

## MR. ALEXANDER MEIKLEJOHN AND THE BARENBLATT OPINION\*

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FOR MORE THAN ten years, a decade marking the span between his seventy-fifth and eighty-fifth birthdays, Alexander Meiklejohn has been producing a major series of essays on the basic issues of free speech in the United States. Mr. Meiklejohn as a philosopher and educator has been primarily concerned with exploring, and revitalizing, the commitment to free speech in a self-governing democracy. In his *Free Speech* in 1948 and his several later essays,<sup>1</sup> he has provided an exhilarating defense of the thesis that discussion on *public* issues cannot by government action be abridged at all. During the troubled years of the Communist threat abroad and at home after World War II, Mr. Meiklejohn's voice has had a special ring. It has spoken with rigor and persistence in seeking to understand "our American plan of government," with sharp criticism of excess and complacency, with deep moral concern. He has been trying to educate us and our children to a rationally held preference for democratic freedom. And he has been a demanding and exciting teacher.

Mr. Meiklejohn is not a lawyer, but these concerns with liberty have brought him increasingly close to law. A theory of free speech in the United States is of necessity a theory of constitutional law. We thus have had from him a two-pronged theory under which it is argued that public speech is totally protected under the first amendment mandate whereas under the fifth amendment private speech is given the qualified protection of other private rights including property. We have had too a friendly but stern criticism of Justice Holmes and his famous clear and present danger test, and an astute appreciation of the greatness of Justice Brandeis' opinion in the *Whitney* case.<sup>2</sup>

As the problems of the day have moved law from the classic issue of direct

\* Although he may understandably wish to disown it, this comment owes a considerable debt to William R. Ming, Jr. of the Chicago bar. In writing I found myself repeatedly going back to and drawing on the many hours of discussion I had had with him a few years ago when he was a faculty colleague. I very much hope he will still be able to recognize some of his ideas.

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<sup>1</sup> In February this year Harper & Brothers republished the *Free Speech* essay, together with several papers written since, under the title, *Political Freedom*. A bibliography of his speeches and papers on the first amendment is found at pages 165-166 of the book. In 1953 Mr. Meiklejohn contributed *What Does the First Amendment Mean* to 20 U. CHI. L. REV. 461 (1953) and *The Priority of the Marketplace of Ideas* to the University of Chicago Law School Fiftieth Anniversary Celebration Conference on Freedom and the Law, Conference Series No. 13.

<sup>2</sup> *Whitney v. California*, 274 U.S. 357 (1927).

government prohibition of speech by criminal sanction to the perplexities of the oblique sanctions found in loyalty oaths, administrative loyalty programs, and congressional investigations, Mr. Meiklejohn's writing has moved with it. We have today a comment from his pen on the opinions of the Court in its last, and possibly most influential, decision on the powers of congressional committees and the privileges of individual witnesses called before them, *Barenblatt v. United States*, decided June 8, 1959.<sup>3</sup> It is a special pleasure again to welcome Mr. Meiklejohn to the pages of the *Law Review*.

In his critical comment, Mr. Meiklejohn is, I think, paying the Court a high compliment. He takes the Court seriously as a major source for the statement and restatement of basic democratic theory. The Court, he has often reminded us, is one of the great educators in American life. He wishes to read its opinions as significant, durable essays on important policy. And it is from this demanding perspective that he finds the majority opinion of Justice Harlan in the *Barenblatt* case wanting.

## II

Although the history of congressional investigation in American law is by now an oft told tale, a brief word may be useful to place the *Barenblatt* case and Mr. Meiklejohn's comment in perspective. Whatever the full impact of committee inquiry on individuals and whatever its Realpolitik functions, it is worth remembering that in law a committee has little power over the individual as contrasted to a court, a legislature, or an administrative agency. All the committee can do is to compel disclosure by the witness. If he is willing to testify and if he testifies honestly, that is the end of the committee's legal power over him. It does not adjudicate, it does not dispose. If he testifies falsely under oath, he will be subject to prosecution for perjury; if he refuses to testify, he will be subject to prosecution for contempt. Therefore the individual's one method of testing or resisting committee power is to refuse to answer and to have his rights measured against the committee's power in a prosecution for the statutory crime of contempt. With the recognition in recent years of the privilege against self-incrimination, the witness has been provided with one sure way of refusing to testify without being guilty of contempt. Since, however, the claim of the privilege may be attended by well known social difficulties for the witness, the central legal puzzle has been whether there is or is not some other route to judicial review of the committee's power to compel testimony. And the puzzle has proved to be genuine indeed because as everyone, and particularly the committee knows, its actual power has been far greater than its legal power.

The first real decision on congressional committees did not come until 1880 in *Kilbourn v. Thompson*,<sup>4</sup> where the committee's powers appeared to have been sharply limited by the barrier of individual privacy. The next 40 years produced little precedent and as late as 1920 the investigative powers of Congress were in

<sup>3</sup> 360 U.S. 109 (1959).

