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Powers of Congressional Investigation Committees

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POWERS OF CONGRESSIONAL INVESTIGATION COMMITTEES

By Charles Loring*

The recent Congressional investigations and particularly those conducted by committees of the Senate, have raised the question as to the power of those committees to compel the attendance of witnesses and the production of papers, and to punish non-attendance, refusal to testify, or the non-production of papers. Is there an unlimited power vested in Congress, in either house thereof or its authorized committees, to investigate any subject whatever and to compel testimony with reference thereto?

The limits to the powers of such Congressional committees and of the Houses of Congress have been well defined by the courts and particularly by the Supreme Court of the United States. That there may be limits to such investigation has apparently occurred to members of both Houses, as witness Senator Walsh's brief incorporated in the Congressional Record of March 24, 1924.[1]

". . . It is a limited power and should be kept within its proper bounds, and when these are exceeded a jurisdictional question is presented which is cognizable in the courts. . . ."[2]

And the brief of Mr. Wood likewise incorporated in that Record on April 1, 1924.[3]

When the powers of these committees were first presented to the courts the contention was made that the right of investigation was unlimited and that the power to compel the attendance of witnesses and to elicit their testimony was likewise unlimited, and in case of a contumacious witness, the authority to punish for contempt was also unlimited. It was contended that this power was inherent in the legislative body and was analogous to the powers possessed by the English Parliament. In the case of *Kilbourn v. Thompson*,[4] the court carefully distinguishes between

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[1]Congressional Record, 68th Cong., 1st session, page 4966.

[2]Ibid, page 4968.

[3]Ibid, at page 5539.

[4](1880) 103 U. S. 168, 26 L. Ed. 377.

the powers of the houses of Congress and those of the English Parliament. It reviews the English cases and comes to the conclusion that the power to punish for contempt which lies in the British Parliament arises from the fact that Parliament, as it originally existed, was a court which exercised judicial functions. In fact, Parliament originally consisted of the bishops, the lords, the knights and burgesses who, when assembled, were called the "High Court of Parliament." This body not only enacted laws, but rendered judgments in matters of private right which when approved by the King were valid and binding. After the expansion of Parliament into the House of Lords and the House of Commons, the judicial function of reviewing decisions of the courts passed to the House of Lords and the power of impeachment, and perhaps other powers of judicial character, went to the House of Commons; and the two houses jointly retained the power for a long time of passing bills of attainder for treason and other high crimes.

It was early claimed that the legislative assemblies of the British dependencies had the same parliamentary rights and privileges which we have seen belonged to the English Parliament and that power to punish for contempt of its authority was a necessary incident to every body exercising legislative functions. The first case to come before the Privy Council was that of the Legislative Assembly of Newfoundland, where it was held that such power to punish for contempt was not inherent in the local legislature as being reasonably necessary for the exercise of its functions and duties and the distinction between that assembly and the House of Commons was carefully made out upon the ground that the House of Commons had such power not because of its legislative functions, but by virtue of "ancient usage and prescription." The Newfoundland case was followed later by the cases of *Fenton v. Hampton,*[5] and *Doyle v. Falconer.*[6]

The United States Supreme Court in the *Kilbourn Case* said:[7]

"We are of opinion that the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two Houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices. Nor taking what has fallen from the English judges, and especially the later cases on which we have

[5](1858) 11 Moore, P. C. 347.
[6](1866) L. R. 1 P. C. 328.
[7](1880) 103 U. S. 168, 189, 26 L. Ed. 377.

just commented, is much aid given to the doctrine, that this power exists as one necessary to enable either house of Congress to exercise successfully their function of legislation."

