Constitutional Aspects of Congressional Investigations into Subversive Activities

Bill E. Brice

COMMENTS
CONSTITUTIONAL ASPECTS OF CONGRESSIONAL INVESTIGATIONS INTO SUBVERSIVE ACTIVITIES

RECENTLY there has been an alarm sounded by many lawyers, as well as political figures, about the activities of Congressional investigating committees. Many charges have been made to the effect that some of our leaders are adopting totalitarian tactics in order to combat Communist principles. Politicians from the precinct level to the Presidency have said that personal freedoms are being sacrificed to political hysteria. It is not the purpose of this article to become involved in political quarrels or partisan policies. The scope of this paper will be limited to an evaluation of the constitutional authority of these committees as viewed in the light of practical reality in the United States today.

For the purpose of clarity, the constitutional aspects of this paper will be divided into several categories.

1. The Constitutional Basis for the Existence of Investigating Committees

The Constitution makes no express provision authorizing Congress to investigate. But from the earliest days of the Colonial States to the present time, the various legislatures have summoned witnesses for the purpose of gathering factual data concerning matters that they had under consideration.[1] An early Supreme Court case upholding the power of Congress to punish for contempt was *Anderson v. Dunn*.[2] Mr. Justice Johnson in that case repudiated the contention that punishment of a witness for refusal to appear and testify was purely a judicial function and, consequently, a violation of the doctrine of separation of powers.[3] He looked to the long established practice followed by legislative

[1] Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 159 (1926).

[2] 6 Wheat. 204 (U. S. 1821).

[3] To the same effect see Barsky v. United States, 167 F. 2d 241 (D. C. Cir. 1948).

bodies and seemed to reason that the legislative function was dependent upon ascertainment of facts and that as a matter of practical necessity the power to investigate was indispensable. The power was upheld again in 1897 in the historic case of In Re *Chapman*.[4] Many cases too numerous to mention have adopted the same rule. It should be sufficient to point out that no case since *Anderson v. Dunn* has repudiated the rule that Congress may investigate and punish a witness for his refusal to appear and answer questions in a proper inquiry. One writer summarized the present state of the law when he stated that the existence of the investigating power is "beyond dispute."[5]

2. Limitations Upon the Power to Investigate

(a) *Limitation by the Scope of the Inquiry*

The mere existence of this power does not necessarily mean that it may enjoy unlimited effect. Leading cases have used language to the effect that there are certain restrictions upon the inquiries of investigating committees. The question now presented is the effect that these expressions of limitation have upon the current investigations into so-called un-American activities. The case of *Kilbourne v. Thompson*[6] uses this language:

> We are sure that no person can be punished for contumacy as a witness before either house unless his testimony is required in a matter into which that house has jurisdiction to inquire.

The court expressly rejected the theory that Congress has an unlimited power of inquiry. In the case of *McGrain v. Daugherty*[7] the general doctrine of the *Kilbourne* case was affirmed, and the Court in defining the nature of Congress' implied powers said:

> ... [T]he two houses of Congress, in their separate relations, possess not only such power as are expressly granted to them by the Constitu-

[4] 166 U. S. 661.

[5] Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 Mich. L. Rev. 181, 214 (1948).

[6] 103 U. S. 168, 190 (1880).

[7] 273 U. S. 135, 173, 174 (1927). Emphasis added.

> tion, but such auxiliary powers as are *necessary* and appropriate to make the express powers effective; . . . neither house is invested with "general" power to inquire into private affairs and compel disclosures. . . .

Other words of limitation were employed by the Supreme Court in the case of *Sinclair v. United States*:[8]

> . . . [F]ew if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary, or unreasonable inquiries and disclosures in respect of their personal and private affairs.

