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Congressional Investigations and Individual Liberties

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CONGRESSIONAL INVESTIGATIONS AND INDIVIDUAL LIBERTIES*

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> "The power to investigate is one of the most important attributes of Congress. It is perhaps also the most necessary of all the powers underlying the legislative function. The power to investigate provides the legislature with eyes and ears and a thinking mechanism. It provides an orderly means of being in touch with and absorbing the knowledge, experience and statistical data necessary for legislation in a complex democratic society. Without it the Congress could scarcely fulfill its primary function."[1]

There is little to cavil with in this statement as a declaration of purposes. However, the fact remains that there is much widespread concern abroad today regarding the use of this "necessary" device of Congressional activity, and serious question as to just how "orderly" it is, and how far much of it is actually involved in the fulfillment of Congress' primary function—namely, legislation.

Serious thinkers throughout this land of ours have given much time and consideration to Congressional

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[1]Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 421, 441 (1951). For a recent book on Congressional investigations, see TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS (1955).

investigations for the past decade or so, particularly insofar as investigation of subversive activities are concerned. There is much here for all thoughtful Americans to be concerned about, and especially in Congressional investigations as they bear upon individual liberties.

The object of this article is to consider the investigative function of Congress as it affects and is affected by the First Amendment of the United States Constitution, the Bill of Rights' corner-stone of individual liberties.

I.

SOURCE AND EXAMPLES OF CONGRESSIONAL POWER TO INVESTIGATE

The investigatory powers of Congress, as is well-known, are derived by implication from the grant of "all legislative power" in Article I, Section 1 of the Constitution. Pursuant to this power there have been through the years a succession of Congressional inquiries, and legislation, and investigations directed at subversives.

A. *Early Congressional Inquiries.*

Congressional investigations are almost as old as the Congress itself. The disaster of the St. Clair Expedition against the Indians was the subject of the first investigation in 1792, only three years after the Congress had been established. Similarly, controversy over the use of the investigatory power of Congress is of long standing. Inquiry into John Brown's raid on Harper's Ferry in 1860 set off a great furor, both within the legislative halls and without. In attacking the process, Senator Charles Sumner said:

> "I know it is said this power is necessary in aid of legislation. I deny the necessity. Convenient at times,

it may be; but necessary never. . . . an alleged necessity has, throughout all time, been the apology for wrong."[2]

Nonetheless, Congress has gone merrily on through the years investigating. The "Teapot Dome" investigations during the 1920's received considerable public approbation, but even these inquiries into the scandals of the Harding administration were severely criticized.

"The senatorial debauch of investigations—poking into political garbage cans and dragging the serews of political intrigue—filled the winter of 1923-24 with a stench which has not yet passed away. . . ."[3]

B. *Legislation Directed at "Subversives."*

Almost from the beginning of this nation, the threat of subversive activity has been of concern to Congress. In 1798, Congress enacted the Alien and Sedition Acts, which authorized the President to deport all aliens regarded as dangerous to the peace and safety of the United States and made it a criminal offense to publish false, scandalous, or defamatory writings with intent to discredit the government, and sundry other "seditious" purposes.[4] Thomas Jefferson pardoned all persons imprisoned under the Sedition Act when just after the turn of the nineteenth century he became President in 1801, and the Act expired shortly thereafter.[5]

The twentieth century, in times of both war and peace, has witnessed especially wide congressional concern regarding "subversives." With the entrance of the United States into World War I, Congress in 1917 and 1918

[2]CONG. GLOBE, 36th Cong. 1st Sess., Pt. 4, 3007 (1860).

[3]Wigmore, *Legislative Power to Compel Testimonial Disclosure*, 19 ILL. L. REV. 452-3 (1925).

[4]Acts of June 25 and July 14, 1798, 1 STAT. 570, 596.

