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Congressional Investigations: First Amendment Limitations on the Power to Punish for Contempt for Refusing to Answer Before a Congressional Committee

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because there is nothing in the evidence to support this figure. Surely there is no greater basis in the evidence for supporting a suggested amount to be allowed for pain over a longer time segment than the life expectancy of the plaintiff.

The only manner in which one can justify this anomaly is by recognition of the simple fact that juries do appear to return higher, often excessive, verdicts in cases where suggestion of a per-diem formula is permitted than in those cases where no such suggestion was employed.[30] Viewed in this light, the distinction gains at least practical validity, but the failure of the court to present its case in that vein leaves doubt as to whether the distinction was intended and if it will survive. In any event, it is now clear that a suggested award, couched in non-inflammatory terms, is permissible. While the *Affett* decision is technically a defeat for plaintiff's counsel in Wisconsin, it may have given them more leeway than they legally enjoyed in the past.

LOUIS W. STAUDENMAIER, JR.

Constitutional Law — Congressional Investigations — First Amendment Limitations on the Power to Punish for Contempt for Refusing to Answer before a Congressional Committee: The petitioner was summoned to testify before a committee of the House Committee on Un-American Activities at a hearing in Atlanta, Georgia. The subcommittee was investigating Communist colonization and infiltration of industry in the South. After being sworn in and stating his name, the petitioner refused to answer any further questions on the ground that his rights under the First Amendment would thereby be violated. As a result of his refusal to answer the subcommittee, he was convicted for contempt of Congress and this conviction was affirmed by the Court of Appeals. The Supreme Court of the United States granted certiorari and upheld the conviction. The basis of the decision was that the First Amendment claims raised by the petitioner were identical to those advanced in the *Barenblatt*[1] decision and upon the authority of that case could not prevail. *Wilkinson v. United States,* ——U.S.——, 5 L. Edd. 2d 633 (1961).[2]

[30] The National Association of Claimant's Compensation Attorneys recognizes this distinction and has filed Amicus Curiae briefs in several recent cases, including the *Affett* case, involving the question of use of a formula.

[1] Barenblatt v. United States, 360 U. S. 109 (1959).

[2] The specific question that Wilkinson was convicted for refusing to answer was: "Mr. Wilkinson, are you now a member of the Communist Party?" Wilkinson v. United States, — U.S. —, 5L. Ed. 2d 633, 639 (1961). The conviction was assaulted from several different directions before the Supreme Court: 1) the subcommittee was without authority to interrogate him, because their purpose was to investigate opposition to the committee and to harass and expose him, 2) the question under inquiry by the subcommittee, which he refused to answer, was not pertinent to the investigation, 3) the

The Committee on Un-American Activities or any sub-committee thereof is authorized to investigate un-American propaganda for the purpose of aiding Congress in its legislative capacity.[3] Any person who refuses to appear or answer any question before the Committee or a subcommittee may be punished for contempt of Congress.[4] The investigatory power of Congress, supplemented by the power to compel testimony through contempt proceedings, was the basis for the conviction of Wilkinson.

The power of Congress to investigate as an adjunct to the legislative function is established beyond dispute.[5] Congressional capacity in this respect has been acknowledged throughout the history of this country.[6] In *McGrain v. Daugherty*,[7] the Supreme Court recognized such power as inherent in the Congressional body.[8] Similarly, the power to punish for contempt is thought to reside inherently in Congress. This was established in an early case upholding contempt proceedings against a non-member of the legislature.[9] In 1881, *Kilbourn v. Thompson*[10] cast doubt on the ability of Congress to examine the affairs of private citizens.[11]

pertinency of the question was not made clear to the petitioner at the time he was directed to answer it, so that he was denied due process and 4) the action of the subcommittee in subpoenaing and questioning the petitioner violated his rights under the First Amendment. *Supra* at 639. This article will deal primarily with the First Amendment issue. The other issues, although certainly not insignificant, will be covered in connection with the First Amendment claim.