Thus, the court has said that the power to investigate is limited to matters into which the Congress has jurisdiction to inquire. What, however, are the limitations of this jurisdiction? This writer can discover no case since the *Kilbourne* decision in which the federal courts have held an investigation to have gone beyond the boundaries which the decisions had established. There have been recent court of appeals cases, *Barsky v. United States*[9] and *United States v. Josephson*,[10] which have held that Congress has not exceeded the bounds of its power in its present investigation of Communist activities. The *Barsky* case has stated that the existence of this investigation can be justified on the broad, general provision in the Constitution that guarantees to the states a republican form of government. Thus, a logical conclusion can be drawn that, in this connection at least, no actual legislation need be contemplated or result in order to uphold the existence of these committees. The mere possibility of legislation seems to be sufficient. A lower federal court has used this language:

> If the subject matter under scrutiny may have any possible relevancy and materiality, no matter how remote, to some possible legislation, it is within the power of Congress to investigate the matter. Moreover, the relevancy and materiality of the subject matter must be presumed.[11]

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[8] 279 U. S. 263, 292 (1929). See also Jurney v. MacCracken, 294 U. S. 125 (1935).

[9] 167 F. 2d 241 (D. C. Cir. 1948).

[10] 165 F. 2d 82 (2d Cir. 1947).

[11] United States v. Bryan, 72 F. Supp. 58, 61 (D. D. C. 1947).

It is submitted that if the rationale of these cases is followed, then an inquiry into industry, churches, small businesses, municipal corporations, etc., *ad infinitum,* would be equally justified. At the date of this writing there have been already investigations launched into some of these phases of American life. This liberal construction of the power seems to mean that Congress, in effect, has a right of investigation into private affairs that is limited by qualifications not sufficiently defined to be observed in the practical operation of these committees. Any protection to the witness, from this language, seems to be in name only.

It should be noted at this point that it would be entirely possible for a validly created committee to ask questions which were beyond the scope of the inquiry. It seems reasonable that each question is governed by the same criteria that the courts have established for the entire investigation. This possibility has been referred to as a limitation of pertinence.[12] However, the limitation seems incapable of offering any protection to the witness in light of the broad, liberal interpretations the courts now place upon the investigating power of Congress. The cited article uses apt language when it says "the so-called limitation of pertinence has been reduced to almost complete insignificance."[13]

(b) *Limitation by Personal Rights of Privacy*

The above mentioned cases have held that the power to investigate cannot be an arbitrary interference into private affairs. Is there, then, a right of privacy, and, if so, what is its origin? The *McGrain* case says that there is no general power to inquire into private affairs. The *Sinclair* case states that men have a right to be exempt from unauthorized and arbitrary inquiries into their personal and private affairs. The case speaks in terms of fundamental law which protects this right. The case of *Marshall v. Gor-*

[12] Nutting, *supra* note 5, at 215.
[13] *Id.* at 216.

don[14] states that a legislative body should be limited to an exertion of *"the least possible power adequate to the end proposed."* In these cases it seems that the idea has been presupposed that man has a right to be free from interference and investigation unless there is some principle of public necessity that will override this right. It is submitted that this right of privacy does not come from a right to remain silent as a part of the right to freedom of speech guaranteed by the First Amendment. The writer takes the position that this constitutional provision was designed to insure man's right to express his beliefs freely. From the long practice of compelled disclosure in courts as well as before investigating bodies, it seems that any right of silence, if such does exist, would readily give way to the public need for information. This was the view adopted by Mr. Justice Prettyman in the *Barsky* case when he rejected the theory that a right of silence was embodied in the First Amendment, which required a clear and present danger in order to justify abridgment.[15]

The right of privacy seems to be one of those inherent concepts of the American way of life that the courts should recognize. It is suggested here that the Due Process Clause of the Fifth and Fourteenth Amendments should prevent the taking of this "liberty" at the mere whim of Congress. The courts have already favored such a result even though they have not pin-pointed and defined the exact source of the freedom.

(c) *Limitation by the First Amendment*

The writer has reached the conclusion that no right of privacy is protected by the First Amendment. This does not preclude the possibility that the right of free speech imposes some limitations upon the present investigations of un-American activities.

A contention is sometimes made that Congress has no right to

[14] 243 U. S. 521, 541 (1917), quoting from Anderson v. Dunn, 6 Wheat. 204, 231 (U. S. 1821).
[15] 167 F. 2d at 246.

legislate in the area of free speech and, consequently, the investigation of Communists or other political affiliations is invalid. In the *Josephson* case[16] this contention was rejected. The court seemed to take a broader view of the present investigations. The power to investigate new and different political concepts seems to have been established on the theory that Congress is entrusted with safeguarding the national security and may investigate any potential source of danger.

