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Rights of Witnesses Before Congressional Investigating Committees

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COMMENTS

RIGHTS OF WITNESSES BEFORE CONGRESSIONAL INVESTIGATING COMMITTEES

As a result of highly publicized congressional investigation during the past year one of the most important, and certainly one of the most controversial matters facing both the American public and the Congressional Investigating Committee, is the question concerning the rights of a witness when called before such an investigatory body. The scope of this article is to attempt to reach an answer to this question, and in so doing, two approaches will be used: 1) what are the boundaries or limits of the inquisitorial power of Congress? 2) what are the legal rights of an individual when called upon to testify before an investigating committee?

The extreme importance in definitely ascertaining what are the rights of a witness appear from the fact that, if the witness refuses to answer the questions propounded to him by the committee on the ground that the committee is either 1) exceeding its power or 2) violating the legal rights of the witness, the good faith on the part of the witness in refusing to answer is no defense[1] to the rather harsh penalties which can be meted out for contumaciousness.[2] It can be seen, therefore, that it behoves the witness to know precisely the extent of his rights and the extent of the committee's authority to extract testimony from him.

I.

LIMITS OF THE COMMITTEE'S POWER

A witness may object to being questioned by a committee because: a) the inquiry pertains to matters upon which Congress has no power to legislate and since Congress can investigate in aid of legislative purposes only, they could not lawfully authorize the investigation; b) the delegation of power to the committee under the authorizing resolution was ineffective because too vague to constitute a valid norm or limitation, which is a requirement for a valid delegation of any legislative power; c) the questions are beyond the scope of the inquiry as set forth in the enabling resolution.

The first successful challenge to the validity of a resolution authorizing a congressional hearing was upheld by the supreme court in *Kilbourn v. Thompson.*[3] The court held that the resolution was improper because it failed to state that legislation was contemplated on the subject to be investigated; and that the matter was one on which Congress

[1] U.S. v. Emspak, 95 F.Supp. 1012 (D.C., 1951); Sinclair v. U.S., 279 U.S. 263, 49 S.Ct. 268, 73 L.Ed. 692 (1929).
[2] 2 U.S.C. 192.
[3] 103 U.S. 168, 26 L.Ed. 377 (1880).

was not authorized to legislate. This view was later modified by the court in the case of *McGrain v. Daugherty*[4] wherein it held that where the subject matter of the investigation is one upon which Congress can properly legislate the resolution need not state that legislation is to be forthcoming.

> "Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit . . . . The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged in that this was the real object. An express avowal of the object would have been better; but in view of the particular subject matter was not indispensible."[5]

Recent decisions have shown little evidence of an intent, on the part of the courts, to depart from the above view and strictly limit the Congressional power of investigation.

> "If the subject matter under scrutiny may have any possible relevancy and materiality, no matter how remote, to snare 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."[6]

Witnesses have criticized resolutions as being too "vague" for them to know the scope of the inquiry, and hence they are unable to judge the pertinancy of the questions asked. This line of attack was used by a defendant[7] cited for contempt of Congress.[8] She attacked the resolution creating the House Un-American Activities Committee, authorizing investigations of "un-American actvities" as being in the nature of a penal statute which does not have an ascertainable standard of guilt. Claiming it violated substantive due process, she asserted its invalidity. The court disposed of her contention by pointing out that her attack was based on the rule of law that declared penal statutes invalid when too vague, and that:

> 'This line of reasoning does not apply to statutes of other types."[9]

If there is no penal sanction applied to the resolution it does not fall under the condemnation of vagueness as do penal statutes. In its reasoning in the *Byran* case,[10] the court pointed out that the exact scope of an investigation cannot always be chartered and bounded in advance with

[4] 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927).
[5] *Supra*, n.4. 273 U.S. 135 at pp.177,178.
[6] U.S. v. Bryant, 72 F.Supp. 58, 61 (D.C., 1947).
[7] *Supra*, n.6.
[8] 2 U.S.C. 192.
[9] *Supra*, n.6, 72 F.Supp. 58, 63.
[10] *Supra*, n.6.

the precision of a survey. The resolution is not primarily a guidepost for the witness but for the committee. Due to its conflicting duality of purpose in that it must inform both the committee and the witness as to the scope of the investigation, the resolution cannot possibly fully satisfy both, when the committee demands vagueness and the witness precision.