<sup>4</sup> 103 U.S. 168 (1880).

considerable doubt. Then came the Teapot Dome Scandal and *McGrain v. Dougherty*<sup>5</sup> and *Sinclair v. United States*,<sup>6</sup> where a broad investigative power in Congress is decisively underwritten, so that as the test is restated the privacy of the individual ends wherever the interest of government begins. Again there was little further law until the postwar period when the question of domestic communism began to intrude, and the familiar congressional committees looking into subversion began to produce a spate of test cases, with the House Un-American Activities Committee as the most frequent target. In 1948 in *Barsky*<sup>7</sup> and *Josephson*,<sup>8</sup> two major attacks failed in the Courts of Appeals by the narrow 2-1 margin and the committee moved into the McCarthy era<sup>9</sup> apparently without any legal limitations other than those imposed by the privilege against self-incrimination.

During this time it was striking that the Supreme Court declined to review cases, although frequently invited to do so.<sup>10</sup> Thus by 1950 the investigating

<sup>5</sup> 273 U.S. 135 (1927).

<sup>6</sup> 279 U.S. 263 (1929).

<sup>7</sup> *Barsky v. United States*, 167 F.2d 241 (D.C. Cir. 1948), *cert. denied*, 334 U.S. 843 (1948), *petition for rehearing denied*, 339 U.S. 971 (1950), Black, J. and Douglas, J. dissenting.

<sup>8</sup> *United States v. Josephson*, 165 F.2d 82 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948), Douglas, J., Murphy, J., and Rutledge, J. dissenting, *rehearing denied*, 335 U.S. 899 (1948).

<sup>9</sup> The belated fate of the cases from Senator McCarthy's sub-committee in the courts provides an arresting epitaph for the Senator's use of the investigative committee. The committee was authorized to investigate "economy and efficiency" in government operations. In *United States v. Kamin*, 135 F. Supp. 382 (D.C. Mass. 1955) and 136 F. Supp. 791 (D.C. Mass. 1956), and in *United States v. Lamont*, 236 F.2d 312 (2d Cir. 1956), the sub-committee's inquiries into communism were held clearly unauthorized by Congress. In *O'Connor v. United States*, 240 F.2d 404 (D.C. Cir. 1956) a question as to whether the witness was "a member of the Communist Conspiracy" was held fatally vague. In *United States v. Hoag*, 142 F. Supp. 667 (D.D.C. 1956) the Court held that the witness' denial that she would engage in sabotage if ordered by the Communist Party did not constitute a waiver of her privilege against self-incrimination as to other questions about her possible connection with the Party.

<sup>10</sup> See notes 7 and 8 *supra*. *Lawson v. United States*, 176 F.2d 49 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934, 972 (1950), Black, J. and Douglas, J. dissenting; *Marshall v. United States*, 176 F.2d 473 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 933 (1950), Black, J. dissenting; *Morford v. United States*, 184 F.2d 864 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 878 (1950).

This is not quite the full story of the Court's handling of these cases on certiorari, however. The Court did agree to review the contempt conviction of Eugene Dennis, 171 F.2d 986 (D.C. Cir. 1948), but limited the grant of certiorari to the single issue of whether the presence of federal government employees on the jury violated the sixth amendment. The Court then held that there was no violation, *Dennis v. United States*, 339 U.S. 162 (1950). In the *Morford* case, the Court after granting certiorari, reversed the original contempt conviction solely because of error in the refusal of the trial court to permit defense counsel to ask certain questions of prospective government employee jurors on voir dire, *Morford v. United States*, 339 U.S. 258 (1950). However, on retrial the defendant waived trial by jury, he was again convicted of contempt, and this time the Court denied certiorari. 340 U.S. 878 (1950).

The most ironic of the cases is that of Gerhart Eisler. In *Eisler v. United States*, 170 F.2d 273 (D.C. Cir. 1948), his contempt conviction was affirmed. Certiorari was granted, 335 U.S. 857 (1948) and the case was argued on the merits in March, 1949. Thereafter, Eisler fled the country and efforts to extradite him from Great Britain were unsuccessful. The Court then ordered the case removed from the docket until further order. 338 U.S. 189 (1949). One cannot help wondering how different the history of the last ten years might have been had Eisler timed his departure differently.

committee appeared to have gone from doubtful and limited power to virtual omnipotence in 75 years. Its regulation, if any were thought needed, was to be left to Congress and not to the courts.

Then in 1953 came the *Rumely* case<sup>11</sup> where the Supreme Court held that a committee as an agent of Congress has only such power as Congress gives it, and therefore it cannot compel testimony on matters outside the scope of its authorization. The importance of *Rumely* lay not in the doctrine which was long familiar but in the fact that the court actually chose to use it to deny the committee power in the particular case. *Rumely* dealt with lobbying, not subversion, and the question left open was how this yardstick would apply to the broad authorizations of committees investigating subversion.

