sion. The usefulness of the class action device as providing an adequate group remedy will depend upon recognition by the courts of the adaptable and multipurpose nature of the class suit device.

## LIMITS ON CONGRESSIONAL INQUIRY
### *RUMELY V. UNITED STATES*

In 1949, Congress created the House Select Committee on Lobbying to investigate "all lobbying Activities intended to influence, encourage, promote or retard legislation."[1] The Select Committee subpoenaed defendant, executive secretary of the Committee for Constitutional Government (CCG), an organization engaged in publishing and distributing to the general public books and pamphlets pertaining to national affairs. Defendant appeared before the Select Committee but refused to obey the Committee's order to reveal the names of persons from whom the CCG had received funds.[2] Defendant was indicted and convicted under a statute making it a misdemeanor for a witness to refuse to answer "any question pertinent to the question under inquiry" by a congressional committee.[3] On appeal, *held*, reversed. *Rumely v. United States*.[4]

The Court of Appeals stated that publicizing the names of purchasers of books and other literature "is a realistic interference with the publication and sale of those writings," and thus a violation of the free speech and free press clauses of the First Amendment. This violation is not counterbalanced by any public danger posed by the CCG that might create a necessity for congressional inquiry. Were the empowering statute of the Select Committee construed to permit the Committee to investigate efforts to influence public opinion at large, serious constitutional questions would be raised. In order to avoid these questions, the court invoked dictionary definitions to limit the meaning of "lobbying activities" in the statute to direct contact with legislators. Given this interpretation, the court found that the Select Committee had exceeded its power in questioning Rumely concerning the names of CCG's subscribers, and that Rumely consequently was within his rights in refusing to supply the information.[5]

The *Rumely* case is not based upon objections to the procedure of the investi-

[1] H.R. Res. 298, 81st Cong. 1st Sess. (1949).

[2] It was maintained by the government that the CCG was attempting systematically to evade the registration provisions of the Lobbying Act, 60 Stat. 839 (1946), 2 U.S.C.A. §§ 261–70 (1951). This was done by accepting as payment for literature money that was in fact a contribution. The court dismissed this argument on the ground that the question of subterfuge was not before the trial court. For a description of the financing of the CCG, consult Schriftgiesser, The Lobbyists 161–66 (1951).

[3] 52 Stat. 942 (1938), 2 U.S.C.A. § 192 (1951).

[4] 197 F. 2d 166 (App. D.C., 1952), aff'd, 73 S. Ct. 543 (U.S., 1953). Discussion in the text is limited to the Court of Appeals decision.

[5] The Supreme Court, in affirming, followed a similar line of reasoning. Douglas, J., concurring, rejected the narrow interpretation of lobbying as contrary to the scope intended by Congress, and concluded that the "potential restraint" on speech and press imposed by the inquiry was an infringement of the First Amendment.

gating committee[6] or its lack of legislative purpose.[7] On a first reading, the court's careful scrutiny of the authorizing statute and its discussion of constitutional limitations seems to indicate that the court is invoking fairly stringent standards to test the validity of congressional investigations. A closer examination of the case, however, may lead other courts to limit the *Rumely* case to its facts, thus depriving it of any value it may have as a limit upon inquiry.

The *Rumely* court is the only one in recent years to employ the empowering statute as a check upon the power of congressional investigating committees.[8] But it should be noted that the check turned on a narrow construction of the statute empowering the committee. When, for example, the statute creating the House Un-American Activities Committee is examined, the possibility of limiting that committee's operations in a similar manner seems dubious indeed. The Un-American Activities Committee is empowered to investigate "the diffusion within the United States of subversive and un-American propaganda that . . . attacks the principle of the form of government as guaranteed by our Constitution."[9] Even if the terms "subversive" and "un-American" were strictly construed, the armchair Socialist and other unconventional but nonrevolutionary thinkers would still not be safe in disregarding a subpoena to appear as a witness.[10] Nor could these persons refuse to answer the payoff question regarding Communist opinion and affiliation, since even under a strict construction the committee would have the power to investigate the activities of the Communist party.[11]