Dicta in the *McGrain* case[11] indicated that a witness may refuse to answer where "the questions are not pertinent to the matter under inquiry."[12] To secure a conviction for contempt of Congress[13] the burden of proof is on the government to prove the pertinancy of the questions. Whether a question is pertinent or not is a matter of law to be determined by the trial court in accord with the test laid down by the supreme court in the leading case of *Sinclair v. United States;*[14] if the question is so related to the subjects covered by the congressional resolution that such facts reasonably could be said to be "pertinent to the question under inquiry" the question as a matter of law is pertinent. The gist of the offense of contempt of Congress is refusal to answer pertinent questions; the witness's mistaken view of the law is no defense.[15] The term "wilfully" in the statute[16] does not require that a criminal intent or a *mens rea* be proved.[17] The statute requires only that the refusal or failure to comply be intentional and not accidental or through mistake of fact.[18]

It has been argued that a person who is directed to testify before a committee is at a loss to determine whether the committee is acting within the scope of its jurisdiction with regard to the scope of the questions asked. A person who declines to answer does so at his peril. However, there are many instances in which a person assumes a risk in determining whether what he intends to do constitutes a crime. This is true, for example, in respect to violations of the anti-trust laws, because what constitutes an illegal restraint of trade is often a debateable matter. As Mr. Justice Holmes aptly remarked:

> ". . . the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment as here; he may incure the penalty of death."[19]

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[11] *Supra,* n.4.
[12] *Supra,* n.4, 273 U.S. 135, 176.
[13] *Supra,* n.8.
[14] *Supra,* n.1.
[15] *Ibid.*
[16] *Supra,* n.8.
[17] Barsky v. U.S., 167 F.2d 241 (C.A. D.C., 1948), cert. denied 334 U.S. 843.
[18] Fields v. U.S., 164 F.2d 97 (C.A. D.C., 1947).
[19] Nash v. U.S., 229 U.S. 373, 377, 33 S.Ct. 780, 57 L.Ed. 1232 (1913).

II.

Fundamental Rights of the Witness in Respect to the Questions Asked

If the investigating committee does not have the power to ask the question, the witness has a corresponding right to refuse to answer. Grounds that have been used to justify a witness's refusal to answer a particular question are: 1) that the answer would incriminate him[20] 2) that the answer would degrade him[21] 3) that the answer would invade his right of privacy.[22]

The privilege against self-incrimination was early recognized at common law,[23] and today is found in the federal Constitution and in the constitutions of all the states except two.[24] The Fifth Amendment of the federal Constitution reads:

> ". . . nor shall be compelled in any criminal case to be a witness against himself . . ."

This privilege against self-incrimnation extends to witnesses before legislative investigating committees.[25]

However, in order to invoke the privilege it must be affirmatively asserted by him.[26]

> "The privilege (of self-incrimination) may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which passes upon it."[27]

The question has not been settled as to what action on the part of the witness constitutes a waiver.[28]

It has been held that if the legislature provides the witness with complete immunity from prosecution by adequate legislation the witness then can not refuse to testify.[29] However, the immunity granted by statute in order to supplant the privilege against self-incrimination must be a "real substitute." In order to be valid, the statutory immunity conferred must be as broad as the constitutional privilege; a *quid pro qua,* i.e., the witness must receive as much protection from the immunity statute as the constitutional privilege affords him.

