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THE FIRST AMENDMENT AS A RESTRAINT ON THE POWER OF CONGRESS TO INVESTIGATE

Marvin Summers* 

One of the vexing problems in the realm of public law relates to the charge by witnesses that their rights under the Constitution have been violated by legislative investigations. This problem poses a conflict in values which, taken separately, are prized, but which stand, nevertheless, in a competitive relationship to one another. That it is necessary and desirable for Congress and state legislatures to exercise the power of inquiry is not seriously questioned, yet the rights of witnesses must be determined and secured lest legislative investigations become a travesty on the concept of limited government.

In a classic sense, this conflict might be represented as an expression of the eternal tension between the authority of the state and individual liberty. Or, in the terminology of the social sciences, it might be seen as a clash between the value structures of the various groups that engage in the political process. Through whatever conceptual lenses the problem is viewed, some sort of acceptable balance must be struck between the contending forces.

A review of congressional and state legislative investigations leads this writer to suggest that during most of this post war period the scales have been tipped in favor of coercive power of legislative bodies. In the context of the cold war and the anxiety about subversion, the imbalance was perhaps understandable. Yet granting the imperatives of national security, many writers1 have questioned whether the general conduct of these investigations was consistent with the spirit and traditions of a liberal society.

In June of 1957, the Supreme Court apparently shared those doubts for it rendered two decisions that appeared to be a calculated attempt to redress the balance. Watkins v. United States2 and Sweezy v. New Hampshire3 are important examples of the general effort of the Warren Court to reemphasize the rights of individuals against encroachments

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by the state in the name of national security. Decisions accompanied by opinions highly critical of some practices and procedures of legislative investigations reversed convictions of witnesses for refusing to respond to inquiries posed under the authority of Congress,\(^4\) in one instance, and a state legislature,\(^5\) in the other. In recent decisions, \textit{Barenblatt v. United States}\(^6\) and \textit{Uphaus v. Louis C. Wyman},\(^7\) the attitude of the Court seems to have shifted somewhat. Although the previous rulings were not reversed, the Court did render decisions adverse to witnesses who had, on constitutional grounds, challenged the investigatory power of legislatures.

Among other complex issues, these cases raised the question of whether the First Amendment was applicable to congressional investigations and to state legislative inquiries (via the Fourteenth Amendment), and whether rights protected by the First Amendment constituted a limitation on the investigatory power of legislatures. This constitutional question had cropped up in previous cases only to be ignored by the Supreme Court or disposed of adversely by lower tribunals. Beginning, however, with the 1957 cases, the Court has devoted considerable attention to "the collision of the investigatory function with constitutionally protected rights of speech and assembly. . ."\(^8\) By way of \textit{dictum}, the Court has declared that the First Amendment is applicable to legislative inquiries and implied that the Amendment establishes some limitations on the investigatory power.

This article examines some instances where the First Amendment has been relied upon as justification for refusing to answer legislative inquiries and traces selected cases through the judiciary with the view of determining the present state of the law and identifying developmental trends. Some consideration will be given both to the theoretical basis for an appeal to the First Amendment and to the problems raised by such a plea.

\(^4\) See H.R. 534, 83d Cong. 2d Sess. for action of the House of Representatives in which the Speaker was directed to submit a report of the Committee on Un-American Activities to the Attorney General for criminal action.

\(^5\) In 1953, the Legislature of New Hampshire adopted a resolution authorizing the attorney general of the state to "make full and complete investigation with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state." The Attorney general was also directed to proceed with criminal prosecutions under the subversive activities act whenever evidence presented to him in the course of the investigation indicates violation thereof, and he shall report to the 1955 session on the first day of its regular session the results of his investigation, together with his recommendations, if any, for necessary legislation. N.H. Laws 1953, ch 307. The authorization was extended two years by N.H. Laws 1955, chs. 197, 340.


\(^7\) Uphaus v. Wyman, 360 U.S. 72 (1959).

\(^8\) Justice Brennan noted that "Judicial consideration of the collision of the investigatory function with constitutionally protected rights of speech and assembly is a recent development in our constitutional law." Uphaus v. Wyman, \textit{supra} note 7.
The considerable body of literature on the power of Congress to investigate and to punish for contempt requires only brief review. Neither the investigatory nor the contempt authority of Congress is conferred specifically by the Constitution. The contempt power is thought to reside inherently in Congress as it does in a judicial body, and in an early case, the Supreme Court sustained the House of Representatives in contempt proceedings against a non-member for attempted bribery of a legislator. The Court ruled that Congress had an inherent right to protect the legislative process from corrupting influences.

On the other hand, the power to investigate is implied from one or more of the legislative grants expressly delegated by the Constitution. Thus, Congress may use its investigatory power in connection with regulating interstate commerce, raising an army, levying taxes, and the like. In 1857, Congress correlated its contempt and investigatory powers by authorizing contempt citations for persons who failed to respond to a summons from either House or who refused to answer a question pertinent to a valid inquiry.

The first challenge to the investigatory power of Congress was...

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9 Barth, supra note 1; Carr, Constitutional Liberty and Congressional Investigations, in Kelly, Foundations of Freedom in the American Constitution (1958); Dimock, Congressional Investigating Committees (1929); Eberling, Congressional Investigations (1928); Griswold, supra note 1; McGeary, The Development of Congressional Investigative Power (1940); Ogden, The Dies Committee (1943); Taylor, supra note 1; Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926); Wigmore, Legislative Power to Compel Testimonial Disclosure, 19 Ill. L. Rev. 452 (1924); Lashley, The Investigating Power of Congress; Its Scope and Limitations, 40 A.B.A. J. 537 (1929); Coudert, Congressional Inquisition v. Individual Liberty, 15 Va. L. Rev. 537 (1929); Morgan, Congressional Investigations and Judicial Review, 37 Calif. L. Rev. 556 (1949); Congressional Investigations: A Symposium, 18 U. Chi. L. Rev. (1951).

10 Anderson v. Dunn, 6 Wheat. (U.S.) 204 (1821).

11 However, the sanction available to Congress was restricted to imprisonment that was not to extend beyond the end of the session in which the contemptuous conduct occurred. This limitation was based on the theory that while Congress had power to prevent conduct that would hinder or obstruct legislation, it could not on its own authority take purely punitive measures against private persons.

12 "But there is no provision expressly investing either House with power to make investigators and exact testimony . . . ." Nevertheless, the court ruled that "the two Houses of Congress . . . possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective." McGrain v. Daugherty, 273 U.S. 135, 161, 173 (1926).