[5]CHAFEE, FREE SPEECH IN THE UNITED STATES 27 (1941).

enacted the so-called Espionage and Sedition Acts, and some 1,900 persons were prosecuted for various activities defined as crimes that in some way interfered with, or criticized, the war effort of the United States.[6] In 1940, Congress passed the first peace-time sedition law since the infamous Sedition Act of 1798—the Alien Registration (or Smith) Act. One of the provisions of this Act makes it unlawful for any person knowingly to teach or advocate the overthrow of government by force or violence, or to help organize or to become a member of any organization so teaching or advocating the overthrow of government.[7]

More recently in 1950, the Internal Security (or McCarran) Act was passed by Congress over a presidential veto. This Act was aimed at outlawing or curbing a wide variety of activities by Communists or other "totalitarians," and is most notable for the section requiring registration with the government of all Communist and Communist front organizations and the individual members of the former.[8]

C. *Investigations Directed at "Subversives."*

In 1919, disturbed by certain reports of Bolsheviki activities, the Senate ordered an investigation of Bolshevik propaganda. The report of this subcommittee, however, dealt largely with a description of the workings of the Russian government, designed primarily to show "what the application of Soviet doctrine would mean in this country."[9]

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[6]Acts of June 15, 1917 and May 16, 1918, 40 STAT. 217, 553; the 1918 law was repealed in 1921. The 1917 law is confined to wartime offenses and is still in effect.

[7]54 STAT. 670 (1940), 18 U.S.C. § 2385 (1952).

[8]Public Law No. 831, 81st Cong., 2d Sess. (Sept. 23, 1950).

[9]S. Doc. No. 61, 66th Cong., 1st Sess. (1919).

Subversive activities bore little of the brunt of Congressional investigating power during the 1920's, but in May, 1930, Congress overwhelmingly adopted a resolution calling for an investigation of communism. This action was caused by sensational charges that the Amtorg Trading Corporation was disseminating Communist propaganda in this country.[10] The Congressional investigative committee found that the charges against Amtorg were not supported by evidence, and that the Communist movement in the United States was pitifully weak. On the other hand, its recommendations were drastic, and designed "to suppress the Communist Party in the United States, root, lock, stock and barrel."[11] No action was taken on the recommendations, however.

After the rise of Hitler, in 1934, the House of Representatives created a special committee to investigate the extent and objects of Nazi propaganda and the diffusion of subversive propaganda in the United States.[12] The committee found little cause for alarm over the fascism and communism in this country. Its recommendations were enacted into law—the McCormack Act, passed in 1938, which required registration of agents of foreign governments disseminating propaganda in the United States.[13]

Then also in 1938, the resolution which has served to the present day as the directive upon which the work of the Un-American Activities Committee has been based, was adopted. The Dies resolution provided for a committee to investigate the extent, character, and objects of Un-American propaganda activities in the United

[10]72 CONG. REC. 9390 (May 22, 1930).

[11]OGDEN, THE DIES COMMITTEE 24 (2d ed., 1945).

[12]78 CONG. REC. 4934 (April 20, 1934).

[13]52 STAT. 631 (1938), 22 U.S.C. § 611 (1952).

States and the diffusion within the United States of subversive and un-American propaganda of foreign or domestic origin, that attacks the principles of the form of government as guaranteed by our Constitution.[14]

The investigation which followed was intended originally to last only seven months, but it continued until 1944 when the life of the Dies Committee expired with the 78th Congress. However, in January 1945, the House of Representatives adopted a proposal that the investigation of un-American activities be made a permanent one, and the present standing committee was created. The language of this resolution was almost identical with that of the original resolution creating the Dies Committee in 1938, and was carried over without change into the Legislative Reorganization Act of 1946, which gave the committee further recognition as a standing committee of the House of Representatives.

Throughout the years, since its creation in 1945, the major interest of the Un-American Activities Committee has been the Communist Party and the alleged subversive activity of its members and fellow travelers.

II.