The immunity staute given to a witness at a congressional investigation reads:

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[20] Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892).
[21] Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896).
[22] Sinclair v. U.S., *supra,* n.1.
[23] 8 Wigmore, Evidence §2250 (3d ed., 1940).
[24] Iowa and New Jersey. 8 Wigmore, Evidence §2252 (3d ed., 1940).
[25] Brown v. U.S., 276 U.S. 134, 48 S.Ct. 288, 72 L.Ed. 500 (1928); Wheeler v. U.S., 226 U.S. 478, 33 S.Ct. 158, 57 L.Ed. 309 (1913).
[26] 8 Wigmore, Evidence §2268 (3d ed., 1940).
[27] U.S. ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 47 S.Ct. 302, 71 L.Ed. 560 (1927).
[28] Note, 35 Va. Law Rev. 104 (1949).
[29] *Supra,* n.21.

> "No testimony given by a witness . . . shall be used as evidence in any criminal proceeding against him in any event, except in a prosecution for perjury committed in giving such testimony. But an offered paper or record produced by him is not within the said privilege."[30]

The full effectiveness of this statute has not been tested,[31] in fact, doubt has been expressed that the immunity granted is sufficient to supplant the privilege of not testifying on matter which would incriminate. An immunity statute with phraseology similar to the above has been declared insufficient and the witness excused from testifying.[32] Even if the immunity statute is valid, it does not protect a witness from being prosecuted by a different soveriegnty.[33] On this point, the Supreme Court has said:

> "But, even granting that there was still a bare possibility that, by his disclosure he might be subjected to the criminal laws of some other soveriegnty, that is not a real and probable danger."[34]

Another ground used by witnesses in justifying their refusal to answer the questions of the probing legislative committee, as indicated supra, is that the answer to the question will render the witness infamous, that it will degrade, disgrace and humilate him. There is no legal basis for a refusal based on these grounds. The fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure.[35]

A refusal to answer questions on the grounds that the question seeks privileged matter, that which is private to the witness, is also without legal merit, providing the question is as a matter of law pertinent to the issue under inquiry. When the question is pertinent to the inquiry the witness's private affairs become clothed with public interest and the witness has a duty of disclosure.[36]

III.

Fundamental Rirhts of the Witness in Respect to the Committee's Procedure

In approaching the problem of the rights of the witness and the procedure of the congressional committee, it must be postulated that there is no rational basis for applying the restrictions upon the proce-

[30] 28 U.S.C. 634.
[31] *Supra,* n.28.
[32] Counselman v. Hitchcock, *supra,* n.20, held that an immunity statute "forbidding the use of testimony" is not as broad as the privilege and is, therefore, void because it would not prevent the use of his testimony to search out other testimony which could be used in evidence against the witness in a criminal proceeding.
[33] Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906).
[34] *Supra,* n.21.
[35] *Ibid.;* U.S. v. Thomas, 49 F.Supp. 537 (D.C. W.D. Ky., 1943); 2 U.S.C. 192.
[36] *Supra,* n.4; Sinclair v. U.S., *supra,* n.1.

dure of the courts to the procedure of the congressional investigatory committee merely because they have been insisted upon in judicial proceedings.[37] The courts have consistently held that the purpose of a congressional investigating committee is merely to secure information and in no way to exercise judicial power.[39] These decisions have been necessitated by the Constitution itself, and the doctrine of separation of powers. The reason for the restrictions of judicial due process upon court procedure is to protect a person when his rights are judicially determined. Since the rights of a witness cannot constitutionally be determined by a congressional committee, there is no need to protect him with judicial due process.

Proponents of this theory contend that while the committees cannot of themselves judge anyone, the hearings do have the effect of bringing the witness before the bar of public opinion where he is thereby judged. They claim that judicial due process is required because of such judgment. The weakness of this position appears to be self evident. The judgment arrived at is a popular judgment, and, of course, judicial due process cannot be applied to popular judgment, as practically every act in society results in popular judgment as to its propriety.

It should be pointed out here that if a court would hold that the concept of judicial due process as evolved by our judicial system was to apply to the procedure used by congressional investigating committees because they were in effect sitting as courts, necessarily these results would follow:

1) All congressional investigating committees would be unconstitutional, because they would be arrogating to themselves judicial rights insofar as they result in public judgment. All public committee hearings today result in popular judgment of witnesses due to the publicity by newspapers, radio and periodicals, not to mention the new medium of television.