In June, 1957 in *Watkins v. United States*,<sup>12</sup> the Court dealt directly for the first time with the major phenomenon—the committee investigating subversion—and to the surprise of at least some commentators,<sup>13</sup> in a 6 to 1 decision, with Justice Clark dissenting, it reversed the contempt conviction. The majority opinion by Chief Justice Warren is complex and touches on many issues including the vagueness of the House resolution authorizing the Un-American Activities Committee, the possible infringements of free speech involved, and the possible illicit or rather non-legal motives of the committee. As subsequent events have shown, it is not an easy opinion to parse, but it is major, it is eloquent, and it appeared to shift the balance of power back toward the witness. In the end the decision is overtly placed not so much on the general issues raised as on a technical point. The federal statute defining the crime of contempt limits it to the refusal to answer questions pertinent to the topic under inquiry.<sup>14</sup> The Court rests its decision on the inability of the defendant witness to discern, under all the circumstances of the case, when a question is pertinent. It finds therefore, a constitutional inhibition against treating as a crime his refusal to answer. A brief concurring opinion by Justice Frankfurter makes it clear that the sole ground for his decision is the failure to make the scope of the authorized inquiry and the relevance of the questions to it “luminous” to the witness at the time the questions are asked. The *Watkins* decision was thus newsworthy

<sup>11</sup> *United States v. Rumely*, 345 U.S. 41 (1953).

<sup>12</sup> 354 U.S. 178 (1957).

<sup>13</sup> Kalven, *A View from the Law: Playwright Arthur Miller on Trial*, 136 NEW REPUBLIC 8 (May 27, 1957).

<sup>14</sup> 2 U.S.C. § 192 (1958). Congress also has the inherent power independently of the statute to punish for contempt. It was this form of contempt which was used in both the *Kilbourn* and *McGrain* cases. *Jurney v. MacCracken*, 294 U.S. 125 (1935) appears to have been the last time Congress exercised its inherent contempt power. It has long been held that the creation of the crime of statutory contempt does not suspend the inherent contempt power; and theoretically, a witness could be subject to both sanctions. *In re Chapman*, 166 U.S. 661 (1897). While there are several differences between the two contempt sanctions, it would seem clear that the same constitutional limitations apply to both, and that the issues currently in controversy would not be affected were Congress to resort once again to its inherent contempt power; but note Justice Clark's warning that the House might find it necessary to use its inherent power with a consequent loss of safeguards for the witness. *Watkins v. United States*, 354 U.S. 178, 225 (1957).

and appeared to herald a new era of judicial review of congressional inquiry. The opinion had the unmistakable air and sweep of the great case with the Court conscious of handling a great issue of policy, but in the end the decision was placed on a narrow and readily curable difficulty in the committee procedure.

Space does not warrant tracing in detail here the reception of the decision and the changes it produced in judicial handling of the contempt cases already in the courts.<sup>15</sup> But in the next year and a half, the Court itself took three more committee cases, each time deciding in favor of the witness.<sup>16</sup>

In June, 1959, exactly two years after *Watkins*, the *Barenblatt* case reached the court. The case involved the same committee (the House Un-American Activities) the same year (1954) and the same general topic of Communist affiliations of the witness and of others he knows. *Watkins* was a labor leader, *Barenblatt* a teacher. But there are differences in the setting of the hearing, in the clarity with which its specific purpose is announced, in the fact that *Watkins* testified freely about himself and refused only to "inform," whereas *Barenblatt* refused to testify either about himself or about others.<sup>17</sup> And further, *Watkins*

<sup>15</sup> Consider, for example, the career of *Singer v. United States*. In 244 F.2d 349 (D.C. Cir. 1957) the contempt conviction was affirmed in a 2 to 1 decision and the *only* issue in controversy was whether the witness had waived by his prior answers the privilege against self-incrimination. The judgment was vacated after *Watkins* and in a one paragraph per curiam decision the Court of Appeals reversed and remanded with instructions to enter a judgment of acquittal. 247 F.2d 535 (D.C. Cir., 1957).

In *United States v. Peck*, 154 F. Supp. 603 (D.D.C. 1957) Judge Youngdahl on the authority of *Watkins* reversed a conviction of March 26, 1957 and directed an acquittal. He read *Watkins* as reopening several issues he had thought foreclosed and found the conviction invalid on first and fifth amendment grounds as well as for a lack of pertinency in the questions defendant had refused to answer. "The Supreme Court's opinion," said Judge Youngdahl, "reopens this field to consideration as a result of the restoration of concern for individual liberties to its traditional high place in the judicial system, and the recognition of the practical effects of such investigations." 154 F. Supp. at 606.

Playwright Arthur Miller benefitted from *Watkins* in a somewhat less direct fashion. On May 31, 1957 he was convicted of contempt for his refusal to answer two questions. On June 28, 1957, following *Watkins*, the trial court held that Miller had seasonably objected to the lack of pertinency of one of the questions but not the other and that the committee had then failed to make it clear to the witness why the question was pertinent. He therefore dismissed one count but held the other. *United States v. Miller*, 152 F. Supp. 781 (D.D.C. 1957). On appeal, the conviction on the remaining count was thrown out in a brief per curiam opinion, on the grounds that the committee had not unequivocally ordered Miller to answer the question. 259 F.2d 187 (D.C. Cir. 1958).