A somewhat different side of the present situation was presented in the dissenting opinion of Judge Edgerton in the *Barsky* case.[17] He called attention to the comprehensive nature of the Smith Act,[18] which covers almost every type of subversive activity that can be envisioned. Further, he pointed to the many statements made by members of the House Un-American Activities Committee which clearly demonstrated the total lack of any bona fide legislative purpose. It may be well at this time to call attention to a few sample statements that have been made.

> This committee is the only agency of the Government that has the power of exposure.... There are many phases of un-American activities that cannot be reached by legislation or administrative action.[19]

> The committee is empowered to explore and expose activities by *un-American individuals* and organizations which, while sometimes being legal, are nonetheless inimical to our American concepts and our American future.[20]

> The country might as well be told first as last that our committee is in this fight to expose un-American activities to the finish.[21]

> The purpose of this committee is the task of protecting our constitutional democracy by ... *pitiless publicity*.[22]

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[16] 165 F. 2d at 90.

[17] 167 F. 2d at 277.

[18] 62 STAT. 808 (1948), 18 U. S. C. 1946 ed. Supp. V, § 2385.

[19] H. R. Rep. No. 1, 77th Cong., 1st Sess. 24 (1941).

[20] H. R. Rep. No. 2742, 79th Cong., 2d Sess. 16 (1947). Emphasis added.

[21] Statement by Congressman Mundt, 92 Cong. Rec. 3767 (1946).

[22] H. R. Rep. No. 1476, 76th Cong., 3d Sess. 1, 3, 24 1940). Emphasis added.

Many quotations of a similar nature from both House and Senate committees are readily available, but need not be repeated here. It appears that committee members have expressed the view that is commonly recognized in the United States today by the average citizen: an assertion of the right to ferret out and expose people believed to be guilty of some un-American point of view. These committee members are frequently referred to as "spy hunters." The patriotic motives of these Congressmen cannot be questioned, for they are trying to concern themselves with what they deem to be in the best interest of the nation as a whole.

Does Congress, however, have the right to take upon itself the nature of the Federal Bureau of Investigation or a federal grand jury under the authority of an implied investigating power? From the language cited in the basic decisions of *Kilbourne v. Thompson, McGrain v. Daugherty* and *United States v. Sinclair, supra,* it is the writer's conclusion that such a result is not justified and that the courts should not construe the power as broadly as they seem to have done in recent cases. Excessively broad construction of the power would allow Congress to use the threat of trial by newspaper to dictate or highly advance its particular concept of Americanism. This borders closely upon an attempt at thought control. That such an extension of power has no place in the American scheme of things needs little comment; however, the very significant language in the famous case of *West Virginia State Board of Education v. Barnette* may be quoted:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what should be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[23]

This case stands as a monument to the proposition that men by virtue of the First Amendment have a right to believe and speak as they choose about the things mentioned in the decision. This is one of our most fundamental rights, and it goes almost without

[23] 319 U. S. 624, 642 (1943).

saying that the founding fathers were greatly concerned that minority opinions were to be protected from persecution. They specifically stated in the First Amendment that Congress should pass no law to abridge the right of free speech. The writer's opinion is that a committee cannot abdicate its fact-finding function and embark upon a self-styled crusade to incite the wrath of the majority against the views of a minority,[24] as the statements of committee members seem to indicate.

3. The Fifth Amendment and the Extent of Its Protection to Witnesses Before Congressional Committees

There are three distinct problems of current importance that must be answered in a discussion of the protection afforded a witness by the Fifth Amendment: *a.* Does the Fifth Amendment privilege against self-incrimination extend to witnesses before Congressional hearings? *b.* Does the use of the Fifth Amendment create an inference of guilt? and *c.* May a witness refuse to answer a question for any reason other than the stated reason of prevention of self-incrimination?

(a) *Availability of the Fifth Amendment to a Witness before a Congressional Investigating Committee*

The privilege against self-incrimination finds its derivation in the early common law of England.[25] It finds expression in the Fifth Amendment of the United States Constitution:

> No person . . . shall be compelled in any criminal case to be a witness against himself.