2) If congressional investigating committees could be constitutionally considered to be "courts," appellate jurisdiction of the courts over the power of Congress to punish witnesses for contempt would be lost. The congressional committee being a court, its contempt citations would not be reviewable in another court.[40] It was for this reason that the supreme court in *Kilbourn v. Thompson*[41] deliberately adopted the position that powers of congressional committees are not judicial in any way.

Not only is there no basis for applying the restrictions on court procedure to congressional committee procedure, but also there is no sound

[37] *Supra*, n.4.
[39] *Ibid.*
[40] In re Falvey v. Kilborn, 7 Wis. 630 (1858); Ex parte Kearney, 7 Wheat. 38, 5 L.Ed. 391 (1822).
[41] 103 U.S. 168, 28 L.Ed. 377 (1880).

reason for applying any other due process requirement. The requirements of due process apply only when life, liberty or property are taken by government action.

A witness may feel that his reputation may suffer as a result of his testifying before the committee, consequently that he was deprived of something by the committee. However, even if this were true, this is not the type of deprivation which is protected against by the due process clause of the Fifth Amendment. His reputation if it suffered, suffered not as a direct result of the action of the committee but rather an indirect consequence of the exercise of a lawful power.

> ". . . . that provision (Fifth Amendment) has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of a lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may indeed render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared?"[43]

However, even if it be assumed the witness may suffer a loss of reputation by his testimony, and that this came about as a direct result of the committee's action, such loss is not such a deprivation of any fundamental right that is protected by the due process clause of the Fifth Amendment.

While the life and liberty of which a person may not be deprived without due process of law are not limited to freedom from mere physical harm or restraint, they do not extend any farther than the protection of those privileges long recognized at common law as essential to the orderly pursuit of happiness of freemen.[44] At common law it was not considered essential to the orderly pursuit of happiness by freemen that they should be free from public comment, or that their reputation was included in the concept of liberty.[45]

However, again if it be assumed that loss of reputation is a loss of a fundamental right, or should the committee in its action in some way infringe a witness's fundamental rights, the problem then is, can such an infringement ever be privileged?

In spite of the broad scope of the rights protected by the due process clause of the Fifth Amendment, these rights are not absolute but subject to the exercise of Congress's power to make regulations reasonably necessary under the authority of its express powers.

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[42] *Supra*, n.4.
[43] Legal Tender Cases, 12 Wall. 455, 551, 26 L.Ed. 458 (1870).
[44] 16 C.J.S. CONSTITUTIONAL LAW §574.
[45] People ex rel. Stern v. Robert R. McBride & Co., 288 N.Y.S. 501, 506 (1936).

Any fundamental right a citizen holds in society is subject to reasonable government regulation which is in accord with due process.[46] Government by definition presupposes the giving up of individual rights and liberties for the welfare of the community.

If Congress itself took away any of a witness's fundamental rights his objection could be that it violated legislative due process, i.e. that the law was unreasonable, arbitrary, and capricious.[47]

If the Committee infringed upon any of a witness's fundamental rights his objection could be that its procedure violated due process. However, due process in its procedural aspect does not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts.[48]

In all cases that kind of procedure is due process of law which is suitable and proper to the nature of the case and sanctioned by the established customs and usages.[49]

The procedure which is sanctioned in congressional committees is that which congress sets up.

"Each House may determine the Rules of its Proceedings, . . ."[50]

The procedure which is suitable and proper in congressional committee hearings is that procedure which while enabling the committee to carry out the purposes for which it was created, does not unreasonably, arbitrarily, or capriciously deprive a witness of his fundamental rights. But within these limits all matters of methods are open to the determination of the House, and it is no impeachment of the rule to say that some other way would be better, more accurate, or more just.[51]