The *Wilkinson* case was accompanied by a companion case, Braden v. United States, — U. S. —, 5 L. Ed. 2d 653 (1961). The principal issues raised in that case were substantially identical to those considered in *Wilkinson*. *Supra* at 655.

[3] The committee is authorized to investigate: "(i) the extent, character, and objects of un-American propaganda activities in the United States . . . and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." Rule XI of the Standing Rules, 60 Stat. 823, 828 (1946).

[4] Refusal of witness to testify. Every person who having been summoned as a witness by the authority of either House of Congress to give testimony . . . 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. 11 Stat. 155 (1857), 2 U. S. C. §192 (1959).

[5] *Congressional Investigations: A Symposium*, 18 U. CHI. L. REV. 421 (1951); *Legislative Inquiry Into Political Activity: First Amendment Immunity From Committee Interrogation*, 65 YALE L. J. 1159 (1956); *The Power of Congress to Investigate and to Compel Testimony*, 70 HARV. L. REV. 671 (1957).

[6] This function of the legislature has its roots in 17th century English parliamentary history. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153 (1926).

[7] 273 U. S. 135 (1927).

[8] *Id.* at 173.

[9] Anderson v. Dunn, 6 Wheaton 204 (1821) (This case involved attempted bribery of a legislator); see, *e.g.*, In Re Chapman, 166 U.S. 661 (1897); Marshall v. Gordon, 243 U. S. 521 (1917); Journey v. MacCraken, 294 U. S. 125 (1935).

[10] 103 U. S. 168 (1881).

[11] *Id.* at 190. Justice Miller, speaking for the court stated: ". . . 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

But any doubt that Congress can compel a private citizen to appear before a committee was dispelled by *McGrain v. Daugherty.*[12] Both the *Kilbourn* and *McGrain* cases limited inquiry to areas which involve a function of the legislature.[13] In *Kilbourn,* the purpose of the inquiry was found to be improper and one from which no valid legislation could result.[14] Later cases have given the legislature the benefit of a presumption that their purpose is legitimate.[15] The power of Congress to investigate and punish for contempt was thus clearly established within the first three decades of the twentieth century. The limitation placed on the investigatory power by the *McGrain* case,[16] taken in conjunction with the presumption of a valid legislative purpose, left Congress free to investigate practically any area without judicial hinderance.[17]

In the post-war years, litigation concerning the investigatory power of Congress has centered around the protection afforded witnesses by the Bill of Rights. Chief Justice Warren has stated that witnesses, ". . . cannot be subjected to unreasonable search and seizure."[18] The well-known right to invoke the Fifth Amendment protection against self-incrimination has been firmly established as available to witnesses before investigating committees.[19] *Wilkinson* and related cases bring into play yet another area of the Bill of Rights. The problem raised is this: Granted that Congress has the power to investigate and punish for contempt, what restrictions, if any, does the First Amendment place on this power? The answer to this problem is complex and a great deal of controversy has arisen respecting application of the First Amendment to Congressional investigations.

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has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen."

[12] *Supra* note 7, at 173, 174.

[13] *Supra* note 10, at 190 and *supra* note 7, at 175, 176.

[14] *Supra* note 10, at 193. The case involved inquiry into a real estate pool. The court felt that the legislature had delved into matters that should be the concern of the judiciary.

[15] In Re Chapman, *supra* note 9, at 670 (resolutions do not have to declare in advance what the Senate meditated doing when the investigation was concluded); McGrain v. Dougherty, *supra,* note 7, at 178 (presumed to be in good faith to aid in legislating); Sinclair v. United States, 279 U. S. 263, 295 (1929). (This case went a step further and declared that the right to investigate in aid of the legislature's constitutional power is not abridged because the information sought may be used in the prosecution of pending government suits.)

[16] *Supra* note 7. That the purpose must be of a legitimate legislative nature.

[17] Apart from investigating a subject within the competence of Congress, the question asked and refused must also be pertinent to the subject under inquiry before punishment can be inflicted. *Supra* note 4.