The power of the Houses of Congress through their committees to compel the attendance of witnesses and the production of papers is based entirely upon the powers delegated to them, or necessarily incident thereto, by the constitution. Each house is the judge of the election and qualification of its members and may discipline them for improper behavior and likewise may conduct investigations for the furtherance of legislation. The House of Representatives is empowered by the constitution to prefer charges of impeachment and the Senate is required to try such charges. For all these purposes there can be little doubt but that each of the houses, or their committees properly empowered, may compel the attendance of witnesses, require them to testify, and require the production of pertinent papers.[8] But neither house can go beyond the jurisdiction thus conferred upon it and conduct a general inquest into the private affairs of any person. In the *Kilbourn Case* the court says:[9]

"Whether the power of punishment in either House by fine or imprisonment goes beyond this or not, *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 the private affairs of the citizen."

The Court then discusses the constitutional division of powers into the three grand departments, and states "as a general rule the powers confided by the constitution to one of these departments cannot be exercised by another."[10] In that case the Court had before it the question of whether a warrant from the House of Representatives to the sergeant-at-arms for the arrest and commitment of one Kilbourn was protection to such officer in a suit brought for false imprisonment against the sergeant-at-arms, and others. It appears that a committee of the House had been authorized by that body to investigate the "real estate pool" in which Jay Cooke and Company were alleged to have a large interest, and which company was heavily indebted to the United States through the "improvidence" of the secretary of the navy. There was obviously no purpose of legislation connected with this investigation; Kilbourn was not an officer of the United

[8]In re Chapman, (1897) 166 U. S. 661, 41 L. Ed. 1154, 17 S. C. R. 677.
[9](1880) 103 U. S. 168, 190, 26 L. Ed. 377.
[10](1880) 103 U. S. 168, 191, 26 L. Ed. 377.

States, and the House was not laying a foundation for impeachment proceedings; so that the question was fairly presented as to whether an investigation not within the powers granted by the constitution might be conducted, witnesses subpoenaed, and punished for refusal to attend or testify. It was first contended that the courts might not inquire into the legality of the proceedings and the case of *Anderson v. Dunn*,[11] was cited as authority. The court distinguishes that case on the ground that the record then before it did not show that the matter was outside of the jurisdiction of the House. The Court in the *Kilbourn Case* finds it necessary, however, to overrule some of the language used in the *Anderson Case* and further states:

"But we do not concede that the Houses of Congress possess this *general power* of punishing for contempt. The cases in which they can do this are very limited, as we have already attempted to show. *If they are proceeding in a matter beyond their legitimate cognizance, we are of opinion that this can be shown,* and we cannot give our assent to the principle that, by the mere act of asserting a person to be guilty of a contempt, they thereby establish their right to fine and imprison him, beyond the power of any court or any other tribunal whatever to inquire into the grounds on which the order was made. . . ."

And quoting from the case of *Burnham v. Morrissey*,[12] as follows:

"The House of Representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court. That house is not the legislature, but only a part of it, and is therefore subject in its actions to the laws, in common with all other bodies, officers, and tribunals within the Commonwealth. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the constitution; and if they have not, to treat their acts as null and void. The House of Representatives has the power under the constitution to imprison for contempt; but the power is limited to cases expressly provided for by the constitution, or to cases where the power is necessarily implied from those constitutional functions and duties, to the proper performance of which it is essential."

[11] (1821) 6 Wheat. (U.S.) 204, 5 L. Ed. 242.
[12] (1859) 14 Gray (Mass.) 226.

The United States Supreme Court says: *"In this statement of the law, and in the principles there laid down, we fully concur."*

In the case of *In re Chapman,*[13] the Court sustained the power of Congress to compel the attendance of witnesses and their disclosure of evidence to enable the respective bodies to discharge their legislative functions. Congress had passed an act[14] in January, 1857, making it an indictable offense to refuse to comply with a subpoena issued by either House. In that case the Senate had sought to inquire into the conduct of such of its members as might have been guilty of misbehavior in dealing in the stock of a certain company engaged in the sugar business. The committees in charge of the investigation sought to prove by a broker that members of the Senate had been dealing in sugar, through the firm of which the broker was a member. He refused to disclose the names and proceedings were taken against him under the statute to which he set up the defense of a lack of power on the part of Congress to legislate along the lines above referred to. The Court, however, sustained that power upon the theory that the Senate had a right to inquire into the conduct of its own members for disciplinary purposes. The opinion indicates plainly, however, that should either House of Congress attempt to go beyond its constitutional powers and inquire along lines outside of those limits that such a showing would constitute a defense.