13 The statute, as amended, now reads: "every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matters under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months." Rev. Stat. §102, 2 U.S.C. §192.
brought to the judiciary in 1881. In *Kilbourn v. Thompson*\(^{14}\) the Supreme Court disallowed the contempt proceedings against Hallet Kilbourn and even cast doubt on the authority of either House to compel private citizens to give testimony pursuant to a purely legislative function.\(^{15}\) However, the doubts raised in 1881 were dispelled some forty years later in *McGrain v. Daugherty*\(^{16}\) where the Supreme Court held that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function," and that either House "has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution."\(^{17}\) The modern view is that in order to legislate wisely on the multitude of complex issues that come before it, Congress must have the means to obtain information far beyond that which its individual members would be expected to have.

The investigatory power is not, however, without judicially defined limitations. In both the *Kilbourn* and *McGrain* cases, the Supreme Court took the position that Congress had no general mandate to conduct investigation; consequently, only those inquiries that were related to a function of the legislature could be justified.\(^{18}\) Even if the subject under inquiry were within the competence of Congress, the specific question the witness refused to answer must also have been pertinent to the purpose of the investigation before punishment could be inflicted under contempt legislation.\(^{19}\)

In sum, the broad outlines of the power of Congress to investigate,

\(^{14}\) 103 U.S. 168 (1881).

\(^{15}\) Justice Miller declared, "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, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into private affairs of the citizen." 103 U.S. 168 at 190. Justice Miller, who wrote the opinion for the Court in the *Kilbourn* case, was no admirer of congressional investigations. Once to a friend he wrote, "I think the public has been much abused, the time of legislative bodies uselessly consumed and rights of the citizen ruthlessly invaded under the now familiar pretext of legislative investigations and that it is time that it was understood that courts and grand juries are the only inquisition into crime in this country. I do not recognize the doctrine that Congress is the grand inquest of the nation, or has any such function to perform nor that it can by the name of a report slander the citizen so as to protect the newspaper which publishes such slander." Quoted from Fairman, Mr. Justice Miller and the Supreme Court, at p. 332 (1939).

\(^{16}\) 273 U.S. 135 (1927).

\(^{17}\) Justice Van Devanter, speaking for a unanimous court; felt that the subject of the inquiry, the administration of the Justice Department under Attorney General Daugherty, was plainly "one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." 273 U.S. 135, 174 (1926).

\(^{18}\) See note 12.

\(^{19}\) One of the elements of the crime is that the question which the witness refused to answer must be "pertinent to the question under inquiry." 2 U.S.C. §192.
including limitations, had been fairly well established by practice, custom and judicial review prior to World War II.

NEW TYPE OF CONGRESSIONAL INQUIRY

The most recent controversy over the conduct and practices of investigating committees arises essentially from a new type of inquiry that has emerged in the post war period. Of the several factors that contributed to the uniqueness of this phase of congressional activity, the most important was the matter under investigation. Previously congressmen had concerned themselves with instances of mismanagement in the executive departments or an occasional attempt at bribery or some other form of corrupt practice. However, many of the recent inquiries have centered around the threat to the security of the United States government posed by communists, their dupes and fellow travelers. Congressional investigators, in addition to seeking out simple criminal action or malfeasance in office, began probing political motivation in an effort to establish a relationship between witnesses and the threat to national security. This type of inquiry produced a conflict between the recognized power of Congress to investigate and the claims of witnesses to the protection of the First and Fifth Amendments of the Constitution.

The conflict of interest inherent in this type of investigation was made even more acute by the circumstances attending this phase of congressional activity. The public was in a highly agitated state over the fear of internal subversion and the reasonable conclusion that there was a connection between the activities of domestic communists and the goals of the Soviet Union. Consequently, there was, on one hand, extensive public support for the efforts of congressmen to ferret out persons with questionable political associations, while on the other, there was an adverse reaction to the witness who questioned, perhaps legitimately, the authority and methods of the investigation.

Congressional committees, competing as they must with the executive for the attention of the public, found in the investigation of subversive activities an unusual opportunity to make an impact on the American people. Under the circumstances, it is understandable that some congressmen pursued their quest with great vigor and with little sympathy for the counter claims of individual witnesses. At the same time, congressmen discovered that they had at their disposal the vast resources of the press, radio, and television. Consequently, the threat

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20 This new phase of investigation began with the establishment of the House Committee on Un-American Activities in 1938 under the Chairmanship of Martin Dies, although the most spectacular investigations of the Committee occurred after it was elevated to the status of a standing committee in 1946.


22 65 Yale L. J. 1159, 1161 (1956).
to the witness' interest in privacy and his reputation was dramatically increased by the availability of mass communication, coupled with the disposition of both congressmen and newsmen to seize upon sensational disclosures.

Another characteristic of the new phase was that congressional committees dealing with subversive activities shifted from the traditional objection of investigating for a legislative purpose to that of exposing persons with unorthodox political views. Representative Dies, the first chairman of the House Committee on Un-American Activities, reflected this objective when he declared, "I am not in a position to say whether we can legislate effectively in reference to this matter, but I do know that exposure in a democracy of subversive activities is the most effective weapon we have in our possession." Professor Carr has pointed out that relatively little legislation emerged from the many inquiries conducted by that committee and that much of the legislation that was passed came from other sources.

Holding witnesses up to public scorn for no particular legislative purpose presents, in itself, serious constitutional questions which become more urgent in light of the scope of congressional interest. In addition to inquiries into alleged disloyal and other questionable persons in government service and defense plants, congressional committees probed institutions of higher learning, the movie industry, the press and other media and even religious institutions. By the early nineteen-fifties, the old dictum that Congress had no general power of investigation seemed to have little meaning.

It should be noted that the new elements in congressional investigations are primarily associated with the House Committee on Un-American Activities and the Subcommittee on Investigations of the Senate Committee on Government Operations. Recognition of these new departures in legislative investigations in no way calls into question the authority of Congress to inquire into subversive activities, whether communist or otherwise. The point is that these developments raise questions that warrant the attention of students of constitutional law.