[18] Watkins v. United States, 354 U. S. 178, 188 (1957). This was dicta in the case which involved procedural deficiencies of the investigation and the First Amendment issue.

[19] Blau v. United States, 340 U.S. 159 (1950); Emspack v. United States, 349 U. S. 190 (1955); Quinn v. United States, 349 U. S. 155 (1955).

The First Amendment issue initially emerged in *United States v. Josephson.*[20] Josephson refused to be sworn or answer questions before the House Committee on Un-American Activities. His position was that an inquiry into his political activities would violate his rights under the First Amendment. The Circuit Court of Appeals for the Second Circuit upheld a contempt conviction. The court found that the First Amendment rights of Josephson were overridden by a compelling governmental interest in national security.[21] The issue was again raised in *United States v. Barsky.*[22] There a majority held that First Amendment rights were overruled by public interest, but specifically recognized the possibility of infringement of these rights.[23]

The Supreme Court denied certiorari in both these cases,[24] leaving the lower courts in doubt as to how to deal with First Amendment claims. This doubt was intensified by the Court's subsequent avoidance of the First Amendment issue.[25] *United States v. Rumely*[26] illustrates the reluctance of the Court to face the issue raised by witnesses claiming protection of the First Amendment:

> Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication. Until then it is our duty to abstain from marking the boundaries of congressional power or delimiting the protection guaranteed by the First Amendment.[27]

The lower courts, faced with the reluctance of the Supreme Court, found a great variety of reasons for failing to convict witnesses claiming the protection of the First Amendment.[28]

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[20] 165 F. 2d 82, (2d Cir. 1947), *cert. denied* 333 U. S. 838 (1948).

[21] The court declared that when speech, ". . . clearly presents an immediate danger to national security, the protection of the First Amendment ceases." *Id.* at 91.

[22] 167 F. 2d 241, (D. C. Cir. 1948), *cert. denied,* 344 U. S. 843 (1948).

[23] *Ibid.*

[24] *Supra* notes 20 and 22.

[25] Marshall v. United States, 176 F. 2d 473 (D. C. Cir. 1949), *cert. denied,* 339 U. S. 933 (1950); Lawson v. United States, 176 F. 2d 49 (D. C. Cir. 1949), *cert. denied,* 339 U. S. 162 (1950); Dennis v. United States, 339 U. S. 162 (1950), *cert. denied* on this issue; United States v. Rumely, 345 U. S. 41 (1953) (questions not within scope of authorizing resolution); Emspak v. United States, 349 U.S. 190 (1955) (5th Amendment grounds).

[26] 345 U. S. 41 (1953).

[27] *Supra* note 25, at 48. The court avoided the First Amendment issue by merely finding the questions put to the witness were not within the scope of the committee's authorizing resolution.

[28] United States v. Raley, 96 F. Supp. 495 (D. D. C. 1951) (self-incrimination); United States v. Nelson, 103 F. Supp. 215 (D. D. C. 1952) (same); Keeney v. United States, 218 F. 2d 843 (D. C. Cir. 1954) (erroneous admission of evidence); United States v. Rumely, 354 U. S. 41 (1953) (scope of resolution); Bart v. United States, 349 U. S. 155 (1955) (failure of committee to rule on witness's objections); United States v. Kamin, 136 F. Supp. 791 (D. Mass. 1956) (pertinency); United States v. Grossman, 229 F. 2d 775 (D. C. Cir. 1956) (self-incrimination).

In 1957, the Supreme Court finally encountered the issue in *Watkins v. United States*[29] and a companion case.[30] Neither case was decided on the basis of the First Amendment claims.[31] However, the Court did spend some time on the protection afforded by the First Amendment. Chief Justice Warren, speaking for the court in *Watkins,* made it clear that the First Amendment applies to Congressional investigations.[32] He further warned that First Amendment rights could be abridged indirectly by social ostracism.[33] Clearly, the court recognized the danger of investigating committees running afoul of the First Amendment. For dealing with this problem the court propounded a balancing of interests test. In the words of Chief Justice Warren:

> The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected.[34]

In *Barenblatt v. United States,*[35] the Supreme Court critically modified the grounds for the *Watkins* decision.[36] Justice Harlan, speaking for the majority, then proceeded to the central issue of the case involving the First Amendment contention. The "balancing of interests" test appearing in earlier cases was firmly established as determinative of First Amendment rights:

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[29] 354 U. S. 178 (1957).

