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Nanette Dembitz

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CONGRESSIONAL INVESTIGATION OF NEWSPAPERMEN, AUTHORS, AND OTHERS IN THE OPINION FIELD — ITS LEGALITY UNDER THE FIRST AMENDMENT

NANETTE DEMBITZ*

"Not for many generations, if ever before in our history, has any organ of government claimed the power to examine and to pass judgment upon who shall work on newspapers." This was the reaction of an outstanding commentator to the recent investigation of New York newspapermen, centering mainly on the personnel of the New York Times, by the so-called Eastland Committee of the Senate.¹ The Eastland Committee was continuing the pattern of attempted purification of public opinion media by means of Congressional investigation, which has become increasingly manifest over the last decade.

Starting with the movies, dealing intermittently with radio and the clergy,² and climaxing with the newspapers, the investigating committees have assumed it was proper for Congress to investigate anyone whose work gave him an influence on public opinion and who was charged with Communist associations or sympathies. They did not seem concerned with a basic question posed in this article: does the first amendment require a showing that a medium of communication or a profession (e.g., the press, radio, or clergy) is being used to a substantial degree for dissemination of pro-Communist propaganda, before a Congressional investigation of suspected Communist sympathy can be undertaken against individuals in that

*Member of New York Bar; B.A., Michigan, 1932; LL.B., Columbia, 1937; LL.M., Columbia, 1946. Formerly attorney in Alien Enemy Control Unit of Department of Justice; counsel to New York Civil Liberties Union, New York affiliate of the American Civil Liberties Union. The views here expressed do not necessarily represent the views of the Union.

1. Walter Lippman, *Today and Tomorrow*, column entitled *Congress and the Press*, N. Y. Herald Tribune, Jan. 10, 1956, § 1, p. 22, col. 3. The investigation was conducted by the subcommittee on Internal Security, headed by Senator James O. Eastland, of the Senate Judiciary Committee. The hearing appears as Part 17 of the Hearings of the subcommittee, pursuant to S. Res. 58, 84th Cong. 2d Sess., *Strategy and Tactics of World Communism (Communist Activity in New York)* Jan. 4-6, 1956.

2. See Carr, *The House Committee on Un-American Activities* cs. III-V (1952).

medium or profession?³ Thus, the committee investigating the clergy was in no way deterred by its own conviction that pro-Communist clergymen were only a handful compared to the large body of "loyal" clergymen.⁴ Similarly, the Eastland Committee obviously assumed it had power to investigate and expose any and every pro-Communist in the non-Communist press. The Committee did not even purport to answer the question of whether the newspapermen under investigation have a substantial influence on public opinion now or even whether they had such an influence in the 1940's when their Communist affiliations for the most part purportedly occurred, or even whether the work and writings of the accused individuals had in any way been affected by their alleged association.⁵

Until and even through the newspaper investigation,⁶ many of those concerned with civil liberties acquiesced in the congressional assumption of power of surveillance over the media of expression. Thus, though there was a storm of protest about some of the procedures in the investigation of clergymen,⁷ even a clergyman known for his interest in civil liberties objected only to the Com-

3. By "Communist" the writer will refer to a member of the Communist Party in accordance with its membership requirements, and by "pro-Communist" will refer to one who is not a member but whose views or expressions are dictated by a dedication to an expansion of Russian power or the Communist form of government.

4. See, e.g., House Committee on Un-American Activities, *Annual Report of the House Committee on Un-American Activities for 1953*, H.R. Rep. No. 1192, 83d Cong., 2d Sess., 97 (1954): "The official record establishes that, as in other fields, the few members of the clergy who have associated with Communist causes is a minute percentage of the hundreds of thousands of loyal, patriotic men of the cloth." Nevertheless, the committee thereafter investigated Rev. John A. Hutchinson, Professor of Religion at Williams College, who, according to "secret sworn testimony" by an unidentified informant, allegedly had in the 1930's "reported to Communist party headquarters" before going to his church. The charge was emphatically denied by Rev. Hutchinson. N. Y. Times, March 19, 1954, p. 10, col. 4.