23 Judge Clark dissenting in United States v. Josephson declared that the House Committee on Un-American Activities "has claimed for itself the function of a grand jury to focus the spotlight of publicity on those it considers subversive, in order to drive them from their jobs in private and government employment and their offices in the trade unions." 165 F. 2d 82, 95 (2d Cir. 1947).
24 83 Congressional Record.
25 Carr, supra note 1 at 462.
26 Hearings regarding Communist Infiltration at Radiation Laboratory and Atomic Bomb Project at the University of California, Berkeley, California, 81st Cong., 1st Sess. (1949).
27 Hearings regarding the Communist Infiltration of the Motion Picture Industry, 80th Cong., 1st Sess. (1947).
28 For House Committee on Un-American Activities reports entitled Communism and Religion and Communism and Education, see House Document No. 136, 82nd Cong., 1st Sess. (1951).
EMERGENCE OF THE FIRST AMENDMENT ISSUE

Since the basic authority of Congress to investigate had been clarified in the *McGrain* and *Sinclair* cases in the nineteen-twenties, the post war litigation tended to evolve around the question whether or not the Bill of Rights provided any restraints on that power. What protection, if any, did the Constitution afford witnesses called before investigating committees?

It is now clear that at least some of the procedural protections in the Bill of Rights are available to witnesses. The Supreme Court has said that the Fourth Amendment provision against "unreasonable search and seizure" is as binding upon congressional committees as it is on law enforcement officers, although there has never been a case that turned on that point. Perhaps the most widely known provision available to witnesses is the protection against self-incrimination contained in the Fifth Amendment. Despite some early doubts, the privilege against self-incrimination was sustained in numerous cases on the lower levels, and, in 1950, the Supreme Court added its confirmation in *Blau v. United States* with later amplification in the *Emspak* and *Quinn* cases.

Although the Fifth Amendment privilege is an important procedural protection for witnesses, its effectiveness is limited. One factor that detracts from the utility of the privilege is the popular impression that pleading the Fifth Amendment constitutes a confession of guilt. So great is the stigma associated with pleading the "Fifth" that the Supreme Court was sympathetic with two witnesses who sought the benefits of the privilege without appearing to rely on the Amendment. Persons who wish to avail themselves of the protections of the Fifth Amendment must weigh carefully the possible consequences of their decision.

A more important factor is that the Fifth Amendment, inherently, provides a very limited range of protection. Consider the witness who

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30 In the Watkins case, Chief Justice Warren noted, "In the more recent cases, the emphasis shifted to problems of accommodating the interest of the Government with the rights and privileges of individuals. The central theme was the application of the Bill of Rights as a restraint upon the assertion of governmental power in this form." 354 U.S. 178, 195 (1957).

31 In a sweeping statement, Chief Justice Warren declared, "The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged." *Id.* at 188.


33 Chief Justice Warren wrote in the *Emspak* case, "No ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination. All that is necessary is an objection stated in language that a committee may reasonably be expected to understand as an attempt to invoke the privilege." 349 U.S. 190, 194 (1954).
is asked to reveal political affiliation. If he is a communist and chooses not to respond, he can rely on the Fifth Amendment, especially since the conviction of Eugene Dennis, et al., in 1951. But what of the witness who does not belong to the Communist party, yet wishes not to reveal his political activities? Technically, the Fifth Amendment is not available to him, although he can plead it and suffer the consequences in terms of social ostracism and possible loss of employment. Or he can refuse to answer and run the risk of prosecution for contempt of Congress. These are unhappy alternatives. This was essentially the dilemma that Paul Sweezy faced. In responding to the Attorney General of New Hampshire, he declared that he was not a member of the Communist party, yet he refused to answer several questions about his political activities because he felt that the inquiry infringed on personal rights protected by the Constitution.

Many witnesses called before investigating committees were confronted with much the same problem when they were asked to reveal their attitudes toward such matters as recognition of “Red China,” the Spanish Revolution, and the fate of Ezra Pound, or to disclose the identity of persons with whom they had associated. In most instances, the answers to these questions would not tend to incriminate, therefore the Fifth Amendment would not be available. Nevertheless, there were objections to this type of inquiry because it infringed on deeply held values of freedom of conscience, expression and association as well as

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35 From a prepared statement, Sweezy set forth his position. “Those called to testify before this and other similar investigations can be classified in three categories.

“First there are Communists and those who have reason to believe that even if they are not Communists they have been accused of being and are in danger of harassment and prosecution.

“Second, there are those who approve of the purposes and methods of these investigations.

“Third, there are those who are not Communists and do not believe they are in danger of being prosecuted, but who yet deeply disapprove of the purposes and methods of these investigations.”

Sweezy associated himself with the third group, then went on to consider the courses open to persons in this category.

“He can claim the privilege not to be a witness against himself and thus avoid a hateful inquisition. I respect the decision of those who elect to take this course. My own reason for rejecting it is that, with public opinion in its present state, the exercise of the privilege is almost certain to be widely misinterpreted.

“Alternatively, the witness can seek to uphold his principles and maintain his integrity, not by claiming the protection of the Fifth Amendment..., but by contesting the legitimacy of offensive questions on other constitutional and legal grounds.” Quoted from a quote in Sweezy v. New Hampshire, 354 U.S. 234, 239 (1957).

36 For an example of this type of inquiry see the interrogation of Arthur Miller by the House Committee on Un-American Activities in an investigation of the unauthorized use of United States Passports held in 1956. Hearings before the Committee on Un-American Activities House of Representatives, 84th Cong., 2d Sess. (1956).
privacy of belief and opinion. Yet what were the rights of witnesses beyond the privilege against self-incrimination?

Many persons refused to respond to this type of questioning on grounds that their rights under the First Amendment were violated.\(^3\) It was claimed that this Amendment constituted a bar to inquiries that pried into an individual's speech, associational, and political activities in much the same manner that the Fifth Amendment established a privilege against self-incrimination. Dean Griswold of Harvard Law School notes that in a number of cases where only the Fifth Amendment has been claimed, "the underlying reason, and perhaps the sound reason, is more closely connected with the First Amendment than with the Fifth. . . ."\(^8\) Frequently, witnesses would appeal to both provisions.

As Chief Justice Warren noted, the contention that rights under the First Amendment were violated by investigating committees raised questions far more complex than those related to the claim of privilege against self-incrimination. There was first the question whether the Amendment was applicable to congressional investigation. The opening phrase, "Congress shall make no law . . . ," seems to suggest that the Amendment was intended as a restriction on legislation that might infringe on designated freedoms. Could the limitations thus established on legislation be expanded to include the investigatory function? Or accepting the applicability of the First Amendment, could a simple inquiry, even under the threat of punishment for perjury or contempt, constitute an infringement on freedoms of speech, religion, press or assembly? If these propositions were upheld, there would remain a delicate problem of practical application. Freedoms under the First Amendment have never been regarded as absolutes, and since the traditional "clear and present danger" test seems to be of little value in this context, some new standard or procedure would have to be devised to distinguish the permissible infringements from those that should be barred. The appeal of witnesses to the First Amendment did, indeed, present the judiciary with novel questions on the appropriate limits of the investigatory power of Congress.