[30] Sweezy v. New Hampshire, 354 U. S. 234 (1957).

[31] In *Watkins,* the court held that the authorizing resolution of the House Committee on Un-American Activities so vague that the petitioner could not judge whether the questions were pertinent to the inquiry. Thus, his conviction was invalid under the Due Process clause of the Fifth Amendment. *Supra* note 29, at 215. In *Sweezy,* it was found that there was no indication that state legislature wanted the information sought from the petitioner. Thus, on basically the same grounds as in *Watkins,* the court held there was a violation of the Due Process clause of the 14th Amendment. *Supra* note 30, at 254, 255.

[32] *Supra* note 29, at 197. In regard to the motive for investigation, Chief Justice Warren stated, ". . . We have no doubt that there is no Congressional power to expose for the sake of exposure." *Supra* note 29, at 200. But, subsequently the court has declared that they will not inquire into the motives of Congressional committees. Barenblatt v. United States, *supra* note 1, at 133.

[33] ". . . And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous. . . . Beyond that, there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time." *Supra* note 29, at 197, 198.

[34] *Supra* note 29, at 198.

[35] *Supra* note 1; *See,* Uphaus v. Wyman, 360 U. S. 72 (1959).

[36] That the authorizing resolution was too vague and in this connection Watkins was not sufficiently appraised of the pertinency of the questions put to him by the examiners. *Supra,* note 29, at 215. The *Barenblatt* decision dismisses the vagueness of the resolution recognized in *Watkins* as satisfied by the "persuasive gloss of legislative history." *Supra* note 1, at 118. Further, the purpose of the inquiry had been publicly announced and the petitioner refused to answer concerning his own Communist affiliations. This was held to be clearly pertinent to the inquiry. *Supra* note 1, at 124, 125.

> Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, . . . do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue *always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.* (emphasis ours).[37]

On the governmental side was the need to investigate the threat of internal subversion by Communist activity. The power to investigate this sphere of activity, ". . . rests on the right of self-preservation, 'the ultimate value of any society.' *Dennis v. United States,* 341 U.S. 494."[38] The Court did not clearly delineate the rights of the individual sacrificed by the balancing test.[39] Discussion of the issue ended abruptly with a flat denial of the petitioner's claim:

> We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended.[40]

Wilkinson raises substantially the same issues as covered in *Barenblatt.* The Court abides point for point with the *Barenblatt* decision.[41] But, the petitioner sought to differentiate *Barenblatt* on the basis that he was attempting to influence public opinion to abolish the committee.[42] The Court rejects this argument:

> But we cannot say that, simply because the petitioner at the moment may have been engaged in lawful conduct, his Communist activities in connection therewith could not be investigated. . . . As the Barenblatt opinion makes clear, it is the nature of the Communist activity involved, whether the momentary conduct is legitimate or illegitimate politically, that establishes the Government's over-balancing interest.[43]

The *Watkins* and *Barenblatt* decisions read together left room for speculation as to how the Court would treat First Amendment claims.

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[37] *Supra* note 1, at 126.

[38] *Supra* note 1, at 128. The court went on to say, ". . . An investigation of advocacy of or preparation for overthrow certainly embraces the right to identify a witness as a member of the Communist party. . . . The strict requirements of a prosecution under the Smith Act . . . are not the measure of permissible scope of a congressional investigation into 'overthrow' . . ." *Supra* note 1, at 130.

[39] *Supra* note 1, at 134. The court simply says that the record is barren of other factors that might indicate the rights of the individual had been violated and enumerates several procedural defects as examples of these rights.