Where the procedure of a committee is sanctioned by the Senate, either directly, or indirectly by allowing the committee to set up its own procedure within limits,[52] is proper to carry out the purposes for which the committee was created, and does not unreasonably, arbitrarily, or capriciously infringe a witness's fundamental rights the witness cannot object to the manner of conducting the hearing. For example, some witnesses object to the publicity attendant upon these hearings, particularly when they are televised. Under the foregoing test, and assuming that the publicity of the hearing violated some recognized fundamental right of the witness, his injury is *damnum absque injuria* for the infringement was not unreasonable. While the primary purpose of investigating committees is to gather facts for the legislators, a secondary purpose is to focus public attention upon these facts so that en-

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[46] Hadachek v. Los Angeles, 239 U.S. 394, 410, 36 S.Ct. 143, 60 L.Ed. 348 (1915).
[47] *Ibid.*
[48] Davidson v. New Orleans, 96 U.S. 97, 102, 24 L.Ed. 616 (1879).
[49] Ex parte Wall, 107 U.S. 265, 2 S.Ct. 569, 27 L.Ed. 552 (1883).
[50] U.S. CONSTITUTION, Art. 1 Sec.5 cl.2.
[51] U.S. v. Ballin, 144 U.S. 1, 12 S.Ct. 507, 36 L.Ed. 321 (1891).
[52] 60 Stat. 812.

lightened public opinion will result in legislative action. As cited in *Tenny v. Brandhove*,[53]

> "It is the proper duty of a representative body to look diligently into every affair of the government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function."[54]

The supreme court has on more than one occasion impliedly recognized that Congress does have a duty to inform the public.[55]

Senator Kefauver, who directed the crime probe which appeared in a large part on television was of the opinion that this informing function was an essential attribute of Congress. In a senate debate on the subject he remarked:

> "It is an important by-product and a very important part of an congressional investigation to let the people know what is going on, so they will take an interest in laws and the enactment of legislation in that connection. I think we always have operated on that basis, and it is a part of the function of congressional investigating committees."[56]

Applying this conclusion to television as a new method of communicating thought the Senator from Tennessee said:

> "In addition, I think as many congressional hearings as possible should be televised. The remarkable thing about the interest television stirred regarding the hearings of our crime investigating committee was that the public was interested in what our committee was doing. There was no showmanship, no altering of committee plans, no rearranging of schedules to benefit the listening and viewing audience. We proceeded exactly as we would have had there been no cameras. This, to my mind, means that thirty million American people were interested in the actual function of their government . . . . the better informed our people become, the better governed they will be."[57]

A moments reflection will reveal the reasons for the ability of television to capture the interest of listeners who would overlook a news-

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[53] . . U.S. . . . 71 S.Ct. 783, 789 (1951).
[54] WILSON, CONGRESSIONAL GOVERNMENT p.303 (15th ed. 1913).
[55] Railroad Labor Board v. Robinson, 3 F.(2d) 488 (1925), reversed on other grounds in 258 U.S. 619; Electric Bond Co. v. Security and Exchange Commission, 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936 (1938).
[56] 97 Cong. Rec. 9995 (Aug. 10, 1951).
[57] *Ibid.* at p. 9996.

story on the same event. Courts of appellate jurisdiction have often commented on the weaknesses of a "cold" record of a case up for review. People are more interested in, pay better attention to, and are more greatly moved by a live performance. Written words can at times capture the interest and attention of readers, but to a much smaller degree than a television program of the actual events.

As indicated, supra, due process requires that any law passed by Congress must not unreasonably, arbitrarily, or capriciously deprive any citizen of his fundamental rights. The same test logically must be applied to the means used in arriving at the end they seek, which is reasonable legislation, in the investigating committee. Therefore the same test must be applied to its methods as is applied to the methods of Congress, i.e. its procedure must not be unreasonable, arbitrary, or capricious as to the end which it seeks.

The end sought by investigating committees as indicated by their enabling resolutions is to find facts. To find these facts, committees employ the device of public hearings. In a democratic state, it is a basic right of every citizen to attend public meetings. Another basic right is the right of the public to every man's evidence.