In addition, ironically enough, the *Rumely* court was probably on quite tenuous grounds in limiting the meaning of "lobbying" to "direct lobbying." It seems reasonable to assume that the House intended the words "lobbying activities" in its resolution to encompass the full meaning imparted to them in the Lobbying Act,[12] and the terms of that act apply to any person who receives money to be used principally to "influence, directly or indirectly, the passage or defeat of any legislation" by Congress. The idea of lobbying adopted in the

[6] See, e.g., McGrain v. Daugherty, 273 U.S. 135 (1927); Barsky v. United States, 167 F. 2d 241 (App. D.C., 1948), cert. denied, 334 U.S. 843 (1948); McGreary, The Development of Congressional Investigating Power 106–8 (1940).

[7] See United States v. Josephson, 165 F. 2d 82 (C.A. 2d, 1947), cert. denied, 333 U.S. 838 (1948); Townsend v. United States, 95 F. 2d 352 (App. D.C., 1938), cert. denied, 303 U.S. 664 (1938); United States v. Dennis, 72 F. Supp. 417 (D.C. D.C., 1947).

[8] See United States v. Bryan, 339 U.S. 323 (1950), rev'g 174 F. 2d 525 (App. D.C., 1949); United States v. Fleischman, 339 U.S. 349 (1950), rev'g 174 F. 2d 519 (App. D.C., 1949); Dennis v. United States, 339 U.S. 162 (1950), aff'g 171 F. 2d 986 (App. D.C., 1948); Morford v. United States, 176 F. 2d 54 (App. D.C., 1949), rev'd on other grounds, 339 U.S. 258 (1950).

[9] 60 Stat. 812, 828 (1947).

[10] United States v. Josephson, 165 F. 2d 82 (C.A. 2d, 1947), cert. denied, 333 U.S. 838 (1948); Townsend v. United States, 95 F. 2d 352 (App. D.C., 1938), cert. denied, 303 U.S. 664 (1938).

[11] Barsky v. United States, 167 F. 2d 241 (App. D.C., 1948), cert. denied, 334 U.S. 843 (1948); Lawson v. United States, 176 F. 2d 49 (App. D.C., 1949), cert. denied, 339 U.S. 934 (1950).

[12] 60 Stat. 839 (1946), 2 U.S.C.A. §§ 261–70 (1951).

*Rumely* case is the old notion of "buttonholing" the legislator to instruct him to vote the "right" way.[13] Today, in the light of modern political reality, lobbying refers to the methods used by an organized group to stimulate its members and the public to activity designed to impress legislators with the group's position on proposed legislation.[14] These methods may be even more effective than personal contact.[15] To assign to the word "lobbying" a meaning current fifty years ago is to ignore the common and accepted usage of the term in modern speech and thought.

It may be that the court in the *Rumely* case deliberately adopted an unsupportable statutory construction in order to avoid the constitutional issue of whether any congressional limitation of public opinion lobbying would be valid.[16] The majority opinion tended to imply that such a limitation would probably run afoul of the First Amendment.[17] But the opinion also indicated that, if "influences upon public opinion were being bought and prostituted, an evil might arise" which could be legitimately regulated. By giving a misleading indication of the true weight of public opinion, an effective lobby can deprive both legislators and the public of the accurate and balanced information necessary to arrive at appropriate decisions. Indeed, full disclosure of information regarding lobbies is arguably highly beneficial to the proper operation of the public forum in that it makes possible judgments concerning the advocate as well as his argument. The distortions of the "free market place of ideas" caused by powerful lobbies might be analogized to the distortions in the economic market resulting from the existence and operations of concentrations of economic power. However, if Congress is to have a breadth of power in regulating speech similar to its economic powers, it may be questioned whether the potency of the First Amendment has not been largely dissipated.