5. See notes 117-21 *infra* and texts thereto for a discussion of Eastland Committee hearings.

6. The newspaper investigation was unique in that it aroused substantial editorial opposition not only on the ground that it seemed intended to discredit the New York Times (see editorial: *The Voice of a Free Press*, N. Y. Times, Jan. 5, 1956, p. 32, col. 1), but also on the ground that the committee's power to investigate the newsmen was, under the circumstances, of doubtful constitutionality. See *The Post and Times-Herald* (Washington, D. C.): "the responsibility for weeding them out belongs, in the American system, to publishers and editors, not to Congress"; *The Star* (Kansas City): "The basic investigating power must be kept under rigid control or it becomes in itself the present danger to our American way of life"; *The Post-Gazette* (Pittsburgh, Pa.): "In the absence of such evidence [that newspapers are being used to subvert the Government] it appears that the subcommittee is engaged in a fishing expedition. . . ." Editorials reprinted in N. Y. Times, Jan. 7, 1956, p. 8; Jan. 8, 1956, p. 70.

7. E.g., see the protests against release of testimony that Rabbis Stephen Wise and Judah Magnes had, prior to 1924, followed the Communist Party Line. N. Y. Times, Sept. 14, 1953, p. 2, col. 6.

mittee's inaccuracies, and conceded that its exposure of any clergymen who were in fact pro-Communist would not be objectionable.⁸ Apparently because it is so common for non-Communist liberals to try to spot pro-Communists in order to keep them from positions of influence in liberal organizations,⁹ Congress' performing this function seems unexceptionable to many of them.

But democracy means preservation of a line between the spheres of private and governmental action, and a refusal to make easy transitions from one to the other. For purposes of constitutional doctrine, precedent for extensions of state control, and most important, effect on free expression, there is a vital difference between a private group, of clergymen let us say, attempting to eliminate Communist influence from its own counsels, and the Government, through a congressional committee, investigating alleged Communists in the clergy. While a private organization's stand and manner of dealing with alleged pro-Communists is a relatively parochial matter, the congressional investigations have a force and influence stemming from the control and authority of the Government over the people as a whole. When the investigations concern charges of Communism against journalists, authors, or others in the opinion field, they undermine, the author believes and will try to demonstrate in this article, the whole institution of free exchange of opinion in this country, and the enjoyment of free expression built on the first amendment. Indeed, because of the unique relation between investigations in the opinion field and first amendment rights, we suggest that this type of investigation bears particular responsibility for a fear of expression which, according to even our more conservative observers, has been laying a heavy and deadening hand on the free exchange of ideas.¹⁰

8. See testimony of Bishop G. Bromley Oxnam in Hearings of Committee of Un-American Activities of House of Representative, July 21, 1953, printed in U. S. News and World Report, Aug. 7, 1953, pp. 40-48, 100-42, especially at p. 135: "... if the procedures are carefully scrutinized ... all of that [the Committee's informing church organizations of Communists among their leaders] could be handled very easily."

9. See, e.g., 1940 resolution of American Civil Liberties Union, barring from any official position anyone subject to Communist discipline. Annual Report of American Civil Liberties Union for 1939-1940 at 48-49 (1940).

10. See, for examples of this observation from diverse sources, letter from former United States diplomatic officials, stating "Fear is playing an important part in American life." N. Y. Times, Jan. 17, 1954, § IV, p. 8E, col. 6; Secretary of State Dulles' reference to the authors of the letter as "a distinguished group of former diplomats whom I highly respect." N. Y. Times, Jan. 20, 1954, p. 9, col. 2. See also President Eisenhower's speech at Dartmouth College against "book-burning," N. Y. Times, June 15, 1953, p. 1, col. 6. See article entitled, *To Insure the End of Our Hysteria*, by Paul G. Hoffman, Chairman of the Board of Studebaker-Packard Corporation, describing "The complex of fear that has spread over America ..." in respect

After discussing the impact on first amendment rights of congressional investigation of alleged Communists in the opinion field, consideration will be accorded to the circumstances in which such an investigation would nevertheless be constitutionally justified. In this connection, we shall give due regard to the fact that pro-Communists in opinion work may deliberately try to mislead public opinion on political questions. On the constitutional question, we shall also consider the case pending before the United States Supreme Court involving the order of the Subversive Activities Control Board requiring the Communist Party to register with the Attorney General as a Communist-action organization.^{10a} This order, like the congressional investigations, is an effort at public exposure of the identity of Communists, particularly in relation to their propaganda activities. We shall also consider the contempt of Congress indictment now pending against author Harvey O'Connor, which offers the most imminent possibility¹¹ of upper court consideration of the first amendment in connection with investigations in the opinion field, and we shall thereafter give attention to the "informing" function of Congress, on which the investigations have been partly predicated.