**Some Early Cases Involving an Appeal to the First Amendment**

The issue first came to the notice of the judiciary in United States

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\(^3\) Among the witnesses who cited the First Amendment either directly or indirectly were Barsky, Josephson, Sweezy, Lawson, Trumbo, Peck, Sacher, Knowles, Barenblatt and O'Connor.

\(^8\) Griswold, supra note 1 at 61.

For example, in response to inquiries concerning his associates, witness Emspak declared, "I don't think a committee like this or any subcommittee has a right to go into any question of my beliefs, my associations. . . ." His grounds were "primarily the First Amendment, supplemented by the Fifth." Hearings before
v. Josephson,\textsuperscript{40} a case growing out of an investigation into the Eisler affair\textsuperscript{41} in 1946 conducted by the House Committee on Un-American Activities. Josephson, who refused to be sworn or to answer questions, challenged the authority of the Committee, claiming that an inquiry into his speech and political activities violated rights protected by the First Amendment. A circuit court of appeals upheld the contempt conviction on grounds that a person who refused to be sworn had no standing to challenge the authority of the investigating body. In reference to the First Amendment claim, the majority was of the opinion that:

The power of Congress to gather facts of the most intense public concern, such as these, is not diminished by the unchallenged right of individuals to speak their minds within lawful limits.

In addition, the court emphatically declared that when “speech, or propaganda, or whatever it may at the moment be called, clearly presents an immediate danger to national security, the protection of the First Amendment ceases.”\textsuperscript{42}

The issue was under consideration again in United States v. Barsky,\textsuperscript{43} the leading case in the Joint Anti-Fascist Refugee investigation of 1946.\textsuperscript{44} Here a different court of appeals granted the possibility that First Amendment freedoms were being infringed, but held that the investigation was justified by an overriding public interest.

In both of these cases the court was divided and in each instance a vigorous dissent was registered. Judge Clark of the Second Circuit, dissenting in the Josephson case, believed that the authorizing resolution of the House Committee on Un-American Activities was so vague as to be defective.\textsuperscript{45} Furthermore, he declared:

We may pass beyond the defect to face the major issue whether or not an authorization so broad is compatible with the First Amendment. I think we can say without reservation of any kind that, had legislation been actually formulated in the exact terms of the authorization quoted, its unconstitutionality would have been conceded.\textsuperscript{46}

\textsuperscript{40}United States v. Josephson, 165 F. 2d 82, 97 (2d Cir. 1947).

\textsuperscript{41}Hearings before the House Committee on Un-American Activities on Investigation of Un-American Propaganda Activities in the United States (regarding Leon Josephson and Samuel Liptsen), 80th Cong., 1st Sess. (1947).

\textsuperscript{42}165 F. 2d 82, 91 (2d Cir. 1947).

\textsuperscript{43}Hearings before the House Committee on Un-American Activities on Gerhart Eisler, 80th Cong., 1st Sess. (1947); and Hearings before the House Committee on Un-American Activities on Investigation of Un-American Propaganda Activities in the United States (regarding Leon Josephson and Samuel Liptsen), 80th Cong., 1st Sess. (1947).

\textsuperscript{44}167 F. 2d 241 (D.C. Cir. 1948); cert. denied, 334 U.S. 843 (1948).

\textsuperscript{45}United States v. Josephson, 165 F. 2d 82, 97 (2d Cir. 1947).

\textsuperscript{46}9 Nine years later, in Watkins v. United States, the Supreme Court agreed with Judge Clark on the questionable nature of the authorizing resolution for the House Committee on Un-American Activities.
Judge Edgerton of the Court of Appeals for the District of Columbia summed up his objections to the conviction of Barsky by stating:

In my opinion the House Committee's investigation abridges freedom of speech and inflicts punishment without trial; and the statute the appellants are convicted of violating provides no ascertainable standard of guilt.\[47\]

In these dissents we find the initial examples of judicial willingness to view certain types of congressional inquiries as violative of the First Amendment.

By 1948, the Court of Appeals for the District of Columbia, although it had ruled against the witness, had acknowledged his contention that First Amendment freedoms were being infringed by congressional inquiries into speech and political activities, while in the Second Circuit the existence of such a claim was denied. This would seem to have been an appropriate time for a ruling from the Supreme Court, but \textit{certiorari} was denied in both instances. At this point there was little reason for optimism on the part of witnesses who had relied on the First Amendment as a defense against charges of contempt of Congress. Courts followed the precedents established in the foregoing cases, and with only one limited exception, ignored or disallowed claims based on the First Amendment.\[48\]

The one exception relates to the case of \textit{Rumely v. United States} \[49\] in the Court of Appeals for the District of Columbia in 1952. This case had developed from the efforts of a congressional committee, as a part of a general investigation into lobbying, to inquire into the activities of Edward A. Rumely, the Executive Secretary of the Committee on Constitutional Government. In an attempt to ascertain the financial basis of this group, congressional investigators had asked Rumely to reveal the names of persons who had purchased large quantities of publications from his organization. He refused to disclose the information and was cited for contempt of Congress.

The court of appeals interpreted the congressional committee's mandate to investigate "lobbying" to mean only direct contact with congressmen; consequently inquiries concerning Rumely's relations with third parties was beyond the authority of the inquiring committee. However, Judge Prettyman, joining Judge Edgerton, went on to declare, "On a record such as this, so slim a semblance of pertinency is

\[49\] 197 F. 2d 166 (9th Cir. 1952).
not enough to justify inquisition violative of the First Amendment."\textsuperscript{50}

This same judge wrote the opinion in the decision that sent Barsky to prison. He distinguished the \textit{Rumely} case from \textit{Barsky} by indicating that in the latter:

... it was shown that the President and other responsible Government officials had ... represented to the Congress that Communism and the Communists are, in the current world situation, potential threats to the security of the country. For that reason, and that reason alone we held that Congress had the power, and the duty, to inquire into Communism and the Communists.\textsuperscript{51}

Judge Prettyman thought the First Amendment was involved in both cases. In one instance infringement was justified by the "potential threats to the security of the country" while the \textit{Rumely} case lacked such urgency; consequently, protected freedoms could be honored.