[13] Herring, Group Representation Before Congress 30–40 (1929); Improving the Legislative Process: Federal Regulation of Lobbying, 56 Yale L.J. 304 (1947).

[14] For a description of modern lobbying techniques, consult Schriftgiesser, The Lobbyists 29–34, 57–60 (1951); Buchannan, Speech before the American Political Science Association (Dec. 28, 1950), 96 Cong. Rec. A7,928 (1951).

[15] Zeller, Modern Pressure Groups, 39 Am. Lab. Legis. Rev. 152 (1939).

[16] See Thomas v. Collins, 323 U.S. 516 (1945); Jones v. Opelika, 319 U.S. 103 (1943); Thornhill v. Alabama, 310 U.S. 88 (1940); DeJonge v. Oregon, 299 U.S. 353 (1937); Near v. Minnesota, 283 U.S. 697 (1931). The Lobbying Act, however, may be compared to the Corrupt Practices Act, 43 Stat. 1070 (1925), which requires the names of contributors of more than $100 to political campaigns to be registered with the Clerk of the House of Representatives. That Act was declared not to be in conflict with the First Amendment despite the fact that such disclosures might deter some from implementing their political views with financial support. Burroughs and Cannon v. United States, 290 U.S. 534 (1934).

[17] The constitutionality of the Lobbying Act has been before the federal courts twice. In United States v. Slaughter, 89 F. Supp. 205 (D.C. D.C., 1950), the court, in refusing defendant's motion to dismiss the indictment, declared: "The section does not abridge Constitutionally guaranteed privileges (freedom of speech, press, petition, etc.) since it leaves every one free to exercise those rights, calling upon him only to say for whom he is speaking, who pays him, how much, and the scope in general of his activities with regard to legislation."

In National Ass'n of Manufacturers v. McGrath, 103 F. Supp. 510 (D.C. D.C., 1952), dismissed as moot, 344 U.S. 804 (1952), parts of the Act were declared as being too vague to ascertain a standard of guilt.

Perhaps the more important question with regard to the *Rumely* case is its effect on prior cases involving congressional committees and the First Amendment.[18] At the outset, it may be remarked that *Rumely* recognizes the fact that publicity can realistically inhibit freedom of speech even though the inhibition springs from community reaction rather than the threat of legal liability. The community reaction with regard to the "subversives" hailed before the House Un-American Activities Committee, involving as it does the risk of exposure to "insult, ostracism, and lasting loss of employment,"[19] is a good deal more serious than the reaction that would probably have been directed toward the persons subscribing to CCG publications. Thus *Rumely* should decisively lay to rest the notion in *United States v. Josephson*[20] that the First Amendment only prevents Congress from imposing legal restrictions on speech, a notion first repudiated in *Barsky v. United States*.[21]

The *Rumely* case maintains the two-fold criterion as to constitutionality between a statute and activities of a committee, first made explicit in the *Barsky* case. Statutes infringing upon the First Amendment are to be invalidated unless there is a showing of "clear and present danger" of the occurrence of substantive evils that Congress has a right to prevent. Investigations, on the other hand, are to be upheld when the danger "is reasonably regarded as potential." The argument seems to be that, unless Congress is empowered to investigate potential dangers, it will never be able to tell when the danger has become sufficiently clear and present to permit the enactment of valid legislation.[22]

An investigating committee begins with several presumptions in its favor, e.g., the presumption of materiality and relevancy[23] with respect to questions asked by the committee and the presumption that the information gathered will be used to enact valid laws if such laws are possible.[24] The difference between a

[18] For a comprehensive study of congressional investigations, both as to their uses and abuses, consult Congressional Investigations: A Symposium, 18 Univ. Chi. L. Rev. 421–686 (1951). As to the problems arising from the operations of the Un-American Activities Committee, consult Carr, The Un-American Activities Committee and the Courts, 11 La. L. Rev. 282 (1951).