to freedom of thought and expression, N. Y. Times Magazine, Nov. 14, 1954, p. 9. See also Oakes, *This Is the Real, the Lasting Damage*, N. Y. Times Magazine, March 7, 1954, p. 9. For a sidelight on the issue, see letter from "High School Teacher" in the strongly anti-Communist *New Leader*, April 20, 1953, p. 28, complaining that the fear of political expression instilled in the students by other teachers makes it impossible for her to continue to tell them that talk of repression is only Communist propaganda.

10a. Since this article went to press, the case has been decided on non-constitutional grounds in a 6 to 3 opinion, and remanded for further proceedings. *Communist Party of the United States v. Subversive Activities Control Board*, 24 U. S. L. Week 4224 (U.S. April 30, 1956). The Court held that the Board must either grant the Party's motion to adduce newly discovered evidence of perjury on the part of three witnesses against it at the Board hearing, or must expunge their testimony from the record, and reconsider its determination "in the light of the record as freed from the challenge that now beclouds it." However, the Court noted that the case raised "constitutional questions appropriate for this Court's consideration," and the issues hereinafter discussed will undoubtedly be again presented to the Court after the next stage of the proceedings.

11. A similar indictment against author Corliss Lamont was dismissed by the district court on non-constitutional grounds, and an appeal is now pending from this dismissal. *United States v. Lamont*, 18 F.R.D. 27 (S.D. N.Y. 1955), *appeal docketed*, C145-216 (2d Cir.). Thus, the merits will not, at best, be reached in the *Lamont* case for some time. Contempt citations have been issued against several newspapermen who refused to answer on grounds of the first amendment in the Eastland investigation, but the cases have not yet been presented to the grand jury. As to these refusals, see N. Y. Times, Jan. 7, 1956, p. 6, col. 1; p. 7, col. 3; as to contempt citations, see N. Y. Times, May 11, 1956, p. 10, col. 7. The perjury indictments against Owen Lattimore, writer, lecturer, and teacher on Far Eastern problems, which involved the first amendment, have been dismissed, and the prosecution definitely dropped. See note 31, *infra*.

Despite the number of times witnesses have raised the first amendment in their objections to testifying before congressional committees investigating various phases of Communism, the Supreme Court has never considered the question of the constitutionality of any of these investigations under the amendment. In the beginning of the intensive Communist investigatory period, 1947 to 1950, various courts of appeals upheld the investigations under the first amendment, including that of alleged Communist influence in the movies in the so-called "Hollywood Ten" case; the Supreme Court uniformly denied certiorari.¹² For a considerable period after these decisions—until O'Connor and a few others sought another first amendment test at the risk of a contempt conviction—those objecting to congressional interrogation relied on the fifth amendment's privilege against self-incrimination, which the Supreme Court has vigorously protected throughout the past decade.¹³ When an objector put his objection on the grounds of both the first and fifth amendments, the usual result was that the objection under the fifth was upheld, so the objection under the first was merely hortatory.¹⁴ Finally, in the *Emspak* case where both amendments had been invoked but it seemed the Supreme Court was bound to decide on first amendment grounds,¹⁵ the Supreme Court nevertheless reversed *Emspak's* contempt conviction merely by upholding his claim of the fifth amendment privilege.¹⁶

Thus, the most authoritative decisions to date on the first amendment validity of the congressional investigation of suspected Communists in opinion-influencing positions are the early courts of appeals' rulings, reinforced to some extent in 1954 by the Court of

12. *Lawson v. United States*, 176 F. 2d 49 (D.C. Cir. 1949), *cert. denied*, 339 U. S. 934 (1950); *Marshall v. United States*, 176 F. 2d 473 (D.C. Cir. 1949), *cert. denied*, 339 U. S. 933 (1950); *Barsky v. United States*, 167 F. 2d 241 (D.C. Cir.), *cert. denied*, 334 U. S. 843 (1948); *Josephson v. United States*, 165 F. 2d 82 (2d Cir. 1947), *cert. denied*, 333 U. S. 338 (1948). See *Morford v. United States*, 176 F. 2d 54 (D.C. Cir. 1949), *reversed on procedural grounds*, 339 U. S. 258 (1950).