<sup>16</sup> *Sacher v. United States*, 356 U.S. 576 (1958) holding that three questions asked of the defendant by the Senate Internal Security Sub-Committee were not pertinent to its topic of inquiry, the recantation of *Matusow*. *Flaxer v. United States*, 358 U.S. 147 (1958) holding that the committee had failed to give witness an unequivocal order as to when he was to produce certain documents. *Scull v. Virginia*, 359 U.S. 344 (1959) holding that a state investigative committee had totally failed to make evident to the witness the pertinency of its questions.

<sup>17</sup> One is tempted to suspect that this is a distinction of importance for the courts. It should be noted that *Singer*, *supra* note 14, like *Watkins*, testified freely about himself. Compare also *Davis v. United States*, 269 F.2d 357 (6th Cir. 1959), decided after *Barenblatt*, where the contempt conviction was affirmed and where *Davis*, like *Barenblatt*, refused to testify about himself or others. The stance of the witness who is candid about himself and declines only to inform on others is, of course, an appealing one, but it is not immediately apparent why his refusal to testify rests on stronger legal grounds.

made a more explicit objection to lack of pertinency than did *Barenblatt*. In any event, in a 5 to 4 decision the Court speaking through Justice Harlan distinguished *Watkins*, found the pertinency of the questions asked *Barenblatt* sufficiently apparent, and affirmed the conviction. Justices Harlan and Frankfurter, who were with the majority in *Watkins*, now join Justice Clark, who dissented in *Watkins*, and the two new justices, Whittaker and Stewart, to make up the five man majority. The opinion by Justice Harlan is again complex and is extremely careful and orderly. There is a vigorous dissent by Justice Black in which the Chief Justice and Justice Douglas join and an additional dissent by Justice Brennan, the four who, along with Justices Frankfurter and Harlan, had made up the six man majority in *Watkins*.

Some further details about the opinions in the *Barenblatt* case should be added. Apart from pertinency, the majority opinion clearly passes on four other issues: (1) it holds that the current charter of the House Un-American Activities Committee is not invalid per se for vagueness; (2) it holds that the charter read in the light of the legislative history shows a sufficient authorization to the committee, without more, to investigate communism in education; (3) it holds that the inquiry does not constitute a violation of the first amendment; and finally (4) it restates the conventional view that the Court will not attempt to assess the actual motives of Congress so long as there is a formal statement of legislative purpose. All four dissenters hold that the committee's actual purpose of exposure of individuals is so palpable that it defeats any presumption of a legitimate legislative purpose; and three of the dissenters hold further that there is a violation of first amendment rights and that the charter of the House Un-American Activities Committee is fatally vague.

A full exegesis of the *Barenblatt* opinions against the *Watkins* opinions requires, and deserves, a major essay. The two cases standing together are now the great precedents on the powers of congressional committees<sup>18</sup> and it is an easy prediction that the bar, the bench, and the law schools will be construing them for years to come. Mr. Meiklejohn's comment is an important effort in that direction.

It is perhaps the final evidence of the contagion of law for Mr. Meiklejohn that he has chosen to place his comment on what he terms the procedural aspects of the case rather than on its broad discussions of the first amendment problem. However, he had already in his prior writing made his contribution to the first amendment debate in the case. Justice Harlan weighed the balance of *Barenblatt's* individual interest in privacy against the public interest in security and resolved the balance in favor of security. Justice Black in dissent eloquently

<sup>18</sup> Perhaps one should add two other recent cases which although dealing with the special New Hampshire provisions making the Attorney General in effect a one man investigating committee, contain major discussions of the larger issues involved. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) and *Uphaus v. Wyman*, 360 U.S. 72 (1959). A full examination of the meaning of *Barenblatt* and *Watkins* clearly would require also a careful consideration of *Sweezy* and *Uphaus*.

pointed out that this was hardly the relevant balance since it is the *public* interest in free speech and free association that has been omitted from Barenblatt's side of the scale. And in making this point, Justice Black was talking pure Meiklejohn.<sup>19</sup>

### III

Whatever the difficulties of interpreting and applying the *Watkins* precedent as it stood, they have been gravely compounded by the opinion in *Barenblatt*. And whether the fault lies chiefly with the first or with the second opinion, the law is now in a less satisfactory state than perhaps ever before.

On the most literal level it is true that *Watkins* and *Barenblatt* can be read together consistently as Justice Harlan does. But the impression will not down that the cases are really deeply inconsistent, and that it might have been better to say so candidly and overrule *Watkins*, indicating—as Justice Jackson once urged to the Court to make clear<sup>20</sup>—that the Court has no real power over the congressional inquest. Yet it is also possible that the future may not read *Barenblatt* as overruling *Watkins*. We may see instead two powerful precedents so close on their facts that future courts will for all practical purposes be free

<sup>19</sup> See, for example, *Political Freedom* (1959) on almost any page and especially 24–28, 53, 54–60, 119.