[19] Barsky v. United States, 167 F. 2d 241, 254 (App. D.C., 1948) (Edgerton, J., dissenting).

[20] 165 F. 2d 82 (C.A. 2d, 1947), cert. denied, 333 U.S. 838 (1948).

[21] 167 F. 2d 241 (App. D.C., 1948), cert. denied, 334 U.S. 843 (1948).

[22] A second argument is that the difference in criteria is to be attributed to the difference in the severity of sanctions. A statute of Congress imposing criminal sanctions must meet a more stringent test than a congressional inquiry where the sanction in effect is merely that of community disapproval.

[23] The language in United States v. Bryan, 72 F. Supp. 58, 61 (D.C. D.C., 1947), indicates how far the courts have gone:

"Congress is not limited to securing information precisely and directly bearing on some proposed measure. . . . Obviously in order to act in an enlightened manner, it may be necessary and desirable for the Congress to become acquainted . . . with all matters that may have an indirect bearing upon the subject. . . . If the subject under scrutiny may have any possible relevancy and materiality, no matter how remote, to some possible legislation, it is within the power of the Congress to investigate the matter. Moreover, the relevancy and materiality must be presumed."

[24] Barsky v. United States, 167 F. 2d 241 (App. D.C., 1948); United States v. Josephson, 165 F. 2d 82 (C.A. 2d, 1947); Townsend v. United States, 95 F. 2d 352 (App. D.C., 1938).

danger "clear and present" and one only "reasonably regarded as potential" clearly permits a wider scope of permitted activity in the latter case and adds force to the objections of those who contend that the investigatory power was too wide to begin with.[25] Furthermore, it is not altogether clear that this scope is necessary to enable Congress to secure the knowledge required for effective legislation controlling clear and present dangers. A statute authorizing investigation only of speech creating a clear and present danger, as advocacy of violent overthrow seems to be today, might enable the committee to collect all necessary information without limiting constitutionally protected speech. However, the committee will still have to mark out the line dividing dangerous speech from protected speech and, in the course of this demarcation, will have to investigate protected speech to some extent. To just that extent, protected speech will be inhibited and the First Amendment problem will remain.

Since the broad test of the *Rumely* and *Barsky* cases represent the present state of the law, it is worthwhile to raise the question of exactly what limits are being imposed on an investigating committee by a requirement that the dangers investigated must be "reasonably represented as potential." The *Rumely* case itself adds little content to the phrase, since apparently the government made no showing whatsoever regarding the dangers posed by such an organization such as the CCG. Had the government argued that the CCG represented as serious a danger to the welfare of the United States from the extreme right as did the Communist party from the extreme left, the court would have been compelled to make a decisive judicial determination in an area so distinctly "political" as to raise a serious doubt that courts should be asked to operate in this area at all.

While the *Rumely* case, in view of the innocuous nature of the CCG as far as the record is concerned, does not represent a significant curtailment of the congressional power of inquiry, the case may repay careful analysis as the powers of congressional committees continue to be challenged.

Suggestions have been made of ways in which witnesses before congressional committees may be deterred from inflicting unwarranted damages to the reputation of third persons.[26] But as to safeguarding the rights of witnesses themselves, in light of the prevailing view of the courts, the only real source of protection would seem to be the decency and common sense of the Congressmen themselves.[27]

[25] Consult Carr, The Un-American Activities Committee and the Courts, 11 La. L. Rev. 282 (1951); Boudin, Congressional and Agency Investigations: Their Uses and Abuses, 35 Va. L. Rev. 143 (1949); Constitutional Limitations on the Un-American Activities Committee, 47 Col. L. Rev. 416 (1947).

[26] Protection from Defamation in Congressional Hearings, 16 Univ. Chi. L. Rev. 544 (1949).

[27] See Barsky v. United States, 167 F. 2d 241 (App. D.C., 1948); Delaney v. United States, 199 F. 2d 107 (C.A. 1st, 1952); Norris v. United States, 300 U.S. 564 (1937).