[40] *Supra* note 1, at 134.

[41] To a great extent the issues raised in *Wilkinson* were similar to those raised in *Barenblatt.* See the text of footnote 2.

[42] *Supra* note 2, at 643.

[43] *Supra* note 2, at 643.

The opinion in *Watkins* seemed to indicate that the Court was on the verge of protecting witnesses from congressional committees on the basis of the First Amendment. *Barenblatt,* however, emphatically refuses to do this, especially where Communist activity is involved.[44] *Wilkinson* established the premise that: whether the activity examined is legitimate or non-legitimate is not the point, the crucial fact is whether there are any Communist overtones connected with this activity.[45] Then the interest of the government will override the right of the witness to refrain from disclosing his political associations.

The rationale behind First Amendment claims is not apparent from an examination of the majority opinions in the foregoing cases. From the moment this issue was first raised, there have been strong dissents finding violation of First Amendment rights.[46]

The supposition that investigating committees have violated the First Amendment rights of witnesses has developed primarily on two lines: (1) compelled disclosures can and often do constitute prior restraints on the freedom of political association and thought[47] and (2) constitutional values such as the rights conferred by the First Amendment cannot be balanced in this situation.[48]

That this type of compelled disclosure by committees may be an indirect restraint on political activity is apparent. Many, not just the timid, will avoid controversial political ideas precisely to avoid subsequent danger of investigation. Aside from this fact, Justice Black dissenting in *Barenblatt* asserts:

> To apply the Court's balancing test under such circumstances is to read the First Amendment to say 'Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interests of the Government in stifling these freedoms is greater than the interest of the people in having them exercised.'[49]

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[44] *Supra* note 1, at 127-32.
[45] *Supra* note 43.
[46] Judge Clark dissenting in the *Josephson* case. *Supra* note 20. Judge Edgerton dissenting in the *Barsky* case. *Supra* note 22.
[47] Justice Douglas in *Rumely,* stated that if a committee can force a publisher to disclose his mailing list, ". . . the free press as we know it disappears" and further, ". . . the imponderable pressures of the orthodox lay hold." *Supra* note 25, at 57. Note the dissent of Justice Black in *Barenblatt, supra* note 1, at 131 and the dissent of Justice Black in *Wilkinson,* ". . . For I believe that true Americanism is to be protected, not by committees that persecute unorthodox minorities, but by strict adherence to basic principles of freedom that are responsible for this Nation's greatness." *Supra* note 2, at 648.
[48] The dissent of Justice Black in *Barenblatt, supra* note 1, at 143. Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom,* 49 CALIF. L. REV. 4 (1961); Kalvan, *Mr. Alexander Meiklejohn and the Barenblatt Opinion,* 27 U. CHI. L. REV. 315 (1960); Meiklejohn, *The Barenblatt Opinion,* 27 U. CHI. L. REV. 329 (1960).
[49] *Supra* note 1, at 143.

Professor Alexander Meiklejohn discussing constitutional values and their proper application states:

> But the Barenblatt opinion, with one smashing blow, proceeds at this point to amend the Constitution. In place of the limited Congressional authority 'to provide for the common Defense' it establishes 'the (sovereign) right of self-preservation' and gives to it an 'ultimate status' as contrasted with the other values which Congress is commissioned to serve.[50]

From an examination of the opinions involving utilization of the First Amendment as a defense, it is apparent that the Court will carefully scrutinize cases in which the issue is raised. Whether the First Amendment limits the power of investigating committees, aside from cases involving procedural or authorization defects, is far from settled. *Wilkinson* was a five-four decision, as was *Barenblatt*. The Court in the future could swing to the position that a witness has been deprived of his rights under the First Amendment.

The appeal in the position of the minority in *Wilkinson* and comparable cases is the concentration on the protection of a traditional freedom. The minority feels that we are sacrificing the rights guaranteed by the First Amendment for national security. The majority of the Court reminds us that it is dealing with Communism.