Purposes of Congressional Investigation

Generally speaking, the investigating power of Congress may validly be used for three purposes:

(1) As a means of supplying Congress with accurate and detailed information essential to intelligent exercise of its express constitutional powers—particularly the enactment of laws.

(2) To supervise or check work of administrative agencies which Congress has charged with law enforcement duties.

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[14]83 Cong. Rec. 7567-86 (May 26, 1938).

(3) To influence public opinion by giving circulation to facts or ideas.

Regarding the primary or first enumerated informational function of Congressional investigations, Woodrow Wilson said, "The informing function of Congress should be preferred even to its legislative function."[15]

In addition to the three purposes, the investigating function may be employed for any of three possible motives:

(1) Personal publicity and advancement,

(2) Party advancement or embarrassment to the other party, or

(3) Desire to expose alleged unlawful or improper conduct by specific individuals, both public servants and private citizens.

The only purpose or motive that has been given formal approval by the United States Supreme Court is the purpose of supplying Congress with information needed to carry on its legislative function.[16] With purposes and motives as broad as these six, it can readily be appreciated that the investigating power of Congress easily lends itself to abuse.

III.

INDIVIDUAL LIBERTIES AND CONGRESSIONAL INVESTIGATIONS

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox, in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[17]

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[15]WILSON, CONGRESSIONAL GOVERNMENT 297-303 (1885).

[16]McGrain v. Dougherty, 273 U.S. 135, 173 (1927).

[17]W. Va. State Board v. Barnette, 319 U.S. 624, 642 (1943).

Thus spake the Supreme Court in 1943. Can it be that circumstances have occurred to the Court which permit an exception, since that time?

A. *Rights in General of Witnesses Called Before Investigative Committees of Congress.*

With the ever-growing "illusion of investigative omnipotence,"[18] the prime issue today—from the standpoint of the individual—is what defenses, if any, does he have against this illusion? Truly, are the only rights a witness has, the rights *given* to him by the investigating committee? In this regard, many thoughtful Americans have paused to wonder whether the right to exercise the liberties guaranteed by the First Amendment lies at the foundation of free government by free men,[19] or whether these rights have been abrogated insofar as Congressional investigating power is concerned.

It has been said that "the prevailing opinion in Congress has been that the first ten amendments do not protect parties before committees since these proceedings are only inquiries and bear no relation to court procedure.[20]

It is true that this illusion has been somewhat dispelled in the opinion in *United States* v. *Rumely*,[21] but the fact remains that the average citizen gets much less consideration than the "lady from Toledo,"[22] even when he is entirely willing to cooperate with the investigating committee and "tell all" about his own activities.

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[18]TAYLOR, *op. cit supra* note 1 at 58-88.

[19]Marsh v. Alabama, 326 U.S. 501 (1946).

[20]Driver, *Constitutional Limitations on the Power of Congress to Punish Contempts of its Investigating Committees*, 38 VA. L. REV. 887, 888 (1952).

[21]345 U.S. 41 (1953).

[22]*Ibid.* 58 (Mr. Justice Douglas concurring opinion).

B. *Right of Committee Witness to Refuse to "Incriminate" Others.*[23]

What, if any, protection does the First Amendment afford the witness who wishes to cooperate fully with the investigating committee regarding his own activities and those of persons he knows to be Communists, but who seeks to reserve the right to remain silent regarding persons whom he is sure have long since removed themselves from the Communist movement?

Apparently the recusant witness must act at his own peril. He is faced with the unenviable task of determining whether the investigation is, or might be, in pursuit of a legitimate Congressional objective; whether the specific query is "pertinent" to that legitimate objective.[24] Then, he must decide whether his refusal to answer is privileged, and weigh this privilege against his general duty to testify[25]—which, of course, is not a matter ultimately for the witness to decide, but initially is for the committee to resolve and ultimately for the court to determine.[26]

Depending upon the purpose of the investigation, there will be some varying restrictions on the right of silence before a Congressional committee, and the degree of such restriction will depend upon the magnitude of the evil. That magnitude will probably determine which of three purpose tests will be applied by the courts. So, in refusing to answer, the witness is further called upon to decide for

[23]In addition to application of the First Amendment, consider also the provisions of the Fifth Amendment, and see GRISWOLD, THE FIFTH AMENDMENT TODAY (1955).

