referred to its Committee on Rules which has not yet acted upon any of them. In the Senate the Lucas bill was referred to the Committee on Rules and Administration which held four days of hearings on it during July and August of 1949. Eleven witnesses were heard including Senators Lucas and McMahon (D., Conn.), Dr. Edward U. Condon, and spokesmen for the AF of L, CIO, ADA, New York City Bar Association, and Jewish War Veterans. Although there was some criticism of specific sections of the Lucas resolution, the preponderant weight of the testimony favored the resolution in principle. Chief criticism of the Lucas proposal came from Mr. George Meader, former chief counsel of the Truman-Mead Committee. Mr. Meader, who has since been elected to the House of Representatives, believed that adoption of the proposal might easily obstruct the work of congressional committees and impair the efficiency of investigative activities.45 The adoption of rules of procedure, he thought, should be left to the discretion of each committee. The way to strengthen the investigative function, he suggested, would be to equip Congress with better staff aids.

After the hearings on the Lucas resolution, Senator Myers (D., Pa.), who presided at the hearings, informed the Senate that the hearings had demonstrated the need for a simple code of ethics to protect those appearing before investigating committees from unfair and defamatory treatment.46 Although the treatment of Dr. Condon by the Committee on Un-

46 95 Cong. Rec. A4813 (July 26, 1949).
American Activities, as described by him at the Senate hearings, indicated the need for passing the Lucas resolution, no action was taken upon it subsequent to the Committee hearings.

OTHER SUGGESTIONS

In addition to the four major reforms described above—broader delegation of the investigative function, a ban on special committees, voluntary committee adoption of codes of fair play, and mandatory minimum standards—several other possible reforms have been suggested. Aside from his three minimum standards, Judge Wyzanski suggests five other steps for further study: that a private person should not be compelled to testify in camera unless the majority of the committee explicitly rules to that effect; that a witness should not be compelled to testify unless at least one member of the committee is present in addition to the interrogator; that in any serious claim of privilege the witness ought to have the right by motion to urge his points before the whole committee; that a person who has been adversely criticized by a witness before a committee should have the right to file with the committee a limited number of written questions which should be answered in writing by the hostile witness, unless the committee by majority vote otherwise directs; and that subpoenas to private persons should require the concurrence of a majority of the committee.47

Professor Carr suggests improved personnel of investigating committees and their staffs.48 Lloyd N. Cutler, Washington attorney, proposes that Congress enact a statute creating a civil penalty for false testimony before a congressional committee. The penalty would be the right of any injured person to collect damages in a federal court action against the false witness.49 Senator Taft (R., Ohio) suggests that federal officers and employees should not be subject to reprisals by reason of their appearance and bona fide, truthful testimony before congressional committees.50 Others have suggested that the supervision of committee behavior be made a matter of party responsibility to be exercised by the party policy committees in each chamber, and that members be disciplined who violate the rules of fair play.

In the last analysis, some believe that the problem of fair play will not

47 Wyzanski, op. cit. supra note 8.
48 Carr, How To Improve Congressional Inquiries, N.Y. Times Magazine 5 (August 29, 1948).
49 In a letter to the N.Y. Times, § 4, p. 6, col. 7 (September 5, 1948).
be solved by court decisions, statutory regulations, or procedural codes, but by individual self-restraint, the development of a sense of personal responsibility in exercising the investigative power, and the moral censure of an outraged public opinion. "The problem," says Walter Lippmann, is not one which is likely to be solved by an ingenious idea. . . . The problem does not lie on the plane of formal law-making, but on the plane of the mores of the nation. We do not have, as yet, a body of intellectual and moral habits, customs, and attitudes to fit the realities of modern popular government.

Senator Pepper summed up the situation neatly twenty years ago when he said:

Congressional investigations in general and senatorial inquisitions in particular are not going to be controlled by the Supreme Court. Nor are they going to be regulated by statutes or procedural devices. Let it once for all be understood that the power of inquiry exists, that its possession is a great public trust, and that the American people are going to pour out the vials of their wrath upon those who prove themselves unworthy of the trust. We have evolved worthy standards of conduct for professional baseball players. We are hopeful of a similar evolution in the case of prize fighters. It would be lamentable if only Senators were to be classed as invincibly barbarous.