It will be noted that the Fifth Amendment mentions only "criminal cases" expressly. The question now under consideration

[24] On the question of the authority of investigating committees to exist for the purpose of publicizing events and disseminating information, see the following: (a) against such authority—Note, 47 Col. L. Rev. 416, 425 (1947); Comment, 46 Mich. L. Rev. 521, 526 (1948); Nutting, *supra* note 5, at 215; and (b) for such authority—Herwitz and Mulligan, *The Legislative Investigating Committee—A Survey and Critique*, 33 Col. L. Rev. 4 (1933).

[25] 8 Wigmore, Evidence (3d ed. 1940) § 2252 ns. 4, 5.

is whether or not the protection of this privilege extends to hearings of Congressional committees. In the case of *Counselman v. Hitchcock*[26] the Supreme Court said:

> It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It doubtless covers these cases, but is not limited to them.

The case of *Grae v. Kennedy*[27] held that the privilege embodied in the constitutional provision that no person shall be compelled to testify against himself is not limited to criminal cases but extends to any proceeding where inquisition may expose a witness to prosecution for a crime. The privilege has been extended to the following situations: (1) federal grand jury investigations, *United States v. Monia*,[28] *Blau v. United States*;[29] (2) federal civil proceedings, *McCarthy v. Arndstein*;[30] and (3) legislative committee investigations, *Blau v. United States, supra, United States v. Fitzpatrick*,[31] *Paretto v. United States*,[32] *Arcado v. United States*,[33] *Marcello v. United States*,[34] *United States v. Costello*.[35]

In light of the authority just discussed, it must be concluded that the protection of the Fifth Amendment is available to a witness while testifying before a committee of Congress.

(b) *Inferences Arising out of the Use of the Fifth Amendment*

Having determined that a witness is protected against self-incrimination in his testimony before the committee, it remains to be seen whether or not his invocation of the Fifth Amendment implies guilt of some federal crime, or, restated, does the Fifth

[26] 142 U. S. 547 (1892).
[27] 282 N. Y. 428, 26 N. E. 2d 963 (1940).
[28] 317 U. S. 424 (1943).
[29] 340 U. S. 159 (1950).
[30] 266 U. S. 34 (1924).
[31] 96 F. Supp. 491 (D. D. C. 1951).
[32] 196 F. 2d 392 (5th Cir. 1952).
[33] 196 F. 2d 1021 (5th Cir. 1952).
[34] 196 F. 2d 437 (5th Cir. 1952).
[35] 198 F. 2d 200 (2d Cir. 1952), *cert. denied*, 344 U. S. 874 (1952).

Amendment extend its protection to the innocent as well as to the guilty, so as to dispel any such inference?

That the latter is the rule is seemingly axiomatic; for a contrary holding to the effect that the Fifth Amendment was designed to protect only the guilty would say that only a guilty party could properly invoke the Fifth Amendment. Thus, when a witness invoked the privilege, it would be positively concluded that he was guilty of one of two offenses: (1) the criminal act which his testimony would tend to reveal; or (2) contempt of court, or Congress, as the case might be. The founders of the Constitution did not envision a system which would put the witness in such a dilemma. The clause was entended to protect all witnesses, and its invocation gives rise to no presumption of guilt.[36]

In *Bradford v. United States*[37] the court stated:

> No presumption against the accused arose from his not testifying in his own behalf, but his failure to testify did not raise a presumption in his favor or enable him to avoid the consequences of fair and reasonable inferences from proven facts.

In other words, the invocation of the constitutional right against self-incrimination gives rise to no inference or presumption of guilt. It merely prevents consideration of the testimony which the witness might otherwise have given.

(c) *Proper Uses of the Fifth Amendment*

At times witnesses have attempted to invoke the Fifth Amendment for other purposes than that of prevention of personal self-incrimination. The Supreme Court has expressly held in *Rogers v. United States*[38] that the privilege is personal to the witness and

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[36] Billeci v. U. S., 184 F. 2d 394 (D. C. Cir. 1950); Zager v. U. S., 84 F. 2d 1023 (4th Cir. 1936); Paxton v. State, 114 Ark. 393, 170 S. W. 80 (1914); Ferguson v. State, 52 Neb. 432, 72 N. W. 590 (1897); Lambert v. State, 197 Md. 22, 78 A. 2d 378 (1951); Powell v. Commonwealth, 167 Va. 558, 189 S. E. 433 (1937).

[37] 129 F. 2d 274, 278 (5th Cir. 1942).