13. See *Brunner v. United States*, 343 U. S. 918 (1952), *reversing* 190 F. 2d 167 (9th Cir. 1951); *Blau v. United States*, 340 U. S. 159 (1950).

14. See *e.g.*, *Emspak v. United States*, 349 U. S. 190, 193, n. 5 (1955) (hearing conducted by House Un-American Activities Committee); *N. Y. Times*, Sept. 16, 1955, p. 14, col. 4 (hearing conducted by Senate Internal Security subcommittee).

15. The claim of privilege against self-incrimination had been rejected by the court below, *United States v. Emspak*, 203 F. 2d 54 (D.C. Cir. 1952). And it appeared from the language of the grant of certiorari that the Supreme Court would consider the validity of the investigation under the first amendment. *Emspak v. United States*, 346 U. S. 809 (1953).

16. *Emspak v. United States*, 349 U. S. 190 (1955); decided with companion case, *Quinn v. United States*, 349 U. S. 155 (1955).

Appeals for the District of Columbia in the *Lattimore* case.¹⁷ We will suggest, however, the possibility that a fuller exploration by the courts of the first amendment question, particularly in the light of the *Rumely* decisions of the court of appeals and the Supreme Court,¹⁸ might lead to a departure from these rulings. But whether or not the courts confront and satisfactorily appraise the first amendment question in the pending round of cases, a question mark rather than a period will be the appropriate punctuation on the subject of this article. For it is apparent from the recent newspaper hearings, which the chairman has said will be resumed,¹⁹ and scheduled hearings on a report issued by The Fund for the Republic of the Ford Foundation,²⁰ that, regardless of changes in the party affiliation of committee chairmen, the problem of delimiting the congressional power to investigate in the opinion field will be a recurrent one.

I. HOW INVESTIGATIONS IN THE OPINION FIELD OPERATE

Preventing Exposure to Pro-Communist Views

It has been a popular theory for some years now that an effective and democratic method of handling propaganda by extremists of the right or left is to expose the identity of its authors.²¹ In theory, this exposure is not suppressive, but merely enlightening, enabling the reader or auditor to appraise the writer or speaker's statements with the latter's bias in mind. The theory, however, wherever else it may apply, cannot stand up when the exposure is

17. See *United States v. Lattimore*, 215 F. 2d 847 (D.C. Cir. 1954).

18. *Rumely v. United States*, 197 F. 2d 166 (D.C. Cir. 1952), *aff'd*, 345 U. S. 41 (1953).

19. See N. Y. Times, Jan. 8, 1956, p. 1, col. 8.

20. Chairman Walter of the House Un-American Activities Committee plans to call Dr. Robert M. Hutchins, director of the Fund for the Republic. "We're not going into the Fund for the Republic—we're going into Dr. Hutchins," Rep. Walter said in an interview. He said the committee wants to know how a certain passage which he said corresponded to "Communist party line" got into the 1954 report of the fund. N. Y. Herald Tribune, Jan. 12, 1956, § 1, p. 6, col. 4.

21. See Report of the President's Committee on Civil Rights, *To Secure These Rights*, 164 (1947); Smith, *Democratic Control of Propaganda Through Registration and Disclosure*, 6 Pub. Opin. Quart. 27 (1942); Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Suppression*, 37 Ill. L. Rev. 193, 213 (1942); Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 Mich. L. Rev. 181, 204-13 (1948); cf. Ernst and Katz, *Speech: Public and Private*, 53 Colum. L. Rev. 620, 626 (1943). See also *Viereck v. United States*, 318 U. S. 236, 251 (1943) (dissenting opinion); *Josephson v. United States*, 165 F. 2d 82, 89 (2d Cir. 1947), *cert. denied*, 333 U. S. 838 (1948).

by means of congressional investigations. In real life, the investigating committees seeking to identify and expose pro-Communists in the opinion field²² do not merely offer enlightening biographical data, but instead teach that suspected Communists must not be given an audience.