Upon appeal, the Supreme Court sustained Rumely in his fight against charges of contempt,\textsuperscript{52} although the majority avoided the First Amendment issue by simply holding that questions put to the witnesses were not within the scope of the authorizing resolution. However, Justices Douglas and Black thought the questions were relevant, and in separate opinions, they expressed their readiness to meet the constitutional issue by holding that Congress had no authority to make the inquiry since it had infringed on protected freedoms.\textsuperscript{53}

By 1953, four distinguished jurists, Edgerton, Prettyman, Douglas and Black thought the First Amendment should be interpreted to provide some restraint on the investigatory power of Congress.

\textbf{ATTITUDE OF THE WARREN COURT—1957}

Although there had been opportunity for review,\textsuperscript{54} it was not until

\begin{itemize}
  \item \textsuperscript{50} \textit{Id.} at 172.
  \item \textsuperscript{51} \textit{Id.} at 173.
  \item \textsuperscript{52} Justice Frankfurter, writing for the majority, did note possible infringement on protected freedoms. "Surely," he declared, "it cannot be denied that giving the scope to the resolution for which the Government contends, that is deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment." United States v. Rumely, 345 U.S. 41, 46 (1953).
  \item \textsuperscript{53} Justice Douglas wrote: "If the present inquiry were sanctioned, the press would be subjected to harassment that in practical effort might be as serious as censorship. A publisher, compelled to register with the federal government, would be subjected to vexations inquiries. A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or papers is indeed the beginning of of surveillance of the press. True, no legal sanction is involved here. Congress has imposed no tax, established no board of censors, instituted no licensing system. But the potential restraint is equally severe. The finger of government levelled against the press is ominous. Once the government can demand of a publisher the names of the purchaser of his publications, the free press as we know it disappears." United States v. Rumely, 345 U.S. 41, 57 (1953).
  \item \textsuperscript{54} The Supreme Court avoided the First Amendment Question in \textit{Emspak v. United States}, 349 U.S. 190 (1955).
\end{itemize}
June of 1957 that the Supreme Court again considered the relation of
the First Amendment claim to congressional investigations. In the
Watkins case, the plaintiff had been summoned before a subcommittee
of the House Committee on Un-American Activities in connection with
the 1954 investigation of communist infiltration into labor unions. Watkins talked freely about his past activities, admitting that he had
worked closely with the Communist party and had supported some of
its activities; but he denied being a member and cited instances where
he had opposed the communists. By all accounts, he was a courteous
and cooperative witness and encountered no difficulty until counsel
for the Subcommittee read certain names from a list and asked Watkins
to identify them and indicate whether they had been associated with
communist activities.

At this point the witness read a prepared statement as follows:

I will answer any question which this committee puts to me
about myself. I will also answer questions about those persons
whom I know to be members of the Communist party and whom
I believe still are. I will not, however, answer any questions with
respect to others with whom I associated in the past. Watkins, attended by counsel, stated specifically that he was not relying
on the Fifth Amendment; instead, he based his refusal to answer on
the grounds that the questions were "outside the proper scope of (the)
committee's activities" and that the committee had no "right to under-
take the public exposure of persons because of their past activities." This answer proved unacceptable and the witness was subsequently
cited for contempt of Congress.

Watkins' conviction was at first reversed by a division of the Court
of Appeals for the District of Columbia, but upon a motion for a re-
hearing en banc, the conviction was sustained by a six to two vote
with Chief Judge Edgerton and Judge Bazelon, who had constituted
the majority in the first instance, turning in dissents. From this action
the Supreme Court granted certiorari. Later, by a six to one decision
with Chief Justice Warren writing for the majority and Justice Clark
entering a dissent, the court of appeals was reversed and the case re-
manded with instruction to dismiss the indictment.

The specific basis for the decision in the Watkins case was that the
witness had been denied due process of law. According to Chief Justice
Warren, the authorizing resolution of the House Committee on Un-
American Activities was so vague and the other methods for determin-

56 Hearings before the Committee on Un-American Activities of the House of
Representatives, (Investigations of Communist Activities in the Chicago Area,
57 Id. at 4275.
58 Ibid.
ing the "subject under inquiry" so inadequate that the witness could not judge whether the questions were pertinent or not. Consequently the petitioner "was . . . not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment." In a companion case, much the same defect was fatal to the efforts of New Hampshire to punish Professor Paul Sweezy for refusing to answer questions posed by the Attorney General in behalf of the state legislature. The Court ruled that:

The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority. It followed that the prosecution of Sweezy violated the due process clause of the Fourteenth Amendment.

Although the decisions in the above cases related, in part, to procedural guarantees, the Court was also faced with the question whether the investigations had infringed on rights protected by the First Amendment. Both witnesses had invoked that constitutional provision at some stage in the proceedings. At the time of the inquiry, Sweezy declared, "I shall respectfully decline to answer questions concerning ideas, beliefs, and associations which . . . seem to me to invade the freedoms guaranteed by the First Amendment to the United States Constitution . . ." Watkins, on the other hand, did not invoke the Amendment at the hearing, but he did so upon appeal. In his brief, it was argued that "compelled disclosures sought by the committee abridge rights protected by the First Amendment" and that the Committee could not "constitutionally require petitioner to reveal past political affiliations of his one-time associates."

Significantly, the Court took the occasion to answer at least some of the questions raised by the First Amendment claim. Any lingering doubts as to the applicability of that provision to congressional investigations should be dispelled. "Clearly," wrote Chief Justice Warren, "an investigation is subject to the command that Congress shall make no law abridging freedom of speech or press or assembly." He also noted that "While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of law making." Furthermore, the Court recognized that an inquiry may constitute a restraint on protected freedoms. "The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental
interference." While the encroachment in particular instances might be very slight, the cumulative effect of wide-spread inquisitorial activity could easily lead to substantial infringement of individual rights.