CONCLUSION

At bottom, the problem is thus seen as one of protecting the rights of individuals without impairing the performance of the investigative function. The methods employed by a few investigating committees in recent times have caused public criticism of Congress and impaired its prestige. Congress may continue to decline in popular esteem unless steps are taken to curb the misuse of its investigative powers. Perhaps the best remedy would be the development of a sense of self-restraint on the part of committee members themselves. But that cannot be guaranteed. Another course of action would be to follow the advice of Justice Frankfurter who maintained that "the methods and forms of each investigation should be left for determination of Congress and its committees, as each situation arises." But it seems evident that rules imposed by individual committees upon themselves, while a step in the right direction, are not the final answer. No half-way measure should stand in the way of congressional action to establish rules of proper procedure of its investigating committees. The elements of a workable code are to be found in the best practices of successful investigating committees. To avoid confusion and promote uniformity, a code of fair conduct for all investigating groups might

51 Lippmann, The Senate Inquisition, 84 Forum 132 (1930).
52 Pepper, Family Quarrels 178-79, 184 (1931).
well be adopted by the House and Senate as part of their standing rules. Such a code would give Congress and the country a yardstick by which to test the performance of every committee of investigation. In the federal Administrative Procedure Act Congress has provided a code of procedure for administrative agencies. This action should now be matched by the enactment of a code for the guidance of its own investigators.

APPENDIX

SAFEGUARDS OF RIGHTS OF PARTIES UNDER INVESTIGATION BY CONGRESSIONAL COMMITTEES AS PROPOSED BY MEMBERS OF CONGRESS, ATTORNEYS, AND OTHERS

1. Any person who believes that testimony or other evidence given in a public hearing before any committee tends to defame him or otherwise adversely affect his reputation may file with the committee a sworn statement, concerning such testimony, which shall be made a part of the record of such hearing.

2. Aggrieved persons may testify in own behalf, secure and examine not more than four favorable witnesses, and cross-examine hostile witnesses, one hour each, personally or by counsel.

3. Petition to invoke safeguard no. 2 must be filed within thirty days and acted on within thirty days thereafter. Petitioner must swear his purpose is not to delay or obstruct committee.

4. Right to be accompanied by counsel at public or private hearing as observer, but not as participant, or adviser while on stand, unless committee consents.

5. Evidence shall be relevant to subject of hearing.

6. Witness may have stenographic transcript of his testimony.

7. Committee shall not publish or file any report, interim or final, unless and until a meeting of the committee has been called upon proper notice and such report has been approved by a majority of those voting.

8. No committee or employee thereof shall publish or file any statement or report alleging misconduct by, or otherwise adversely commenting on, any person unless and until such person has been advised of the alleged misconduct or adverse comment and has been given a reasonable opportunity to present to the committee a sworn statement with respect thereto.

9. No committeeman or employee shall speak, lecture, or write about the committee for compensation.

10. No. 9 supra is to apply to standing, select and joint committees and subcommittees thereof.

11. Subpoenas shall not issue unless approved by majority of committee in writing.

12. Hearings shall be public or secret as majority of committee rules to be in public interest.
13. Secret testimony requires presence of two committeemen, plus interrogator.
14. Accurate stenographic record must be kept of all testimony at public hearings.
15. All witnesses, at hearings, public or secret, shall be entitled to full and fair presentation of matter under investigation, to aid and advice of counsel, and such other assistance as may be necessary to protect their rights.
16. All witnesses at hearings of the committee, whether public or secret, shall be advised of their constitutional right against self-incrimination and their right not to divulge confidential communications protected by law.
17. Any person who claims a privilege not to appear or who, having appeared, claims a privilege not to answer a question, shall be entitled to present through counsel a written motion and oral argument presenting the claimed privilege to the committee.
18. Any witness at a hearing, public or secret, may question another witness who comments upon his testimony, via a written question handed to the chairman, who in his discretion may refuse to use part or all of it.
19. No witness shall be in contempt of the committee for refusing to obey a subpoena, unless and until the committee has, upon notice to all its members, met and considered the alleged contempt, and by a majority of those present voted such witness in contempt.
20. No adverse statement or report shall be publicly released until the committee, upon due notice, has met and approved such release by quorum of whole committee.
21. No photographs, moving pictures, television or radio broadcasts shall be made during hearings.
22. No major investigation shall be initiated without unanimous approval of subcommittee or majority approval of full committee.
23. All testimony taken in executive hearings shall be secret and not released or used in public hearings without approval of majority of committee.
24. A clear statement should be made of the subject of any investigation.
25. Any witness giving testimony in open hearing which reflects adversely on character or reputation of another person shall disclose his sources of information, unless his answer would threaten the national security.
26. No report or statement, interim or final, shall be filed, published or released that reflects adversely on any person’s character or reputation unless based on evidence presented at an open hearing.
27. There shall be created by law a civil penalty for false testimony before a congressional committee, the penalty to be the right of any injured person to collect damages in a federal court action against the false witness. Such damage actions to be placed at top of court calendars and expedited.
28. Every witness who testifies in a hearing shall have a right at the conclusion
of his testimony either to make a sworn statement or at his option to file a
sworn statement which shall be made part of the record of such hearing,
but such oral or written statement shall be relevant to the subject of the
hearing.
29. Except at his own request, no reporter, editor, or publisher shall be called to
testify before a committee to be questioned concerning any publication by
him, unless upon vote of a majority of the committee or subcommittee
before whom he is called to testify. In such case the committee or sub-
committee must have at least five members.
30. Counsel for the committee must be a lawyer.
31. A person who is under the committee's scrutiny should be fully apprised
of the matters as to which the committee proposes to inquire.
32. The committee should identify the witnesses upon whose testimony it has
relied in commencing the hearing.
33. Investigations should be conducted by groups within the regular standing
committees of the House or Senate and not by special committees.
34. No legislator who is an interested party or who is in a position to shake
down potential witnesses should be permitted to serve as head of an in-
vestigating subcommittee.
35. Investigations should be confined to important matters of public con-
cern, as distinguished from party interests, and should be conducted in a
non-partisan manner.
36. Investigations should be conducted in the open.
37. No witness should be cited for contempt of Congress for refusal to answer
questions as to his religious or political beliefs.
38. Every investigating committee should be supplied with expert counsel and
staff investigators especially trained in the art of fact-finding by democratic
methods.
39. No transcript of testimony taken under oath at either a public hearing or
an executive session shall be altered or edited.
40. No summary of a report or prediction of the contents of a report or a
statement of his conclusions concerning an investigation may be made by a
member prior to the issuance of a duly approved report. Any member
violating this provision shall, on the vote of the majority of a quorum of the
committee, be denied the right to take part in the formulation of or vote
upon the committee report with respect to such investigation.
41. All of the testimony on which a report is based shall be released concur-
rently with the report.
PROPOSED REFORMS