How can the committees be otherwise understood when they make clear that suspected pro-Communists should be discharged from jobs and removed from opportunities where they can disseminate their views, and in fact that suspicion will attach to anyone who tolerates them in opinion-influencing positions?²³ Indeed, the *raison d'être* of the attempted congressional exposure of suspected Communists in the opinion field forecloses a moderate, academic, "mere-enlightenment" approach or reaction to the exposure. The congressional exposures are in an atmosphere of crisis and emergency; exposure of Communists is sought on the ground of the grave risk that the public has been and will be duped and misled into disloyalty and treason by the suspected Com-

22. "Informing" the American public and exposing to it the identity of suspected Communists, is not merely an incidental by-product of the investigations, but is one of their major aims. See statement of Chairman Velde of House Un-American Activities Committee during the hearings on Bishop Oxnham, cited *supra* note 8, at 107, that his intention was to "... get your record straight so that we may inform the American people regarding their activities, what you did belong to and what you did not belong to." See statement of Ex-Congressman Mundt that the committee was to act by exposure and publicity (92 Cong. Rec. 3767 (1946)), and frequently furnished information to the American people. Carr, *op. cit. supra* note 2, at 37-38, 56-57, 75, 215, 269, 452, 454. And see Internal Security Subcommittee of Committee on the Judiciary, *Institute of Pacific Relations*, S. Rep. No. 2050, 82d Cong. 2d Sess., 85 (1952) (hereinafter referred to as McCarran Report); see testimony during recent hearing before same subcommittee (now headed by Senator Eastland, and herein called the Eastland committee) as to repetition in public hearing of names of ex-Communists already disclosed in executive session, N. Y. Times, Jan. 5, 1956, p. 20, col. 3; Jan. 7, 1956, p. 6, cols. 5 & 6.

23. *E.g.*, statements by House Un-American Activities Committee as to the necessity for discharge of Communist scriptwriters and others from the movie industry, quoted in Carr, *op. cit. supra* note 2, at 57, 453; questioning of Bishop Oxnham on his toleration of a clergyman suspected of pro-Communism in a church organization, Hearings cited *supra* note 8. See Edgerton, J., dissenting, in *Barsky v. United States* 167 F. 2d 241, 260 (D.C. Cir.), *cert. denied*, 334, U. S. 843 (1948); Clark, J., dissenting in *Josephson v. United States*, 165 F. 2d 82, 100 (D.C. Cir. 1947), *cert. denied*, 333 U. S. 838 (1948).

The mere threat of Committee exposure caused the refusal of the New York City Board of Estimate to approve a contract with playwright Arthur Miller; it was "disturbed over rumors that Mr. Miller was to be called before a Congressional investigating committee because of alleged left-wing views. . . ." N. Y. Times, Dec. 5, 1955, p. 33, col. 4. The contract was for Mr. Miller to write a movie script on juvenile delinquency in cooperation with the New York City Youth Board; the cancellation because of the threatened exposure seemed particularly inappropriate since the Board had approved Miller's story outline, had specified that all its "standards and ethics" were to be observed, and it had "final say on the shooting script. . . ." *Ibid.*

munists' views.²⁴ Certainly it would be a normal conclusion that the best course for protection against so insidious a danger would be to avoid contact with it. There is an easy transition from the premise that pro-Communists must be exposed, to the premise that no one should be exposed to their opinions.²⁵

Condemning Opinion Coinciding with Communist Party "Line"

The committees' emphasis on uncovering and eliminating from the public forum, writers and others in the opinion field who are pro-Communists, does not merely impel the public to shun the individuals it has so categorized. Committees attacking pro-Communism in the opinion field engage in an interrelated condemnation of people and ideas. The ideas embraced in the Communist Party "line" are necessarily of concern to these committees, and it is because the "line" encompasses many of the debatable political issues of the day that the investigations of alleged Communists in opinion-influencing positions have a pervasive influence on free expression. The Communist Party does not take a line that is distinctively Communist on most political issues. Many of its positions on the issues of the day could be reached by an exercise of honest independent judgment from non-Communist premises. Thus, currently, the Communist Party line is against NATO, for recognition of the Chinese Communist regime, for a ban on the manufacture of nuclear weapons, and for neutralization of Germany. Views on such political issues of general concern are necessarily the focus in investigations of alleged Communists in opinion-influencing positions, for it is on these issues rather than on the unmarketable doctrine of forcible overthrow of the government that the Communist Party addresses the public.²⁶ That is,

24. The subcommittee that submitted the McCarran Report, *supra* note 22, hereinafter referred to as the McCarran Committee, had as one of its express objectives the determination of "whether or to what extent these agents [agents of the Communist world conspiracy] and their dupes led or misled American Public Opinion." McCarran Report at 2. See Annual Report of House Un-American Activities Committee for 1946, quoted in Carr, *op. cit. supra* note 2, at 328; H. Rep. 1476, 76th Cong., 3d Sess. 3, 24 (1940).