In viewing the controversy between the majority and minority, it seems apparent that the "communist conspiracy" is the greatest threat that has ever faced our country. Nothing has ever come as close to undermining the basic structure of our society. To deal competently with this problem, the legislature must enact legislation. Investigation of the situation is necessary before adequate legislation can be enacted. Serious interference by the Court in this area could greatly impair the ability of the legislature to deal adequately with the spread of Communism. Faced with the reality of the "cold" war, the position of the majority is sound. The answer to the minority position is that the rights granted by the First Amendment are not absolute. Political freedom undoubtedly includes the right to criticize and seek reform, but it does not include the right to destroy the society that has nourished it. Thus, the justification for the majority position that First Amendment rights must at times yield in the interest of self-preservation.

Apart from the positions of the majority and minority on the Supreme Court, there is a third possibility. Congress can effectuate reform. Perhaps, the bitter disagreement over the methods of investigating committees could be alleviated by a reformation of these methods. It has been suggested that a code of conduct be imposed on committees

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[50] Meiklejohn, *The Balancing of Self-Preservation Against Freedom*, *supra* note 48, at 11, 12.

to safeguard the rights of witnesses.[51] Another possibility is found in the method used by the Royal Commissions in England. This method would employ such help as impartial experts and use a greater selectivity in the calling of witnesses.[52] JAMES H. YAGLA

Federal Income Taxation—Lease or Conditional Sale: Plaintiff, in its taxable year 1953, inaugurated a tool lease program and by the end of 1954 had entered into agreements with respect to eighty-seven machines that it manufactures. Under this program the lessee had a choice of three plans, A, B or C. Plan A called for a mandatory rental period of three years at 25% of the list price per year, B for two years at 30% and 25% respectively, and C for one year at 35%. If the lessee so desired, it could purchase under plan A at the end of the third year for 45% of the list price, under plan B at the end of the second for 60%, and under plan C at the end of the first for 80%. There were also provisions whereby a lessee could return the property or exercise the option to purchase at times subsequent to the mandatory rental period. All three plans ran for a maximum of seven years and carried a minimum option to purchase at 25% of the list price at the end of that time. In its 1954 tax return plaintiff treated the revenue derived from such agreements as rental income and deducted depreciation on the leased machines. Thereafter, the Internal Revenue Service audited plaintiff's books and declared the leases to be conditional sales for federal income tax purposes. After paying the additional taxes plaintiff sued for refund. *Held*: The lease-option agreements were what they purported to be, and petitioner was thereby allowed to treat the proceeds as rental income and deduct depreciation. *Kearney & Trecker Corporation v. Commissioner,* 195 F. Supp. 158 (E.D. Wis. 1961).

The lease-option agreement has both tax and non-tax advantages.[1] The principal non-tax benefits are a freeing of the working capital of the lessee and an added selling feature in the sales pro-

[51] Galloway, *Congressional Investigations: Proposed Reforms,* 18 U. CHI. L. REV. 478, 483 (1951). The article also suggests several other alternatives: 1) delegation of certain types of inquiries to various outside agencies; 2) a ban on the creation of special investigating committees of Congress; or 3) voluntary adoption of codes of fair conduct by congressional committees. *Supra* at 483. *See also,* Chase, *Improving Congressional Investigations: A No-Progress Report,* 30 TEMP. L. Q. 126 (1957).

[52] Finer, *Congressional Investigations: The British System,* 18 U. CHI. L. REV. 521, 554 (1951). This article has a complete analysis of the British system of investigation. For a comparison of the Australian system of investigation see, Campbell, *Parliamentary Investigations: The Australian Experience,* 9 J. PUB. L. 382 (1960).

[1] For detailed discussion of lease-option agreements see: Schneider, *Tax Considerations in Planning Leases,* 1960 TULANE TAX INST. 455; Kirby, *Considerations in Business Lease Arrangements,* 34 TAXES 34 (1956); Griesinger, *Pros and Cons of Leasing Equipment,* 33 HARV. BUS. REV. 75 (1955).