COMPARATIVE ANALYSIS OF PROPOSED CODES

(The numbers after each proposal are keyed to the preceding
list of forty-one safeguards.)

1. § 2
2. § 3
3. § 4
4. § 5
5. § 6
6. (at cost of transcript) § 7
7. § 8
8. § 9
9. § 10
10. § 11
11. (Counsel may only observe) § 5
12. § 8

II. Holifield Bill, H.R. 74, 81st Cong. 1st Sess. (1949)
1. § L
2. § L
3. § M
4. (Right of counsel to examine and
   cross-examine) § L
5. § N
6. (at cost of transcript) § E
7. § O
8. § P
9. § Q
10. § B
11. § C
12. § D
13. § E
14. § F
15. $ H
16. $ I
17. § J
18. § K
19. § P
20. § P
21. § L
22. § L
23. § L
24. § L
25. § L
26. § L
27. § L
28. § L
29. § L
30. § L
31. § L
32. § L
33. § L
34. § L
35. § L
36. § L
37. § L
38. § L
39. § L
40. § L
41. § L

III. Buchanan Bill, H.R. 824, 81st Cong. 1st Sess. (1949)
1. § 2(c)
2. (or have such material stricken
   from the record) § 2(c)
3. § 4(6)
4. § 4(6)
5. § 4(6)
6. § 4(6)
7. § 4(6)
8. § 4(6)
9. § 4(6)
10. § 4(6)
11. § 4(6)
12. § 4(6)
13. § 4(6)
14. § 4(6)
15. § 4(6)
16. § 4(6)
17. § 4(6)
18. § 4(6)
19. § 4(6)
20. § 4(6)
21. § 4(6)
22. § 4(6)
23. § 4(6)
24. § 4(6)
25. § 4(6)
26. § 4(6)
27. § 4(6)
28. § 4(6)
29. § 4(6)
30. § 4(6)
31. § 4(6)
32. § 4(6)
33. § 4(6)
34. § 4(6)
35. § 4(6)
36. § 4(6)
37. § 4(6)
38. § 4(6)
39. § 4(6)
40. § 4(6)
41. § 4(6)

IV. Javits Bill, H. J. Res. 20, 81st Cong. 1st Sess. (1949)
1. § 4(6)
2. (no mention of favorable wit-   nesses) § 4(6)
3. (Advice of counsel allowed witness
   while testifying unless majority of
   committee disapproves) § 4(2)
4. (while any witness is testifying)
5. § 4(2)