Also, the Court felt that there was a particular hazard in subjecting a witness to public scorn and loss of prestige for beliefs and associations entertained a quarter of a century ago which, in the eyes of the public, would be judged by contemporary standards. The fact that in many instances the greater part of the penalty leveled against the recalcitrant witness may be in the form of social pressures or ostracism inflicted by private persons does not relieve Congress of the responsibility of "initiating the reaction." While both Justice Warren, for the Court, and Justice Frankfurter, in a concurring opinion, took the position that the First Amendment does limit the investigatory power of Congress, they did not suggest that a valid claim based on that Amendment would prevail in all instances. We are cautioned that although freedom of speech, religion, press and assembly rank high in our value structure, these values must be measured against competing demands. Chief Justice Warren noted that "despite the adverse effects which follow upon compelled disclosures of private matters, not all such inquiries are barred." This is not an unreasonable position although it poses the further difficulty of distinguishing the permissible encroachments from the one so gross as to be violative of the First Amendment. In dealing with this problem, a balance of interest approach was suggested. Against "the interest of Congress in demanding disclosures from an unwilling witness," the Court would weigh an "individual's rights to privacy" and "his liberty of speech, press, religion (and) assembly." Justice Frankfurter expanded upon this approach in his concurring opinion in the *Sweezy* case:

To be sure, this is a conclusion based on a judicial judgment in balancing two contending principles—the right of a citizen to political privacy, as protected by the Fourteenth Amendment, and the right of the State to self-protection. And striking the balance implies the exercise of judgment. This is the inescapable judicial task in giving substantive content, legally enforced, to the Due Process Clause, and it is a task ultimately committed to this Court.

Note that both Justices seem to anticipate a more active role on the part of the judiciary in determining the broad outline of the law of legislative investigations.

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64 Id. at 197.
65 Id. at 198.
66 Id. at 198-199.
Recent decisions seem to indicate a slight shift in the attitude of the Supreme Court toward the rights of witnesses before investigating committees. While the shift is not so precipitous as to undercut the basic orientation toward the First Amendment, the tone of the opinions and the effect of the rulings show a greater deference toward the interest of the state in compelling testimony from reluctant witnesses than was evident in the 1957 cases.

In the Barenblatt case, the petitioner had been called to testify before a subcommittee of the House Committee on Un-American Activities in connection with the 1954 investigation of communist infiltration into educational institutions. Barenblatt, a former instructor at Vassar College, was asked whether he was or had ever been a member of the Communist Party and whether he had belonged to the Haldane Club during the time he held a fellowship from the University of Michigan. His refusal to respond brought a conviction on a five count indictment that was upheld by the Court of Appeals for the District of Columbia. Subsequently, the Supreme Court remanded the case to the Court of Appeals for a rehearing in light of the Watkins case which had been decided in the interval. A sharply divided Court of Appeals again sustained the conviction and the Supreme Court granted certiorari.

The petitioner argued that his conviction ought to be set aside, first, on grounds of vagueness in the congressional rule which founded the parent committee, second, because he had not been sufficiently "apprised of the pertinency" of the questions, and third, because "the questions petitioner refused to answer infringed rights protected by the First Amendment."68 The arguments that had prevailed for Watkins came to naught for Barenblatt. By a five to four decision, the conviction was sustained.

Justice Harlan, writing for the majority, sought to distinguish this case from Watkins. On the issue involving vagueness of the authorization resolution, which incidentally was the same rule challenged in the 1957 case, Justice Harlan asserted that the defect had been compensated for by the clear statement by the Chairman of the Subcommittee concerning the authorization and the purpose of the investigation. Further, on the question of pertinency, the majority felt that in the context of the investigation the questions posed, unlike those put to Watkins, were relevant and pertinent to the declared objectives of the inquiry.

On the constitutional question, the Court accepted the interpretation of the First Amendment found in the 1957 cases. Justice Harlan wrote,

"The precise constitutional issue confronting us is whether the Subcommittee's inquiry into petitioner's past or present membership in the Communist Party transgress the provisions of the First Amendment, which of course reach and limit congressional investigations." Then the Court also accepted the balance of interest concept as a suitable approach for judging the applicability of the constitutional provisions. However, in weighing the various elements involved in the Barenblatt case, the Court concluded "that the balance between the individual and the governmental interest... must be struck in favor of the latter, and... therefore the provisions of the First Amendment (had) not been offended." The majority seemed prepared to tip the scales in favor of the government's interest in investigating communism provided only that a reasonable relation could be established between the questioning of Barenblatt and the declared objective of Congress.

Justice Black, who was joined by Justices Warren, Douglas and in part by Brennan, wrote a vigorous dissent in which he chided the majority for over subscribing to the government's view that there was a significant connection between the questioning of the witness and the fate of the nation. Holding that a witness's constitutional rights would have to be subordinated to the demands of an investigating committee even when a valid relationship existed between the questioning and a legislative objection was an anathema to Justice Black. He argued that the constitutional rights of a witness ought to prevail irrespective of the procedural and jurisdictional tidiness of the investigation.

The main point urged in the dissent was that the conduct of the House Committee on Un-American Activities and that of the Subcommittee in question infringed rights protected by the First Amendment and this was ample basis for reversing the conviction of Barenblatt. Devotion to the freedoms of the First Amendment leads Justice Black to reject the "balance of interest" test supported by the Court in both the Watkins and Barenblatt cases. Congress simply has no interests that supersede the freedoms of speech, assembly, press and petition. But even assuming the balancing process, Justice Black was of the opinion that the most important element to be weighed had been ignored. The Court, he charged, "completely leaves out the real interest in Barenblatt's silence, the interest of the people as a whole in being able to join organizations, advocate causes and make political 'mistakes' without later being subjected to governmental penalties for having dared to think for themselves." The dissent in Barenblatt

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69 Id. at 126 (1959).
70 Id. at 134.
71 Id. at 144.
contains the clearest judicial exposition to date on the social interest involved in legislative investigations.

The appellant in the *Uphaus* case was the Executive Director of World Fellowship, Inc., an organization that had conducted programs of political discussion and recreation in New Hampshire. Some of the speakers at the sessions were alleged to have been either communist or affiliated with front organizations. The state's attorney general, acting as a one man legislative committee under the same authority as that involved in the *Sweezy* case, undertook an investigation.\(^\text{72}\) The issue was joined when Uphaus, who had testified about his own activities, refused to honor a subpoena *duces tecum* calling for a list of persons who had attended the summer sessions of World Fellowship.

To his conviction for civil contempt, Uphaus interposed several objections. First, he maintained that the ruling in *Pennsylvania v. Nelson*\(^\text{73}\) denied the state's jurisdiction over matters relating to subversion, and second, he argued that the order requiring him to reveal the names of guests violated rights protected by the First Amendment.