[24]Gilligan, *Congressional Investigations*, 41 J. CRIM. L. AND CRIMINOLOGY 618, 623 (1951).

[25]U.S. v. Bryan, 339 U.S. 323 (1950).

[26]Townsend v. U.S., 95 F.2d 352, 361 (D.C. Cir. 1938).

himself whether there is a clear and present danger, a probable danger, or an ultimate danger.[27]

It is unquestionably true that ultimately the decision rests with the court to determine whether the witness has any choice in regard to answering or refusing to answer the committee's questions. However, the witness is nonetheless instantly perched on the horns of an imposing dilemna—he must decide for himself whether he can, in all conscience, answer the questions of the committee, or whether the First Amendment, or any other factor, relieves him of this obligation. Some members of Congress feel that the "relative necessity of the public interest" outweighs private rights at this time. However, public interest in private rights has also increased. More and more, thoughtful people are deeply concerned about the underlying basic freedoms. Let us consider one facet of the problem.

C. *Right of Committee Witness to Refuse to Testify in Response to Questions He Regards as not Pertinent.*

If an individual is convinced that there is a danger and believes that he has information that will aid the government in combatting the evil; he is completely willing to appear before a Congressional committee and divulge everything he knows about the Communist Party, his activities and the activities of others whom he believes are still active in the Party; and he has waived any privilege against self-incrimination under the Fifth Amendment; does the individual have the right to question the pertinence of certain questions or their constitutionality under the First Amendment? Basically, these are the questions involved in *John T. Watkins* v.

[27]Schenck v. U.S., 249 U.S. 47 (1919); Gitlow v. U.S., 268 U.S. 652 (1925); Dennis v. U.S., 341 U.S. 494 (1951).

United States.[28] The only questions Mr. Watkins refused to answer related to persons with whom he had been associated many years before, whom he believed were no longer associated with the Communist movement, information, incidentally, which the committee already had in its possession. Watkins was indicted under 2 U.S.C. § 192 for refusal to answer questions of a subcommittee of the Committee on Un-American Activities and was found guilty in the District Court. This decision was reversed by the Court of Appeals on the grounds that questions intended to expose past members or past affiliates of the Communist movement are not, in the absence of a legislative purpose, pertinent to the matter under inquiry.[29]

En Banc, on rehearing, the Court reversed this ruling and held that the questions were pertinent to a valid legislative purpose and were authorized by the Act.[30] It refused to accept the contention of Watkins, and of the previous hearing, that the sole purpose of the committee was exposure, stating: "Congress has power of exposure if the exposure is incident to the exercise of a legislative function. Congress certainly has the power of inquiry or of investigation when the inquiry or investigation is upon a subject concerning which Congress may legislate. The fact that such an inquiry or investigation may reveal something or "expose something is incidental and without effect upon the validity of the inquiry."

Perhaps the most shocking statement made by the Court of Appeals in reversing on rehearing—at least to this writer—was that "a legislative inquiry may be as

[28]24 U.S.L. Week 2329 (D.C. Cir., June 13, 1955).

[29]24 U.S.L. Week 2329 (D.C. Cir., Jan. 26, 1956).

[30]John T. Watkins v. U.S. 233 F.2d 681 (D.C. Cir. Apr. 23, 1956). *Cert. granted* 25 U.S.L. Week 3093 (Oct. 9, 1956). For a similar situation consider the recent refusal of Arthur Miller to furnish the name of "other" persons.

broad, as searching, and as exhaustive as is necessary to make effective the Constitutional powers of Congress."[31]

IV.