<sup>20</sup> In *Eisler v. United States*, 338 U.S. 189, 195 (1949), *supra* note 9, Justice Jackson dissented from the Court's refusal to decide the case once Eisler had fled the country. He said:

"I cannot agree that a decision of Eisler's case should be indefinitely deferred, awaiting what I do not know. The case is fully submitted and all that remains is for members of the Court to hand down their opinions and the decision. Eisler's presence for that would be neither necessary nor usual. The case has reached this stage at considerable detriment to the country, since this Court's grant of his petition for review was what delayed Eisler's commencement of sentence and afforded him opportunity to escape. If ever there were good reasons to grant him a review, they are equally good reasons for now deciding its issues.

"The Rules of this Court provide that we shall grant a petition for review here only where there are '*special and important reasons* therefor.' They limit such cases to those that present 'a question of *general importance* . . . which *has not been, but should be, settled by this court.*' Rule 38, 28 U.S.C.A. (Emphasis added.)

"Under our practice, the grant of Eisler's petition meant that four Justices of this Court, at least, were in agreement that the questions he raised were of this description. If they were then, they are still. His petition challenged the power of Congress and its investigating committees to hold, and to control the procedures of, investigations of this nature. These questions are recurring ones, certain to be repeated, for the grant of a review has cast doubt not only on the validity of Eisler's conviction but upon congressional procedures as well. No one can know what the law is until this case is decided or until someone can carry a like case through the two lower courts again to get the question here.

"Decision at this time is not urged as a favor to Eisler. If only his interests were involved, they might well be forfeited by his flight. But it is due to Congress and to future witnesses before its committees that we hand down a final decision. I therefore dissent from an expedient that lends added credence to Eisler's petition, which I think is without legal merit. I do not think we can run away from the case just because Eisler has.

"I should not want to be understood as approving the use that the Committee on Un-American Activities has frequently made of its power. But I think it would be an unwarranted act of judicial usurpation to strip Congress of its investigatory power, or to assume for the courts the function of supervising congressional committees. I should affirm the judgment below and leave the responsibility for the behavior of its committees squarely on the shoulders of Congress."

to choose between them and to decide that it is the one and not the other precedent that today controls the case before it.

In any event, the distinction between permissible and non-permissible congressional power as now drawn seems to me frivolous. In both *Watkins* and *Barenblatt* the witness knew that the committee's general topic was the investigation of communism in America and that the committee had little interest in whether the communism was in labor unions or in education or in the press or in defense plants. Are we to believe that the crucial failure in *Watkins*, a failure so prejudicial that it rose to the level of a constitutional defect, was the failure to mention that he was being asked about labor although he was a labor leader and 23 of the 30 names he was asked about were clearly associated with labor? Was it a concern with such small differences that triggered the long complex opinion in *Watkins*? It is disconcerting to see the important national policy issue of the power of congressional committees resolved by a finicking concern with the facts of each case—the accidents of just what the chairman happened to say that day, the accidents of the sequence of witnesses called, etc.—as though we were engaged in the negligence calculus of *FELA* cases.

Finally, not the least visible of the results of the collision of the *Watkins* and *Barenblatt* cases is the gravity of the dissent in *Barenblatt*. If the majority are settling for a tidy small scale pertinency yardstick, the dissenters have converged on a position that is impressively radical.<sup>21</sup> It may someday prove to have been the real contribution of *Barenblatt* that now we have four judges of the United States Supreme Court who not only think, but are willing to place their decision on the grounds, that the Un-American Activities Committee has had no legitimate legislative purpose in fact; and that three judges now find in some congressional inquests an infringement of freedom of speech and association so serious as to violate the first amendment.<sup>21a</sup>

Since the relationship between the two cases is so provocative, it may be permissible to indulge in a brief conjecture as to why the decision in *Watkins* was in the end placed on so narrow and so fragile a ground. Of course the explanation may quite simply be that this was the ground that would command the votes of Justices Frankfurter and Harlan. But there is much in the Warren opinion that suggests a more interesting hypothesis. At the very end of the opinion we are told:

<sup>21</sup> The four dissents in the Court of Appeals should be added to the roster. Judges Edgerton and Bazelon found that the charter of the committee was per se invalid; Judges Fahy and Washington found that the committee had no authorization from Congress to investigate in the field of education. 252 F.2d 129 (D.C. Cir. 1958). And there is also the extraordinary vigor of Justice Brennan's dissent in *Uphaus* on the ground that the purpose of the New Hampshire inquiry was "exposure for exposure's sake." Chief Justice Warren and Justices Black and Douglas joined in his dissent.

<sup>21a</sup> Justice Brennan's dissent might well be added here. He does find a violation of first amendment rights but solely because the committee's purpose is exposure.