Prior to the development of television, the rights of the citizenry to attend public meetings was limited by the physical size of the hearing chamber. In the pre-television era, no one would have questioned the right of a committee to transfer its public hearing from a room seating only one hundred persons to one seating one thousand, or even one hundred thousand. Such a move would have even been lauded by the public. Can objection be made when science by electronic methods has enabled the committees to transfer their hearings from rooms seating, perhaps, five hundred persons, to one seating many thousands? The advantages gained by such "electronic transfer" are obvious.

Even those who contend that televising these hearings violates procedural due process in that it infringes the witness's fundamental rights in an unreasonable manner admit that the committee has the power to hold public hearings, and that the amount of publicity attendant upon such hearings is just a matter of degree. However, they feel that the television publicity just goes too far. The answer to this "degree" argument can be gathered from the field of taxation.

Mr. Chief Justice Marshall early in the history of our country made his now famous statement that, "The power to tax is the power to destroy."[58] Notwithstanding the great power of taxation for evil, our courts have yet to restrain a tax as being too large once it has been determined that Congress has the power to levy the tax. They have constantly iterated the principle that the amount of the tax is a political

[58] McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819).

question. Similarly, it appears, the amount of the publicity of a congressional hearing is a political question, and a witness who refuses to testify on the grounds that there is too much publicity has no standing in court. The remedy lies at the polls.

IV.

Other Gounds Upon Which the Witness May Refuse to Testify

In order to effectively insure the presence of witnesses called before a congressional investigating committee the courts have sustained the power of Congress to issue subpoenas.[59] This power included the right to require the production of papers, records, and documents by the issuance of a subpoena duces tecum.[60] If the issuance, substance, or form of the subpoena violates either the Fourth Amendment (searches and siezures) or the Fifth Amendment (self-incrimination) the witness is justified in refusing to produce the documents.

A subpoena duces tecum does not violate the searches and siezures clause of the Fourth Amendment if the documents called for are sufficiently specified, and are sought for a purpose relevant to the inquiry. The requirement of "probable cause supported by oath or affirmation"[61] necessary in the issuance of a subpoena is satisfied in the case of a congressional investigating committee's subpoena if: a) the investigation is authorized by Congress; b) is for a purpose Congress can order; c) the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness comes down to the specification of the documents to be produced for the purposes of the relevant inquiry.[62] Mr. Justice Sutherland in *Brown v. United States*[63] laid down the test of a valid subpoena duces tecum stating that it does not violate the Fourth Amendment if it specifies a reasonable period of time, and, with reasonable particularity, the subjects to which the documents called for relate. He went on to point out that a subpoena duces tecum may nevertheless be so onerous as to constitute an unreasonable search; however to uphold an objection to a subpoena duces tecum on the ground of unreasonable search, the search involved must be out of proportion to the ends sought, as when the person served is required to fetch all his books at once to an exploratory investigation whose purposes and limitations can be determined only as it proceeds.[64] Hence, an order for the production of books and papers which limits the examination

[59] *Supra*, n.4.
[60] Oklahoma Press Publishing Co. v. Walling, Wage & Hour Administrator, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1945).
[61] *Ibid.*
[62] *Ibid.*
[63] *Supra*, n.25.
[64] 47 Am. Jur. Searches and Seizures §58; McMann v. Securities and Exchange Commission, 87 F.2d 377 (2d Cir., 1937), cert. denied in 301 U.S. 684. As to "fishing expeditions" refer to 17 Am. Jur. Discovery and Inspection §11.

to such matter as is pertinent to the issue does not infringe on the constitutional guaranty against unreasonable searches and seizures.[65]

The privilege against self-incrimination, as discussed supra,[65] that justifies refusal to orally testify to matters that would incriminate the witness is equally applicable as an aid to the witness when a subpoena duces tecum requires that the witness produce certain records and documents incriminatory in nature. The compulsory production of a man's private books or papers to be used against him is not substantially different than compelling him to be a witness against himself. Such seizure or compulsory production is within the spirit of the constitutional provisions providing that no person shall be compelled to testify against himself.[66] The privilege does not extend, however, to public records or to books or records that are required by law to be kept, such as the records of a corporation,[67] an insolvent bank,[68] drug prescriptions,[69] druggists' records of sales of intoxicating liquors,[70] and records of pawnbrokers.[71]