INDIVIDUAL LIBERTIES UNDER THE BILL OF RIGHTS AND THE RIGHTS OF COMMITTEE WITNESSES

"Freedom of speech is not what it used to be in America. It has been so abused that it is not exercised by others."[32] Courts, too, have shown that they are reluctant to interfere with the fundamental power of a legislature to inform itself. Except in decisions on the Fifth Amendment, the judiciary has done little to curb the "Inquisition."[33] To denounce the whole program as suicidal nonsense involves a risk few care to take. Yet as a nation, we are committed to what we generally term "certain basic freedoms." So basic—it might be noted—that Alexander Hamilton argued that there was no need for a constitutional Bill of Rights.

Our Bill of Rights rejects the philosophy that political and religious controversies should be regulated in the public interest. It leaves no room for regulation. It says the government shall make "no law respecting an establishment of religion—no law . . . prohibiting the free exercise of religion—no law . . . abridging the freedom of the press—no law abridging . . . the right of the people peaceably to assemble—no law abridging . . . the right of the people to petition the government for a redress of grievances." The essence of our Bill of Rights is tolerance for all shades of opinion, persecution for none. Under our way of life a man should never go to jail for what he

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[31]John T. Watkins v. U.S., *supra* note 30 at 687.

[32]Address by Senator Margaret Chase Smith, 96 CONG. REC. 7894 (1950).

[33]Bischoff, *Constitutional Law and Civil Rights*, 30 N.Y.U.L. REV. 54, 68 (1954), republished in 1954 ANNUAL SURVEY OF AMERICAN LAW 54, 68 (1955).

thinks or espouses. He can be punished only for his acts, never for his thoughts, or beliefs, or creed.

As a people, we are united on the essential principle that each should have the freedom of his own conscience, the right to advocate his own faith, the right to worship his God in such manner as he chooses. We are, in other words, tolerant of diversities among men; we are respectful of schools of thought and schools of politics that oppose us.[34]

Furthermore, the Supreme Court of the United States has, through the years, substantiated these beliefs and protected them when they have been endangered.

> The right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men" and we must in all cases "weigh the circumstances and . . . appraise . . . the reasons . . . in support of the regulation of the free enjoyment of the rights."[35]
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> "Authority here is to be controlled by public opinion, not public opinion by authority. . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes . . . freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[36]

It is sometimes argued that government may make some laws abridging our basic freedoms. Freedom of speech and press does not protect disturbances of the public peace or the attempt to subvert the government.[37]

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[34]Douglas, *The Manifest Destiny of America*, THE PROGRESSIVE, Feb., 1955, p. 7.

[35]Schneider v. State of New Jersey, 308 U.S. 147, 161 (1939).

[36]*Supra* note 17 at 641, 642.

[37]Gitlow v. U.S., 268 U.S. 652 (1925).

Nor is one free to yell "fire" where there is a "clear and present danger" that his words will bring about a substantive evil that Congress has the right to prevent. This latter statement redounds with ambivalent reasoning. Like the twin-headed Janus, Justice Holmes here espoused the free-market-place-of-ideas creed of our founding fathers on the one hand, and at the same time seems to have decreed that words which might be uttered in times of peace may so inflame men in time of war that no court could regard them as protected by any constitutional right on the other hand.[38] Yet this sort of ambivalence pervades the judiciary today, unfortunately. The "clear and present danger" has been watered down to "when danger is reasonably represented as potential," at least insofar as the investigatory power of Congress is concerned.[39]

Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature, no less than to courts, is committed the guardianship of deeply-cherished liberties.[40] But to the people, no less than to the government, is committed the ultimate protection of our basic rights. For the freedom to follow his conscience, Socrates drank of the hemlock. For freedom to worship as they chose, Christian martyrs faced the lions in the arena. For writing "may moral virtue be the basis of civil government," David Brown spent two years in jail for sedition until pardoned by President Jefferson. And so it goes. For refusing to

[38]Schenck v. U.S., 249 U.S. 47 (1919).