In sustaining Uphaus' conviction, the Court, speaking through Justice Clark, ruled that the *Nelson* decision only barred a state from prosecuting subversive conduct that was directed against the national government. The purpose of the *Nelson* ruling was to prevent a race to the court house by state and federal officials. Nothing in that decision barred the prosecution of seditious or subversive acts directed against a state, and even more remote was the notion that the ruling restricted a state from investigating "subversive persons" which New Hampshire was purporting to do.

Justice Clark dismissed the First Amendment claim rather summarily by declaring that "academic and political freedom discussed in *Sweezy v. New Hampshire* are not present here in the same degree since World Fellowship is neither a university or a political party."\(^\text{74}\) Any rights Uphaus might have had under the First Amendment were, in the opinion of Justice Clark, more than counterbalanced by the authority of the state to inquire into the operations and membership of an organization incorporated under New Hampshire law.

Justice Brennan, in a dissent joined by Justices Black, Douglas and Warren, expressed the view that the primary purpose of the investigation was to punish, by exposure to public scorn, persons connected with the World Fellowship, Inc. This was hardly justification for any kind of investigation and particularly one that infringed upon speech and associational activities. Furthermore, Justice Brennan, suggested

\(^{72}\) See *supra* note 5.

\(^{73}\) 350 U.S. 497 (1956).

\(^{74}\) *Uphaus v. Wyman*, 360 U.S. 72, 77 (1959).
that due to the exposure motive the whole investigation might be regarded as an equivalent of a bill of attainder and therefore unconstitutional.

**RATIONALE FOR THE FIRST AMENDMENT CLAIM**

Before the judiciary can go much farther in interpreting the First Amendment as a restraint on legislative investigations, some agreement will have to be reached on the theoretical basis for such a holding. The lack of this orientation is apparent in the groping one detects in the works of justices, lawyers and laymen who are favorably disposed to such a claim. Certainly, something more elaborate than the simple statement that "protected freedoms are infringed" will be needed if the Supreme Court is to sustain the First Amendment claim where no defects can be found in the procedure or authorization of investigating committees.

Some witnesses have inferred that their refusal to respond is based on a general right to privacy. In a famous article published in 1890, Samuel D. Warren and Louis Brandeis argued that an individual's interest in privacy should be protected against intrusions from newspaper reporters, gossip columnists and photographers. The idea has gained the support of many influential scholars and has been accepted in some jurisdictions. However, it may be doubted whether a claim which might be valid against private parties can be asserted against a committee of Congress, and there would be further questions about its association with the First Amendment. Later as an associate justice, Brandeis wrote that the founding fathers "sought to protect Americans in their beliefs, their emotions and their sensations. They conferred as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." But even here, he was referring to the Fourth Amendment; not the First. Consequently, Charles P. Curtis is probably correct when he wrote that the Supreme Court has never held that the First Amendment includes a right to privacy.

One further point needs clarification. Persons who oppose the notion that the First Amendment constitutes some sort of limitation on the power of Congress to investigate frequently invoke Wigmore's quote from Lord Hardwicke that "the public is entitled to every man's evidence" as support for their position. Just as frequently, they will

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75 Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).
77 Olmstead v. United States, 277 U.S. 438 (1928), (Dissenting opinion).
78 Curtis, Wringing the Bill of Rights, The Pacific Spectator at 371 (1948).
79 "For more than three centuries it has now been recognized as a fundamental maximum that the public... has a right to every man's evidence." S Wigmore, Evidence §2192 (3d ed. 1940).
neglect to point out that this statement was made in relation to ju-
dicial proceedings, and that Wigmore, at least, was firmly of the opinion
that legislatures did not have unlimited power of inquiry.80

Another question related to the claim of privacy is whether or not
freedom of speech, secured by the First Amendment, carries with it
a privilege of silence. Such an implication might be drawn from the
opinion of Justice Jackson in West Virginia v. Barnette,81 a case de-
cided in 1943. Here the Court viewed the flag salute as related to free-
dom of expression and held that the First Amendment protected the
Jehovah's Witnesses in their refusal to perform the ceremony. Yet this
point of view, suggested at the time the First Amendment registered its
high water mark in the Roosevelt Court, has not been developed in
subsequent litigation. Most authorities would be inclined to agree
with Judge Prettyman's analysis in the Barsky case that while freedom
of speech is justified as a means for arriving at political decisions and
for effecting change in both government personnel and policy, neither
of these considerations supports a claim to silence.82

What justification is there, then, for construing the First Amend-
ment as a limitation on the investigatory power of legislatures? This
writer supports the view that certain types of inquiries constitute a
prior restraint on freedom of expression and political association.
"Patently, if it is well known that expressing novel political ideas and
advocating certain types of change in government frequently subject
individuals to burdensome investigation and disparaging publicity, many
persons might be constrained to refrain from such activity."83 Wides-
spread use of legislative investigations that pry into political expression
and association should be regarded as detrimental to the political
process in a democracy.

That compelled disclosures may constitute a prior restraint upon
political activity and association seems clear. As the petitioner argued
in the Watkins case, "If a union official from Rock Island can be sub-
opnaed in 1954 to disclose the 1944 political membership of his former
associates, fear will take the place of freedom of political association.
..."84 Previously, Justice Douglas had expressed the view in the
Rumely case that once the government, through an investigating com-

80 However, at sections 2195 under the heading "Officers Possessing Power to
Compel Testimonial Answers," Wigmore notes that due to policy considera-
tions and the fact that legislatures do not proceed according to strict eviden-
tial rules, "strict limitations" should be placed on the power of legisla-
tures to compel testimony. Id., §2195. Also see Wigmore's criticism of legisla-
tive inquiries in Legislative Power to Compel Testimonial Disclosures, 19
Ill. L. Rev. 452 (1924).
81 319 U.S. 624 (1943).
82 Barsky v. United States, 167 F. 2d 241, 249 (D.C. Cir. 1948).
83 Note Constitutional Limitations on Un-American Activities Committee, 47
Colo. L. Rev. 416, 428. Also see, note The Power of Congress to Investigate
and to Compel Testimony, 70 Harv. L. Rev. 671, 674 (1957).
84 Brief for Petitioner, p. 21.
mittee, can force a publisher to disclose the names of those who subscribe to his material, "The free press as we know it disappears" and "the imponderable pressures of the orthodox lay hold." More recently, Chief Justice Warren noted that among the evils associated with compelled disclosure of unpopular views was the "more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and association in order to avoid a similar fate at some future time." The grave consequences attending disclosure of membership in unpopular organizations are well known to the government employee, the school teacher and the defense worker. Even persons engaged in purely private pursuits can be adversely affected by such disclosures. It seems quite probable that this state of affairs tends to make persons more than circumspect in their organizational affiliations, and actually works to restrain expression and action in the realm of politics.