25. See *e.g.*, McCarran Report at 170, where the Committee asperses as one of the Institute for Pacific Relations "pro-Soviet propaganda activities," its idea in 1936 and 1944 "of having outstanding Soviet Spokesmen meet influential Americans," even though the Communist viewpoint was being represented by open and avowed spokesmen for it.

26. The Senate Committee which recommended passage of the Subversive Activities Control Act, discussed in notes 60-68 *infra*, and texts thereto pointed out in justification of the Act's purpose of exposing Communists that "the present line of the party . . . is to avoid wherever possible the open advocacy of force and violence." S. Rep. No. 1358, 81st Cong., 2d Sess. (1950); see also Senator Eastland's statement in opening the resumed hearings of the Eastland committee that the committee was mindful of the fact

if a clergyman or publicist is alleged to be a Communist and to have been aiding Communism, the investigators are necessarily concerned with whether he propagandized for party line positions; this, it cannot be doubted, would be a likely function for a Communist in an opinion-influencing position.

How can the committee treat dissemination of the political views embraced in the "line" as evidence of disloyalty and as a dangerous influence towards pro-Communism, without indicating condemnation of such views? It is impossible for it to avoid explicit or implicit condemnation, nor can it carry on the investigation without manifesting that an orthodox affirmative anti-Communist line is the touchstone and badge of loyalty. Thus, for example, the McCarran Committee in its investigation of pro-Communist influence on American public opinion as to the Far East, uses as the yardstick for measuring whether a viewpoint was pro-communist, the assumption that the United States should have unconditionally supported the Nationalist government of China over the past decade.²⁷ A laudatory description by Owen Lattimore, journalist and author, in 1945 of economic reforms in the Communist area during the Chinese Civil War,²⁸ and his belief in 1949 that "Chinese Titoism" might result if the Russians overrode Chinese interests,²⁹ are taken as evidence of pro-Communist sympathy on Lattimore's part. Similarly, a recommendation against unconditional American aid to the Nationalist government is aspersed as pro-Communist in motivation by showing its parallel in views of the Communist Party.³⁰

"that the internal Communist conspiracy has as one of its primary aims the influencing of public opinion...." Hearings, *supra* note 1, at p. 1587. See similar statement by Senator Welker, at opening of a hearing by Eastland Committee at which it questioned a woman who publishes the "Far East Reporter" (a pamphlet with a circulation of about 1,000) and who delivers about 150 lectures a year on the Far East. He stated as the reason for the hearing that the committee has evidence of "... an effort to attune our foreign policy to the purposes of the Soviet Foreign Office." N. Y. Herald Tribune, March 9, 1956, § 1, p. 5, col. 3; N. Y. Times, March 9, 1956, p. 26, col. 6. And see statement by Chairman Walter of House Un-American Activities Committee, *supra* note 20.

27. See McCarran Report at 211.

28. McCarran Report at 192; see Lattimore, *Solution in Asia*, 79-84, 178-200 (1945).

29. McCarran Report at 211, 210. See also p. 129, as to suspicion of John Carter Vincent for a similar belief.

30. McCarran Report at 198-200. Similarly, under the caption: "Lattimore Was . . . A Conscious, Articulate Instrument of the Soviet Conspiracy" (McCarran Report at 214), the Report cites as supporting data Lattimore's 1945 book, *Solution in Asia*, which primarily favored continuance of Chiang Kai Shek's leadership, China's freedom from colonialism, and co-operative economic activity in China by Russia, China, the United States and Britain' (*Solution in Asia*, 79-84, 178-200). The book, the Committee

We are not here concerned with whether the Committee was right or wrong in its conclusion about Lattimore, or with whether its evidence of association in addition to the evidence of the coincidence of some of his opinions with the Communist line was of any probative value.³¹ We are concerned only with the tendency of a committee investigating alleged Communists in the opinion field to force a government-directed orthodoxy of opinion on what are in fact controversial issues, such as the proper solution of the Chinese situation.³² If a committee is to determine whether a writer other than an overt Communist has a pro-Communist influence on such issues, it is views that bear some similarity to the party line but could well be voiced by a non-Communist that must

pointed out, "... was approved as a party line book ... by the Communist Party" and sold in Party bookstores (McCarran Report at 217).