[39]Barsky v. U.S., 167 F.2d 241 (D.C. Cir. 1948). For a critical discussion of Court of Appeals decision in the *Barsky* case and the Second Circuit decision in U.S. v. Josephson, 165 F.2d 82 (2d Cir. 1947), *cert. den.* 333 U.S. 838 (1948), see Editorial Note, *Congressional Power of Investigation and Freedom of Speech, with reference to the Un-American Activities Committee*, 17 CIN. L. REV. 264-76 (1948).

[40]*Supra* note 17.

divulge the names of man who had paid only passing interest to the Communist movement to a committee bent on exposure, John T. Watkins was fined for contempt of Congress.

V.

UNDESIRABILITY OF COMMITTEE DETERMINATION OF INDIVIDUAL LIBERTIES

One of the foremost students of free speech in this country, Professor Zechariah Chafee, Jr., has observed that legislative investigating committees are eminently suited to pass on general questions and badly suited for the decision of individual cases.[41] Congress was not designed to determine whether an individual is innocent or guilty of crime or other conduct. That is what courts are for. Congress sits to make laws for everybody and to supervise administrative methods for everybody. It is not its business to pass judgment on one man—except by impeachment.

A legislative committee conducting an investigation of of an explosive problem, inevitably, is engaged in politics.[42] The result is that frequently the individual is exposed to public scorn, embarrassment, and often loss of employment.

VI.

COMMITTEE PUBLICITY CONCERNING WITNESSES' UNPOPULAR ACTIVITIES AND OPINIONS

Congress has power of exposure, said the Court in the *Watkins* case, if the exposure is incident to the exercise of a legislative function.[43]

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[41]BARTH, THE LOYALTY OF FREE MEN, Foreword xii (1950).

[42]GRISWOLD, *op. cit. supra* note 23 at 46.

[43]233 F.2d 681, 687 (C.A.D.C., 1956).

The cost of this system of punishment by publicity entails sacrifices not only for the individual who becomes involved in it, but also, on a wide scale, for the society as a whole. If all the elements of due process can be thus evaded, the personal security of individuals in the United States from arbitrary or summary punishment becomes a fiction. One result is to heighten the general insecurity of which this evasion of constitutional safeguards is a symptom.

The Court of Appeals in the *Watkins* case stated that it *would* be quite in order for Congress to authorize a committee to investigate the rate of growth or decline of the Communist Party and, as a part of this inquiry, that it *would* be pertinent to such an investigation to inquire as to whether thirty persons were Communists between 1942 and 1947.[44]

Watkins stated explicitly that he would answer any questions regarding his own activities and those of individuals who were still active in the Communist Party, but that he was unwilling to answer questions regarding the activities of persons who had long since departed from any party influence. It is, therefore, rather difficult to comprehend the relevance of these individuals' activities from 1942 to 1947 in relation to the authority to identify *present* believers and belongers to the Communist Party; also, what relation possible party membership in 1942-1947 has to do with "labor unions found to be communist-infiltrated" in 1954.[45]

As Judge Edgerton stated in his dissent in the *Barsky* case: "This Court now holds that the First Amendment, which restricts the express power of taxation, does not

[44]*Id.* 4-5. The court did not find that Congress *had* authorized such an investigation, but merely that it would be in order to so authorize.