It should be remembered, however, that a witness may not claim the privilege without ample justification. The claiming of the privilege does not relieve the witness from the duty to bring the documents to the investigation, but it does prevent the committee, acting as a whole, to utilize the documents or papers. As stated by Justice Sutherland,[72]

> "A person required by a subpoena duces tecum to produce papers and documents has a duty to produce the papers in order that the court might by an inspection of them satisfy itself whether they contain matters which might tend to incriminate. If he declined to do so, that alone would constitute a failure to show reasonable ground for his refusal to comply with the requirements of the subpoena . . . the individual citizen may not resolve himself into a court and himself determine and assert the criminating nature of the contents of books and papers required to be produced."

If the witness refused to show the documents to the head of the investigating committee on the grounds that the documents would tend to incriminate him and a court later determined that, as a matter of law, they were not of such a nature as to justify invoking the privilege, then it seems to the writers that a contempt charge against the witness brought by the committee would be sustained; the witness acts at his peril and a mistake of law is no defense.

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[65] 47 AM. JUR. SEARCHES AND SEIZURES §58.
[66] Boyd v. U.S. 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886).
[67] *Supra*, n.60.
[68] Burnett v. State, 8 Okla. Crim. Rep. 639, 129 P. 1110 (1913).
[69] 17 AM. JUR. DRUGS AND DRUGGISTS §14.
[70] 30 AM. JUR. INTOXICATING LIQUORS §433.
[71] 40 AM. JUR. PAWNBROKERS AND MONEYLENDERS §6.
[72] *Supra*, n.25.

The televising of the Kefauver committee proceedings has raised several new questions. What is the extent of a witness' right of privacy, and does the televising of a hearing constitute a violation of this right of privacy? The concept that each and every individual has an inherent right of privacy is the result of an 1890 law review article by Samuel D. Warren and Louis D. Brandeis.[73] This right of privacy in the sense used by these authors was never recognized at common law. The constitutional right to be let alone refers only to the right to be free from bodily injury, or from a reasonable fear of bodily injury, and does not include a right to be free from public comment.[74] Nor is it included in the Federal Constitution, the Amendments, or Congressional enactment.[75]

Since the publication of the law review article referred to above, many states have enacted legislation granting to the individual a right of privacy. But, even in these states, this right can be waived, either voluntarily or involuntarily. If the witness by his accomplishments, fame, mode of life or by his adopting a profession or calling which gives the public a legitimate interest in his activities and character, he is a public personage and he thereby relinquishes or loses his right of privacy.[76] The publication of a person's name or picture in connection with a news or historical event of legitimate public interest does not constitute an actionable invasion of the right of privacy.[77] Also, in certain public matters such as jury duty, public hearings and the like, the right of the public to the performance by all citizens of the public obligation has been held to be paramount to the individual's right of privacy.[78]

A witness can not refuse to appear before a congressional investigating committee hearing on the grounds that he must travel too far or incur too great an expense in so doing. The committee's power to compel attendance of the citizens is absolute.

> "Either House of Congress in the discharge of the great duties devolved upon it by the Constitution and as necessarily incident thereto, has the undoubted right to require the personal attendance before its committees, as a witness or otherwise, of any citizen of the country, and to be paid or not according to its own will and pleasure. Attendance in such a case is not by agreement, but is the voluntary or involuntary submission of a subject

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[73] Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L.Rev. 193 (1890).
[74] People ex rel. Stern v. Robert R. McBride & Co., *supra*, n. 45; Henry v. Cherry & Webb, 30 R.I. 13, 73 A. 97 (1909).
[75] Prudential Insurance Co v. Check, 259 U.S. 530, 42 S.Ct. 516, 66 L.Ed. 1044 (1922).
[76] 76 ALR 58.
[77] 138 ALR 78.
[78] 138 ALR 31.

to a power of government which must be obeyed and which cannot be resisted."[79]

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[79] Lilly's Case, 14 Ct.Cl. 539, 542 (1878).