We are mindful of the complexities of modern government and the ample scope that must be left to the Congress as the sole constitutional depository of legislative power. Equally mindful are we of the indispensable function, in the exercise of that power, of congressional investigations. The conclusions we have reached in this case will not prevent the Congress, through its committees, from obtaining any information it needs for the proper fulfillment of its role in our scheme of government. The legislature is free to determine the kinds of data that should be collected. It is only those investigations that are conducted by use of compulsory process that give rise to a need to protect the rights of individuals against illegal encroachment. That protection can be readily achieved through procedures which prevent the separation of power from responsibility and which provide the constitutional requisites of fairness for witnesses. A measure of added care on the part of the House and the Senate in authorizing the use of compulsory process and by their committees in exercising that power would suffice. That is a small price to pay if it serves to uphold the principles of limited, constitutional government without constricting the power of the Congress to inform itself.<sup>22</sup>

The suggestion then is that it was the hope and the point of the *Watkins* opinion to throw the responsibility back to Congress to review seriously the use of compulsory process by its committees. This strategy might not dispose of all controversies over committee inquest but it need not prove a negligible control. The Court was inviting Congress to authorize only reasonably precise, limited inquiries spelling out why the information sought would be useful.<sup>23</sup> Had the invitation been accepted, it presumably would have meant the end of the standing, and roving, committee under a broad grant of power. Presumably too the threat implied in *Watkins* was that unless Congress did this, the Court would rigorously scrutinize authorization and pertinency. As a matter of diplomacy between the two great branches of government, the Court was willing to accept the considered judgment of Congress that this inquiry was needed and useful, but nothing less.

If this was the point, it involved as a matter of doctrine holding that Congress could not prevent judicial review by defaulting and authorizing its committees to investigate whatever they pleased. But the Court may have anticipated that it would not have to come to a show-down with Congress on this issue, that the House would read its criticisms of the Un-American Activities resolution and revise the charter. That expectation, or hope, was defeated well before *Barenblatt* reached the Court. It is astonishing how little stir the Court's radical criticism of the charter caused in Congress. Hence *Barenblatt* presented the court for a second time with the charter of which the Court had said, in *Watkins*, "It would be difficult to imagine a less explicit authorizing resolution."<sup>24</sup> And this time there was a show-down on the legality of the charter itself.

<sup>22</sup> 354 U.S. 178, 215-16 (1957).

<sup>23</sup> Justice Clark dissenting in *Watkins* seems to me to agree on this reading of the Warren opinion. See 354 U.S. at 225-27.

<sup>24</sup> 354 U.S. 178, 202 (1957).

When after *Watkins* the *Barenblatt* case was remanded to the Court of Appeals, two of the judges in dissent, Edgerton and Bazelon, squarely held that *Watkins* had invalidated the charter per se.<sup>25</sup> But the majority of the court as well as the majority of the Supreme Court held that *Watkins* did not go that far. That is probably the better reading of the *Watkins* opinion, but it left open, as Justice Harlan clearly recognized in *Barenblatt*, the question of whether the Court should now go that far. Justice Harlan offers two reasons why it should not. The second is found in the "persuasive gloss of legislative history"<sup>26</sup> which showed repeated endorsement by the House since 1938 of the activities of the committee in investigating communism. He concluded therefore that the committee was doing what the House intended. This may be true but it either misses or denies, on the view here argued, the ultimate point that *Watkins* was raising. The issue was whether Congress could bypass any issues of authorization and pertinency by an enormously broad and vague grant. The legislative gloss had been of course equally available to Justice Harlan and the other judges joining the majority in *Watkins* when they said, "No one could reasonably deduce from the charter the kind of investigation that the Committee was directed to make."<sup>27</sup>

It is likely that Justice Harlan found his first reason more persuasive. It was that if the charter were per se invalid, the committee had no authority at all to compel testimony, and, worse, had not had any since its inception in 1938. This he obviously regarded as a *reductio ad absurdum*, and in one sense it certainly is. But it is an absurdity chiefly of the Court's own making by its steadfast refusal a decade ago to review the first set of serious challenges to the power of this committee.<sup>28</sup>

Perhaps the doctrinal premise underlying this guess as to the strategy behind the format of the *Watkins* decision and opinion could not bear careful scrutiny in any event.<sup>29</sup> It may be undesirable for Congress to delegate broad discretion to its investigating committees, but if Congress makes it clear that they have

<sup>25</sup> They argued carefully that this was the alternate grounds of decision in *Watkins* and not dictum. 252 F.2d 129, 138 (D.C. Cir. 1958).

<sup>26</sup> Justice Frankfurter concurring in *Watkins* had suggested that "implied authority for the questioning by the Committee, sweeping as was its inquiry," might "be squeezed out of the repeated acquiescence by Congress in the committee's inquiries. . . ." 354 U.S. 178, 217 (1957).

<sup>27</sup> 354 U.S. 178, 204 (1957).

<sup>28</sup> See cases cited notes 7, 8, 9 *supra*. All of these cases involved the House Un-American Activities Committee.