The opinion *In re Pacific Railway Commission,*[15] contains some very enlightening statements with reference to the constitutional powers of Congress. The commission, authorized by Congress to investigate the Pacific Railway, endeavored to compel Leland Stanford to disclose his private affairs to that body. This action brought from Judge Field the following language:

"Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value. The law provides for the compulsory production, in the progress of judicial proceedings, or by direct suit for that purpose, of such documents as affect the interest of others, and also, in certain cases, for the seizure of criminating papers necessary for the prosecution of offenders against public justice, and only in one of these ways can they be obtained, and their contents made known, against the will of the owners."[16]

[13] (1897) 166 U. S. 661, 41 L. Ed. 1154, 17 S. C. R. 677.
[14] 11 Stat. at L. 155.
[15] (1887) 12 Sawy. (U.S.C.C.) 559, 32 Fed. 241.

And from Judge Sawyer, these words:[17]

". . . A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established and there is no knowing, where the practice under it would end."

Judged by the rules laid down in the foregoing cases and in many state cases which might be cited, some of the resolutions upon which investigations are now being, or have recently been, conducted in Congress may well be said to be vulnerable, and not within the constitutional powers of Congress. Take, for instance, the Senate resolution upon which the Daugherty investigation is founded and let it be understood that the writer holds no brief for that gentleman. The resolution reads as follows:

"RESOLVED, That a committee of five Senators, consisting of three members of the majority and two of the minority, be authorized and directed to investigate circumstances and facts, and report the same to the Senate, *concerning* the alleged *failure* of Harry M. Daugherty, Attorney General of the United States, *to prosecute* properly violators of the Sherman Antitrust Act and the Clayton Act against monopolies and unlawful restraint of trade; the alleged *neglect and failure* of the said Harry M. Daugherty, Attorney General of the United States, to arrest and prosecute Albert B. Fall, Harry F. Sinclair, E. L. Doheny, C. R. Forbes, and their coconspirators in defrauding the Government as well as the alleged *neglect and failure* of the said Attorney General *to arrest and prosecute* properly, efficiently, and promptly *and defend* all manner of civil and criminal *actions* wherein the Government of the United States is interested as a party plaintiff or defendant. And said committee is further directed to *inquire into,* investigate, and report to the Senate the *activities of* the said Harry M. Daugherty, Attorney General, and any of his assistants in the Department of Justice *which would in any manner tend to impair their efficiency or influence* as representatives of the Government of the United States.

"That said committee above referred to and the chairman thereof shall be elected by the Senate of the United States.

"RESOLVED FURTHER, that in pursuance of the purposes of this resolution said committee or any member thereof be, and hereby is, authorized during the sixty-eighth Congress to send for persons, books, and papers; to administer oaths, and

[16]In re Pacific Railway Commission, (1887) 12 Sawy. (U.S.C.C.) 559, 32 Fed. 241, 250.

[17]In re Pacific Railway Commission, (1887) 12 Sawy. (U.S.C.C.) 559, 32 Fed. 241, 263.

to employ stenographic assistance at a cost not to exceed 25 cents per hundred words, to report such hearings as may be had in connection herewith, the expenses thereof to be paid out of the contingent fund of the Senate, and that the committee, or any sub-committee thereof, may sit during the sessions or recesses of the Senate."[18]