Attacks on colonialism and on the Japanese Emperor, and the view that Outer Mongolia was independent prior to World War II, are also treated as likely to reflect a pro-Communist purpose (McCarran Report at 194, 216).

31. That government officials themselves realized the untrustworthy calibre of the evidence other than his opinions, is indicated by the fact that no evidence of affiliation or any type of association with the Party was used as the basis for his perjury indictment for stating that he "had never been a follower of the Communist line ... or ever had been a promoter of Communist interests." In the second indictment, which was filed after the first was dismissed for vagueness, all the specifications related to Lattimore's statements of opinion on China and other world problems like those which figured in his investigation, with the addition of specifications concerning his publication of similar opinions by others in magazines he edited. After the second indictment was also held invalid, the Government decided to cease its attempt to prosecute and did not petition for certiorari. See *United States v. Lattimore*, 127 F. Supp. 405 (D. D.C. 1955) (dismissing second indictment and giving history of case), *aff'd by an equally divided court* (D.C. Cir. 1955). As to conclusion of the case, see *N. Y. Times*, June 29, 1955, p. 1, col. 3.

32. Thus, for example, Lattimore's view that there were economic improvements in the Communist areas in the Chinese Civil War, which the committee treated as obviously untenable and an indication of pro-Communism, *supra*, note 28, in fact had much reputable support. See Report of Military Intelligence Division of United States War Department on "The Chinese Communist Movement," date 5 July 1945, printed as Part 7A, Appendix II of Hearings before the Internal Security Subcommittee of Senate Committee on the Judiciary, 82d Cong., 1st Sess. (1951), 2d Sess. 2415-18, 2395 (1952); Brandt, Schwartz and Fairbank, *A Documentary History of Chinese Communism* 344 (1951) (prepared under a Carnegie grant to Russian Research Center of Harvard University); Dallin, *Soviet Russia and the Far East* 227 (1948), as to the "wealth of incontrovertible evidence pointing to widespread corruption, inefficiency, misery, and political degradation in Kuomintang China," though his book as a whole attacks Russian and Communist policy; and see statements of Ambassadors Gauss and Stuart and General Wedemeyer, *United States Relations with China* 64, 237, 246-47, 257 (U. S. State Dept., 1949).

Similar documentation as to the non-Communist support for various opinions held against Lattimore in the investigation and subsequent indictment, are given in the Appellee's Brief in the Court of Appeals in the appeal on the second indictment. Brief for Appellee, pp. 9-26, *United States v. Lattimore*, Case No. 12, 609 (D.C. Cir.).

come in for condemnation—for a concealed Communist dresses up his views so they are not blatantly and identifiably the fruit of Communist sympathy. The shadings and complexities of the opinions under attack as pro-Communist are therefore necessarily ignored, and the committee must pass over without comment their possible elements of truth and merit. Views are dogmatically classified against the crude yardstick of whether they would have been agreeable to the Communists. A position that can be epitomized as having the same thrust as a party view is treated as evidence that a party view was deliberately followed. Condemning dissemination of certain views, the committee indicates that one side of the argument, on an issue over which there can be an honest difference of opinion, is true and approved, and the other not only unenlightening but cause for suspicion of disloyalty.

Whether or not the committee explicitly goes through the process of appraising opinion on a series of political issues, as did the McCarran Committee—which was unusually articulate about its ratiocinations—the public would, we believe, feel the pressure toward an orthodox, ultra-nationalist point of view. Any committee in this field makes clear that pro-Communist opinion is dangerous, whether or not it tries to go down the line specifying what that opinion is. But, though pro-Communism may rhetorically be termed a virus,³³ spotting it is not as simple as spotting the measles. It is often uncertain who or what is pro-Communist³⁴—besides, the committees have nurtured a fear of subtle deception and its enormous dangers. Divergence from what is obviously orthodox on any political issue might entail contact with and absorption of a view coinciding with the Communists; if there is fear of this consequence, one can only entertain ideas within the

33. *E.g.*, remarks of former Representative Hobbs, in debate on deportation statute, 84 Cong. Rec. 10449 (1939).