<sup>29</sup> Chief Justice Warren is explicit that the vagueness, and apparently the undue delegation of investigative authority as well, could under some circumstances be cured by sufficiently explicit statements by the committee as to the purpose of the particular hearing. Justice Black dissenting in *Barenblatt* notes: "[W]e are dealing here with governmental procedures which the Court itself admits reach to the very fringes of congressional power. In such cases more is required of legislatures than a vague delegation to be filled in later by mute acquiescence." 360 U.S. 109, 139-40 (1959). He then appends a footnote citing *Panama Refining Co. v. Ryan* 293 U.S. 388 (1935) and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

done so, it is not altogether easy to state the constitutional objection. The doctrine of undue delegation of congressional power has not been fashionable in recent years.

But if this point will not hold, and *Barenblatt* virtually forecloses any further objections along this line, it would seem that any significance of the pertinency requirement as a safeguard evaporates with it.<sup>30</sup> And that is perhaps the one sure lesson of the *Barenblatt* decision.

#### IV

The tension between the opinions in *Watkins* and *Barenblatt* indicates that the evolution of constitutional doctrine for judicial review of congressional committees has not yet run its course. It is not easy to see what the full shape of that doctrine will or should be.

As one reflects on the controversy over congressional committees in American law, one suspects that the decisive points of difficulty are two:<sup>31</sup> one turns on the actual motives of the committee and the other turns on the logic of granting subpoena power for the finding of facts in aid of legislation. The two points are closely interconnected and while they serve to illuminate the roots of contemporary difficulties, it may well prove true that neither point furnishes an insight that can be translated into constitutional doctrine.

First then there is the awkwardness of the Court calling a spade a spade with respect to Congress; the awkwardness, that is, of the Court using as a source of limitation its knowledge of what committees are in fact doing. The chief irony for some years has been that no court has ever suggested that the exposure and public informing functions of a committee are a predicate for power

<sup>30</sup> The basic authorization apart, there are some logical difficulties with the concept of pertinency in any event. If the inquiry is not authorized, then it is easy to see that the questions are not pertinent. What is puzzling is to see how a question might not be pertinent although authorized. Hence, it would seem that pertinency could add little to the protection afforded the witness by the scrutiny of authorization. Justice Frankfurter is helpful on the point in his carefully worded concurring opinion in *Watkins*. It might be noted that in *Watkins* the Court starts with pertinency and never passes on whether the inquiry was authorized; in *Barenblatt* the court first establishes that the inquiry was authorized and has less trouble with pertinency.

Authorization is in itself a limited safeguard since under the statutory contempt procedure, Congress normally must vote a contempt citation as a step in the process. The congressional vote thus represents a construction by Congress of what it intended the committee inquiry to cover. Hence, it would be unusual for the Court to reject Congress' own reading of its intention. *United States v. Rumely*, 345 U.S. 41 (1953) is the most illuminating decision thus far on this problem.

<sup>31</sup> No effort has been made in this comment to deal with the first amendment issues that may be involved. The first amendment problem here is a difficult one and the difficulties have been elaborately analyzed in both the majority and dissenting opinions in the *Barsky*, *Josephson*, *Watkins*, *Barenblatt*, *Sweezy*, and *Uphaus* cases. The thrust of the present discussion however is that the flaws in the congressional committee as we know it are more general and pervasive than simply its impact on freedoms of speech and association. The use of compulsory process is, I would argue, as difficult to justify in the case of Frank Costello or Dave Beck as it is in the case of John Watkins or Lloyd Barenblatt.

to compel testimony. The legal doctrine is that the power to compel depends on the need of information on behalf of legislation. And the fact is equally firm that the committee device provides a remarkably effective loyalty program. There can be sensible debate on whether the committee form of loyalty program did not on balance perform a worthwhile function. But there can be no debate that if the House had, agreeing with its various chairmen, explicitly authorized the Un-American Activities Committee to do exactly what it has done for 20 years, the Court would find totally lacking any predicate for the power to compel testimony.

Yet if Congress says it has a legislative purpose and if it occasionally legislates, what can the Court do with its knowledge of real life? How can it hear evidence on—and try the motives of—Congress? It is not just idle etiquette that makes the Court go slow here. However much one admires the candor and gusto of the four dissenters on this point,<sup>32</sup>—and I do—there remain real difficulties in translating their “judicial notice” of committee reality into workable legal doctrine.

The second difficulty has been less fully appreciated and discussed, although Mr. Meiklejohn notes it sharply. It turns on the connection between the power of Congress to investigate in aid of legislation *and* the power of Congress to compel testimony for this purpose. Since at least *McGrain v. Dougherty*, it has been assumed that the second necessarily follows from the first and that therefore the power to compel testimony is coterminous with the power to investigate. The argument has been the simple one that the power must be implied since without the power to compel, Congress would be at the mercy of the hostile witness and unable to gather the facts needed as a basis for rational legislation.

It is too late in the day to argue that the investigative committee should not have any subpoena power. But it is perhaps not too late to point up that almost all contemporary difficulties arise from the too easy granting of that power to each congressional inquest—and to urge that the case for granting the power to compel testimony *in aid of legislation* is far less persuasive than has been supposed. The point cannot be fully argued here, but what is asked for is a more serious look at the logic of the legislative process before we find congressional subpoena power necessary. What kind of factual detail, what level of factual proof are useful in reaching the threshold of conviction requisite for legislation? Surely legislation requires a very different precision as to the facts of the particular case than does adjudication of the particular case.