[45]68 STAT. 775, 50 U.S.C. § 841; 24 U.S.L. Week 2497, 233 F.2d 681, 686 (C.A.D.C., 1956).

restrict the implied power of investigation. Investigation in general, and this investigation in particular, is not more necessary than taxation. There is no basis in authority, policy, or logic for holding that it is entitled to a preferred constitutional position."[46]

According to the doctrine enunciated in the *De Jonge* case, the right of expression belongs to every man regardless of his past, present or future, except for statements that transcend constitutional limits.[47] Yet this investigation restricts the freedom of speech by uncovering and stigmatizing expressions of unpopular views. The committee gives wide publicity to its proceedings. This exposes the men and women whose views are advertised to risks of insult, ostracism, and lasting loss of employment.[48]

CONCLUSION

To speak or not to speak is a fundamental right, the exercise of the right to speak being, of course, specifically protected by the First Amendment. To think or not to think is likewise a basic attribute of human beings, and the result of the exercise of their rationality or irrationality, the capacity for which is distinctive in man as opposed to other beings. On the other hand, the Congress needs information in order to legislate in a wise fashion,

[46]167 F.2d 241, at 253 (D. C. Cir. 1948).

[47]DeJonge v. Oregon, 299 U.S. 353, 365 (1937).

[48]*New York Times*, Jan. 6, 1956, p. 6, col. 7. The Daily News dismisses reporter, Wm. A. Price; Wm. A. Price, a reporter who had been in the employ of the News for 15 years and who served his country as a naval aviator during World War II, was discharged solely on the basis that his "usefulness" to the News was "destroyed" because he objected to the Eastland Committee hearings on the grounds of the First Amendment and refused to testify. For an excellent recent article on investigation of newspapermen, authors and others, see Dembitz, *Congressional Investigation of Newspapermen, Authors, and Others in the Opinion Field: Its Legality Under the First Amendment*, 40 MINN. L. REV. 517 (1956).

and thus to seek to maintain domestic peace and order necessary to progress. Both the individual and Congress must transmit their rights to speak and think and to develop legislative information into deeds and acts, if they are to perform effectively their respective functions. The problem presented by the *Watkins* case is how to balance the Congressional power to investigate with the rights of the individual to think and particularly to speak.

One approach that has been suggested is for Congress to adopt Codes of Fair Investigatory Procedure which would clearly enunciate ground rules to be followed by the members of investigating committees and particularly would clarify the rights and obligations of witnesses appearing before it. In this regard, two observations might be made. First, such a code would only be effective so long as the individual members rigidly followed it; second, even though such a code were devised, Congress need only be bound by it so long as it suited its purposes and could readily modify or revoke the code at will. For these reasons, among others, it appears fairly obvious that a Code of Procedure is not the ultimate answer to the problem.

The basic freedoms guaranteed by the Constitution are no more absolute than the authority of Congress to restrict these freedoms for the sake of the national security. For this reason, the Supreme Court is not likely to lay down any hard and fast rules on the subject. It will, however, examine each case in the light of its particular circumstances and apply the rule laid down in 1821—that Congress shall exercise "the least power adequate to the end proposed." Recognizing that an element of exposure will, of course, result from all such inquiries, the Court must nevertheless examine, re-define and curtail the absolute right and power of exposure

insisted upon in this instance and sanctioned by the Court of Appeals.

As pointed out by Chief Judge Edgerton in his dissent in the *Watkins* case, "Words and conduct of the Committees . . . go far to confirm the inference that its purpose on this occasion was exposure."

Mr. Velde, Chairman of the Committee in the 83rd Congress, has indeed stated: "We feel that we have a duty . . . to inform the people who elected us about subversive activities. . . ."[49]

The error of these legislators is that in conducting Congressional investigations they have shown insufficient regard for individual liberties. They confuse loyalty with orthodoxy. Acting upon this confusion, they have tended to suppress diversity and in effect to insist upon a rigid conformity. The national loyalty of free men is not so much to their government as to the purposes for which their government was created.[50]

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."[51]

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[49]*Supra* note 43, at 692-93.

[50]BARTH, *op. cit supra* note 41 at 3.

[51]Marshall, C.J., McCulloch v. Maryland, 4 Wheaton 316 (1819).