The importance of freedom of political association was emphasized by Justice Frankfurter when he wrote that "the inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of our kind of society that it cannot be constitutionally encroached upon on the basis of so meager a countervailing interest" as that presented by New Hampshire. Nor is this a newly discovered value, for over a century ago De Tocqueville expressed the view that:

> The most natural privilege of man next to the right of acting for himself is that of combining his exertions with those of his fellow creatures and of acting in common with them. I am therefore led to conclude that the right of association is almost as inalienable as the right of personal liberty. No legislator can attack it without impairing the very foundations of society.

Indeed, the freedom to affiliate and to act through groups composed of persons of like interests is one of the most viable elements in our political system and any infringement thereon must be carefully weighed.

It follows, then, that the availability of the First Amendment as a bar against certain types of inquiries should be regarded as more than a constitutional right of the witness, for, as Justice Black pointed out in his Barenblatt dissent, society has an interest in preserving the integrity and the vitality of the political process. Mr. Alexander Meiklejohn had this social interest in mind when he asserted that in the area of public discussion, the First Amendment:

> is not, in the first instance, concerned with the right of the

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85 345 U.S. 41, 57 (1953).
88 De Tocqueville, Democracy in America at 196 (Bradley rev. 1945).
speaker to say this or that. It is concerned with the authority of the hearers to meet together, to discuss, and to hear discussed by speakers of their own choice, whatever they may deem worthy of their consideration.\footnote{From the heat and bitterness of actual investigation, witnesses have appealed to the protection of the Constitution and have presented to the judiciary questions involving an interpretation of such traditional values as freedom of expression and association. The Supreme Court.}

From this social interest position one can counter the criticism made by Justice Clark in the Watkins case\footnote{Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 84th Cong., 2d Sess. (1955), p. 11.} that the petitioner was seeking to vindicate, not his own, but the rights of others. Apart from whatever rights Watkins and those he sought to protect might have had, the crux of the matter is that if the interrogation infringed on freedoms essential to the political process, society had an interest in the inquiry that Congress and the judiciary are bound to respect.

**Conclusion**

Constitutional rights are seldom devised to meet imagined or fancied wrongs; they are normally developed as a response to actual practices and policies which a dominant segment of the community feels are reprehensible. The cold war with its tensions and anxieties which drove the nation to view with grave concern any unorthodox beliefs and behavior and to countenance restrictions and limitations on individual freedom on a scale unknown in previous periods of American history may have been the matrix for new constitutional developments. It is hoped that a substantial number of Americans may now be able to look back on recent events with a degree of detachment to permit a balanced assessment of the clash of interest between investigating committee and the rights of witnesses. At the very least we should attempt to view the problem in its proper perspective. In time of national crisis, the issue is likely to be represented as a choice between the security of the nation on one hand the rights of a few people on the other. If this were the correct analysis, there would be no choice at all. But it is submitted that the Nation's security rests on many complex factors, most of which are far removed from the investigatory power of Congress. Consequently, the factors in the equation are still the traditional interest of the Government in information as weighed against both the constitutional rights of witnesses and the interest of society in maintaining the viability of the political process.

From the heat and bitterness of actual investigation, witnesses have appealed to the protection of the Constitution and have presented to the judiciary questions involving an interpretation of such traditional values as freedom of expression and association. The Supreme Court.

\footnote{Justice Clark maintained, in dissent, that Watkins "was actually seeking to . . . protect his former associates, not himself, from embarrassment. He had already admitted his own involvement. He sought to vindicate the rights, if any, of his associates. It is settled that one cannot invoke the constitutional rights of another." 354 U.S. 178, 231 (1957).}
has responded by stating that the restrictions of the First Amendment are binding upon legislative committees, and by holding that certain inquiries may constitute an infringement on protected freedoms. (It should be noted that the strictures of the First Amendment apply with equal force to state legislatures.) Further, when protected freedoms are involved, the Court has indicated that it would review the procedure and authorization of the inquiring committee with great care. However, the basic constitutional question of whether the First Amendment constitutes a limitation on the power of legislatures to compel disclosures even where there are no authorization or procedural defects has not been answered by the Supreme Court.

It seems probable that this question will be presented in due course. Since constitutionally protected liberties ought to have a standing in their own right that may counterbalance the power of Congress quite apart from any technical defect in the action of the legislature or its committees, this writer is of the opinion that the Court should hold that the First Amendment does constitute such a restraint. The limitation could take the form of a presumption that all compelled disclosures of political beliefs, actions, and associations, whether legal or otherwise, are barred, unless the government can show a direct and compelling relation between the information sought and some substantial interest that Congress can protect. Admittedly this formulation does not embody the preciseness of an algebraic equation, but it does provide a point of departure, identifies the values to consider and suggests a method of establishing their relative merits. Adding the interest of society in maintaining the vitality of the political process to the interest of the individual witness in protected rights would seem enough to justify the limited presumption in favor of the First Amendment.

The Court might also take the position that among the elements necessary to establish the direct and compelling relation between the information sought and a substantial interest that Congress can protect is a showing that the information was not available to the investigators from any other reasonable source. It has been clearly established that in many instances where Congress has cited a witness for contempt, the information sought was either in the hands of the inquiring committee or it was of such a trivial nature that it could have had no possible relevance to the ability of Congress to legislate. In the case of John Watkins, the identity and the political affiliations of the persons he refused to comment upon were known to the committee.

The judiciary might also attempt to establish categories of questions

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91 In N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958), Justice Harlan declared, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."
that are presumed to fall within the protection of the First Amendment, thus putting the witness and the investigators on notice that when such inquiries are made the relation to a substantial interest must be clearly indicated. A precedent along this order may be seen in the relation between the Fifth Amendment privilege against self-incrimination and the inquiry concerning communist affiliations.

Finally, it must be noted that the expanded role of the judiciary does not relieve Congress of the ultimate responsibility for supervising its investigating committees. Nevertheless, the judiciary can provide some protection for witnesses and the introduction of the First Amendment as a possible bar to certain types of inquiries could be an important addition to the law of legislative investigations.