[38] 340 U. S. 367 (1951).

exercisable only on his behalf. The case clearly stands for the proposition that the privilege cannot be used to protect others from incrimination. An extremely important consideration at the present time is whether or not a witness may refuse to answer if he is denied the opportunity to explain fully the inferences that might arise from a categorical "yes" or "no" reply. In other words, may a witness invoke the Fifth Amendment to protect himself from disclosing incriminating facts.

The problem is highlighted by a case in which a federal district court held that a witness had the right of explanation and must be allowed a reasonable opportunity to clarify his answers.[39] The court of appeals reversed the decision on broad grounds,[40] and the precise question has never been passed upon. Although the reason for the rule announced by the district court is not too clear, it seems to this writer that an explanation of the Fifth Amendment and the protection that it was designed to produce can only lead to a result contrary to that reached by the court of appeals.

The opinion of Judge Learned Hand in *United States v. Rosario St. Pierre*[41] sheds a great deal of light on this inquiry. The opinion reads, in part, as follows:

> Whatever may have been the original limits of the privilege [against self-incrimination] . . . , since Counselman v. Hitchcock . . . it is settled in federal courts that a witness cannot be compelled to disclose anything that will "tend" to incriminate him, whether or not the answer would be an admission of one of the constitutive elements of the crime.

The court thus adopted a broad view as to matters which fall within the purview of the Fifth Amendment. At the same time, it placed a stern limitation on the power of an investigating body, be it judicial or legislative, to compel a witness to disclose certain facts, even though such disclosure would not amount to an unveiling of a constitutive part of a criminal act. In other words, the

[39] Cole v. Loew's Inc., 8 F. R. D. 508 (S. D. Cal. 1948).
[40] 185 F. 2d 641 (9th Cir. 1950).
[41] 132 F. 2d 837, 838 (2d Cir. 1942).

court included within the purview of the Fifth Amendment any testimony which would *tend* to establish a circumstantial chain of evidence against the witness.

The question arises whether the rationale of the *Rosario* case would embrace a claim of self-incrimination based on the *type* of questioning leveled at the witness, particularly in a Congressional investigation in which the witness does not have a right to counsel, to cross-examination, etc. It is submitted that under the criteria expressed in the above opinion, a witness may be justified in invoking the Fifth Amendment on the grounds that the questions were framed in such a manner, and his answers limited by the investigating body in such a way, as to tend to establish incriminating circumstantial evidence against him.

If the language employed by Judge Hand leaves any doubt as to this proposition, the rule of construction consistently applied by the courts to the Fifth Amendment and all other amendments which guarantee freedoms to the individual dispels all doubt. The decisions establish the rule that constitutional provisions for the security of persons and property should be liberally construed.[42]

For a clear illustration let us turn to the case of *Gouled v. United States*[43] where the Supreme Court in considering the nature of the Fourth and Fifth Amendments stated:

> It would not be possible to add to the emphasis with which the framers of our Constitution and this court [citing cases] have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. The effect of decisions cited is: that such rights are declared to be indispensable to the "full enjoyment of personal security, personal liberty, and private property;" that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the

[42] Gouled v. U. S., 255 U. S. 298 (1921); Arndstein v. McCarthy, 254 U. S. 71 (1920); Counselman v. Hitchcock, 142 U. S. 547 (1892); Boyd v. U. S., 116 U. S. 161 (1886); Powell v. Commonwealth, 167 Va. 558, 189 S. E. 433 (1937).

[43] 255 U. S. 298, 302, 303 (1921).

> guaranties of the other fundamental rights of the individual citizen,—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a *liberal construction*, so as to prevent stealthy encroachment upon or "gradual depreciation" of the rights secured by them, by imperceptible practice or by well intentioned but mistakenly overzealous executive officers.

And in *Counselman v. Hitchcock, supra,* the Supreme Court stated:

> This provision [against self-incrimination] must have a broad construction in favor of the right which it was intended to secure.[44]

Giving the Fifth Amendment the broad construction which it is thus due, it must be concluded that a witness cannot be compelled to testify if the testimony is in a form which, on its face, is misleading and incomplete and would furnish a link in a chain of incriminating circumstantial evidence against him.

Bill E. Brice.

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[44] 142 U. S. at 562.