V. Douglas Bill, H.R. 4564, 80th Cong. 1st Sess. (1947)
1. § 2(c)
2. (or have such material stricken
   from the record) § 2(c)
3. § 2(a)
4. § 2(a)
5. § 2(a)
6. § 2(a)
7. § 2(a)
8. § 2(a)
9. § 2(a)
10. § 2(a)
11. § 2(a)
12. § 2(a)
13. § 2(a)
14. § 2(a)
15. § 2(a)
16. § 2(a)
17. § 2(a)
18. § 2(a)
19. § 2(a)
20. § 2(a)
21. § 2(a)
22. § 2(a)
23. § 2(a)
24. § 2(a)
25. § 2(a)
26. § 2(a)
27. § 2(a)
28. § 2(a)
29. § 3
30. § 3
31. § 3
32. § 3
33. § 3
34. § 3
35. § 3
36. § 3
37. § 3
38. § 3
39. § 3
40. § 3
41. § 3
VI. Klein Bill, H.R. 3443, 81st Cong. 2d Sess. (1950)

1. § (6)(i) 5. § 1
2. (call a "reasonable number" of witnesses in his behalf) § (6) (ii)
   (iii) (iv) 6. § 4
4. (Advice of counsel allowed witness while testifying unless ma-
   jority of committee disapproves) § 2
10. § 7
14. (keep stenographic record of executive sessions also) § 4
21. (while witness is testifying) § 5
24. § 1
25. § 4

VII. Statement by Forty-five Law School Professors

2. (Number of witnesses not specified) §§ b, e 26. (Conclusions should not rest on undisclosed material in commit-
4. ("advice and assistance” of counsel) § d tee files) § f
31. § c
32. § c

VIII. Proposal of Judge Wyzanski

4. Suggestion (a) 28. Suggestion (b)
14. Suggestion (c)

IX. Proposal by the New York City Bar Association

1. § (6)(a) 5. § (1)
2. (call a "reasonable number” of witnesses on his behalf) § (6) (b)
   (c) (d) 6. § (4)
4. (Advice of counsel allowed witness while testifying unless ma-
   jority of committee disapproves) § 2
10. § 7
14. (keep stenographic record of executive sessions also) § (4)
21. (while witness is testifying) § (5)
24. § (1)
28. § (4)

X. Proposal by Henry H. Glassie and Thomas M. Cooley

1. (Statement must be filed within ten days of testimony if public, or
   within ten days after release of the testimony if taken in execu-
   tive session) § IV (D) 6. (In addition, any person may have a transcript of a public
   hearing at cost) § III (B) and (D)
4. (Counsel may advise client, challenge questions and question in-
   terest of any member) § V (A) and (B) 7. § VI(A)
5. (Majority vote of quorum present determines relevancy) § IX
12. (public, unless majority of quorum orders executive session) § II (B)
13. (Must have quorum of the committee and the committee coun-
   sel—or staff member designated by the counsel—present) § III (A)
PROPOSED REFORMS

14. § III (B)
16. ("Nothing in these rules shall impair the right of a witness to refuse to answer on the ground of self-incrimination") § IV(E)
18. ("The interrogatories shall be used or not in accordance with the discretion of the majority of a quorum present"; if not used they may be appended to the transcript if the person submitting them so desires) § IV(B)
21. § VIII
23. ("The transcript of any executive session may, under conditions prescribed by a majority of the committee, be made available to any interested person upon a confidential basis without being made public") § III (E)

XI. Proposed by Arnold, Fortas and Porter
1. Suggestion no. 2
2. Suggestions nos. 2 and 3
31. Suggestion no. 4
32. Suggestion no. 4

XII. Proposal by Prof. Stanley Surrey
1. § 3
2. § 4
3. (twenty days instead of thirty. Committee shall secure witnesses if majority deems it necessary. Committee need not act if majority finds evidence does not reflect adversely. Person shall be notified of time and place of meeting.)
4. (right of counsel to advise) § 2
6. (at cost of transcript) § 6
11. § 10
13. (no person required to appear unless two committee members are present)
15. § 11
22. (any investigation or study must have majority approval of committee or subcommittee) § 10
23. § 9
25. § 7
26. § 8

XIII. Proposal by the American Civil Liberties Union
1. § 9
2. § 9
3. § 10
6. (at cost of transcript) § 4(e)
7. § 12(a)
8. § 12(b)
9. § 13
11. § 4(b)
12. § 4(c)
13. § 4(d)
14. § 4(e)
15. § 5(a)
16. § 6(a)
17. § 6(b)
18. § 7
19. § 8
28. § 5(b)

XIV. Proposal by The Washington Post (a series of twelve editorials entitled "Turning on the Light")

1. Suggestion no. 6
4. Suggestion no. 7
6. (at cost of transcript) Suggestion no. 7
18. (Questions "within appropriate limits") Suggestion no. 5
19. (require a majority vote of Senate or House to punish for contempt) Suggestion no. 9