When Congress in aid of legislation calls the hostile witness, it is obviously not concerned with his impressions of the general problem or his advice—the House Committee as Mr. Meiklejohn points out, had no interest in Mr. Baren-

<sup>32</sup> In many respects it is the dissent of Justice Brennan in *Uphaus* which is the most impressive statement of this line of challenge.

blatt's views on the problems of communism in education. Presumably no committee would insist that an expert witness who was unwilling should testify in aid of tax or labor or securities legislation. The subpoena power is needed only to compel the unwilling witness to disclose something about himself or his associates; and since he is unwilling, it is likely to be something he would prefer to keep to himself. Hence in every instance of compulsory testimony, and not merely in the exceptional, we are imposing a burden on the witness, invading a privacy he wishes to keep. The procedure of inquiry, no matter how gentlemanly, must of necessity then begin to look like an imperfect trial of the individual case.

It is of course true that witnesses are daily compelled to testify in court and that there are interests superior to the desire of the witness to be let alone. But it is precisely those interests which are claimed as superior in the case of the congressional committee which need further scrutiny. What needs to be explored is the easy assumption that facts gained this way have high utility for the purposes of legislation. If Congress wishes to consider legislation on communism in labor or education, it can, as in part it did, get considerable impression of the scope and structure of the problem from people in labor or in education and from those who have studied the Communist movement. But it is surely absurd to assume, as we solemnly appear to have done for years, that its best route to legislative insight is to inventory the Communists in the United States one at a time. Whatever the motives of the congressional committee, it has for the past ten years or more been assiduously collecting far more information about the individual case than could possibly be necessary or useful to rational legislative judgment. And these superfluous data have been collected at a considerable price to individual privacy.

The thesis then is this: that the power to compel testimony will by its nature be used primarily where the witness wishes to conceal something about *his individual case* or that of his friends; and that in the majority of cases the facts so obtained on individual cases will have little or no relevance or utility to the consideration of general legislation; and that it is only as an aid to the consideration of general legislation, that congressional committees have the power to compel testimony. Or to restate the conclusion: the power to compel testimony should be far narrower than the power to investigate.<sup>33</sup>

Like the point about legislative motives, this point about scrutinizing the need for subpoena power may not translate easily into workable legal doctrine. In fact it may appear to be simply a restatement of the challenge to legislative

<sup>33</sup> The argument as sketched here admittedly does not do justice to several troublesome points. It does not differentiate between the need for compulsory process in the investigation of private citizens and in the investigation of government operations. It assumes, as noted, that no new issues are raised if we shift back to the inherent contempt power of Congress. It assumes that the Court's widely used formula about legislative purpose means literally the purpose of legislating and nothing else. And finally it does pause for the analogies of the grand jury and the administrative agency.

purpose.<sup>34</sup> There is however a difference. The first challenge goes to motive; this goes to logic. The first is "proved" largely from ill considered remarks of committee members and seems rebutted if the committee does recommend legislation. The second approach would take the legislative purpose for granted and put in issue whether this line of inquiry was not too luxurious a way to find facts for the legislative judgment.<sup>35</sup> But whether or not a court could make this calculus any more readily than it could make the calculus of motives or the calculus of pertinency, it remains striking that the whole edifice of the congressional inquest rests today on the thin and unexamined premise that the congressional power to compel testimony is coterminous with the congressional power to investigate.<sup>36</sup>

## V

We return in the end to Mr. Meiklejohn. The relationships between the *Watkins* and *Barenblatt* opinions are rich and varied; not the least interesting of them is the difference in approach to big issues of civil liberties. The cases make evident that what is needed is some fusing of a passion for liberty with a passion for rigorous analysis. And in this, as in so many matters, Mr. Alexander Meiklejohn provides an admirable model.

<sup>34</sup> For example, Justice Brennan in *Uphaus* repeatedly and effectively, asks what the connection of the inquiry is to any logic of legislation, but he does so in order to establish as his final conclusion that the *true purpose* of the inquiry was "exposure."

<sup>35</sup> If we are serious about committee fact finding in aid of legislation, surely the handling of the fifth amendment cases is the prize oddity. The chief fact finding achievement of several committees in the past decade in their own eyes would appear to be the amassing of cases where the witness exercises a constitutional privilege not to answer their questions.

<sup>36</sup> The English practice separates the inquiry in aid of legislation from the inquiry into scandal and malfeasance that falls short of crime. In general it grants the subpoena power only to the latter inquiry. Finer, *Congressional Investigations: The British System*, 18 U. CHI. L. REV. 521 (1951). Chief Justice Warren notes the point in *Watkins*. ["Modern times have seen a remarkable restraint in the use by Parliament of its contempt power."] 354 U.S. 178, 191 (1957).