It will be noted that no legislation is apparently contemplated; nor is the information sought susceptible for use for the furtherance of legislation. It is true that Harry M. Daugherty was, until his recent resignation, a public officer of the United States and had this resolution been passed by the House, it may be that it would be sustainable under the powers which that House has to prefer charges of impeachment. Undoubtedly the House of Representatives may delegate to a committee the ascertainment of facts upon which charges of impeachment may or may not be preferred, and the investigation of any impeachable officer for that purpose by such committee would undoubtedly be proper. The Senate, however, is restricted to the trial of the charges preferred by the House and may not, within its constitutional powers, investigate for the purposes of preferring charges. That is the exclusive privilege of the House of Representatives. Even had the resolution contained a statement that the information so obtained was to be used for the purpose of furthering legislation it is doubtful whether any court would permit so obvious a pretext to sustain the resolution. In the case of *People ex rel. Sabold v. Webb,*[19] the resolution under consideration contained the statement that the investigation was for the purpose of remedial legislation; yet the court held that the mere statement in the resolution could not change the obvious character of the investigation which was an inquiry into the cost and profits made in the erection of the State Capitol at Albany.

When the Daugherty committee organized, according to the public press, it announced that it would not be controlled by rules of evidence; that it would accept hearsay testimony and that the right of cross-examination would be limited. It is interesting to note Judge Field's remarks upon a similar assertion by the Pacific Railway Committee: He said:[20]

". . . And yet, if the commissioners are not bound, as they have asserted, by any rules of evidence in their investigations, and may receive hearsay, ex parte statements, and information of

[18]Italics are the author's.
[19](1889) 5 N. Y. S. 855.
[20]In re Pacific Railway Commission, (1887) 12 Sawy. (U.S.C.C.) 559, 32 Fed. 241, 257.

every character that may be brought to their attention, and the court is to aid them in this manner of investigation, there can be no room for the exercise of judgment as to the propriety of the questions asked, and the court is left merely to direct that the pleasure of the commissioners in the line of their inquiries be carried out."

Nor would it be proper for a legislature to conduct an investigation for the purpose of vindicating or condoning some public official. In *Ex parte Caldwell,* the court says:[21]

". . . It would be a very remarkable spectacle, indeed, for Congress and Legislatures of the states to conduct investigations for vindication purposes, at the expense of the people, in every instance where, in the heat of partisan debate, some charge of misconduct, malfeasance, or violation of law, is made against a public official, and extend such vindicatory investigation to such officials after they have filled their terms of office and passed into private life."

". . . It is true generally, as contended for, that all inferences are to be made and all doubts solved in favor of the legitimacy of the legislative purpose and action, but not when it expressly appears by the act itself, in positive terms, that its purpose is illegitimate and contrary to constitutional limitations."[22]

This case was subsequently reversed by the Supreme Court on the ground of want of federal jurisdiction only.[23] The views of members of Congress who believe that Congressional power is only limited by Congressional discretion are well set out in a speech of Honorable John J. McSwain of South Carolina, delivered in the House of Representatives, April 18, 1924.[24] Mr. McSwain did not discuss the effect of the fourth amendment on his doctrine, nor did he discuss the history of congressional powers and their limitations as set forth by the Supreme Court in the *Kilbourn Case.*[25]

Conclusions

From the foregoing cases it is apparent that neither the National Legislature nor either House thereof has the right, in conducting these investigations, to go beyond the powers delegated to it by the constitution for the discipline or expulsion of members, for impeachment purposes, or for determining whether members were elected or qualified; and in furtherance of legisla-

[21](1905) 138 Fed. 487, 495.
[22](1905) 138 Fed. 487, 496.
[23]Carfer v. Caldwell, (1906) 200 U. S. 293, 50 L. Ed. 488, 26 S. C. R. 264. A very interesting and instructive note on this subject is contained in 40 Ann. Cas. 1055 where the federal, state and English cases are collected.
[24]Congressional Record, 68th Cong., 1st sess., page 6915.
[25](1880) 103 U. S. 168, 26 L. Ed. 377.

tion. Measured by these rules, the above quoted resolution is beyond the powers of the Senate, and the demand made by the committee in furtherance of that resolution for the inspection and delivery of files from the attorney general's office and the compulsion of witnesses, would appear to be entirely unenforceable. Other resolutions are before the Senate upon which investigations are being conducted and in two instances at least the authority of the Senate has been challenged in the courts.