34. Thus, an Army pamphlet "for the guidance of intelligence officers and employees," entitled, "How to Spot a Communist," stated that one sign was discussion of "controversial subjects" listed as follows: "McCarthyism, violation of civil rights, racial or religious discrimination, immigration laws, anti-subversive legislation, any legislation concerning labor unions, the military budget, and 'peace.'" The pamphlet was withdrawn after protests by the American Civil Liberties Union and other organizations. *N. Y. Times*, June 19, 1955, § 4, p. 2E, col. 5.

See statement of Jackson, J., concurring in part in *American Communications Ass'n v. Douds*, 339 U. S. 382, 439, n. 11 (1950): "Nothing is more pernicious than the idea that every radical measure is 'Communist' or every liberal-minded person a 'Communist.' One of the tragedies of our time is the confusion between reform and Communism—a confusion to which both the friends and enemies of reform have contributed. . . ."

narrow approved orbit.³⁵ The tendency of investigations in this field as presently conducted is, therefore, we submit, to guide the public towards an orthodoxy of ultra-nationalism, and to cause avoidance of any speaker or writer who does not demonstrate by his avowal of such a viewpoint that he is free from taint or suspicion.³⁶

It is true that political views resembling those espoused by the Communist Party line may be brought in as evidence of a person's pro-Communism in investigations in any field, and thus are stamped with an aura of suspicion. However, treatment of such views as suspicious and dangerous is more pronounced and is inevitable, rather than incidental, in investigations in the opinion field, because there the dissemination of opinion is the very activity that is apprehended as the danger.

II. HOW INVESTIGATIONS IN OPINION FIELD CONTRAVENE FIRST AMENDMENT PRINCIPLES

The committees obviously exert an influence against the free and unabashed scrutiny of ideas envisaged by the first amendment, insofar as they discourage appraisal of political ideas on their merits and encourage acceptance of what appears government-approved and safe.³⁷

More than that, the very premise on which rests first amendment-free exchange of opinion is defeated by the committees' all-pervasive concept and precept that it is dangerous to give Communists an audience for fear they will mislead the public. For the committees' premise is that all pro-Communist publicists, though a small minority and of insignificant influence among the hundreds or thousands of "loyal" persons working in the medium, should be

35. See *Barsky v. United States*, 167 F. 2d 241, 255 (D.C. Cir.), *cert. denied*, 334 U. S. 843 (1948) (Edgerton, J., dissenting): "It is not prudent to hold views or to join groups that the Committee [the House Un-American Activities Committee] has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to speak . . . I think . . . that, among the more articulate, it affects in one degree or another all but the very courageous, the very orthodox, and the very secure. . . ."

36. The Committees' work seems analogous to the establishment of a system of censorship which has the "pervasive" effect of discouraging any composition that is not certain of the censor's approval. See *Thornhill v. Alabama*, 310 U. S. 88, 98 (1940).

37. "A free man . . . must dare to doubt what a legislative or electoral majority may most passionately assert. The danger that citizens will think wrongly is serious, but less dangerous than atrophy from not thinking at all. Our Constitution relies on our electorate's complete ideological freedom to . . . preserve our democracy from that subversiveness, timidity and herd-

silenced.³⁸ The committees' approach is thus directly opposed to "... the theory of our Constitution . . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market,"³⁹ and that truth can and will be sifted from error by the "power of reason as applied through public discussion. . . ."⁴⁰ The committees express none of the confidence in "free and fearless reasoning"⁴¹ that produced the first amendment when they conclude that the public's protection lies in eliminating all misleading influences—all pro-Communists. Rather than confidence that the power of reason will find the truth in a free exchange of opinion, the committees seem to follow the view that exposure of the public to the errors of Communism is fatal to discovery of the truth. The committees thus stand athwart the first amendment way to understanding and enlightenment.⁴²

The committees investigating alleged Communists in the opinion field make a further assault on the foundations of free exchange of opinion, in that they contradict the philosophy expressed in Chief Justice Hughes' classic declaration in the *De Jonge* case:

"The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of

mindfulness of the masses which would foster a tyranny of mediocrity. . . . The idea that a Constitution should protect individual nonconformity is essentially American. . . ." *American Communications Ass'n v. Douds*, 339 U. S. 382, 442-43 (1950) (Jackson, J., concurring in part). "... [T]he basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies." *Dennis v. United States*, 341 U. S. 494, 503 (1951).

38. See notes 4, 23-25 *supra* and texts thereto. See also note 58 *infra*, and note 26 *supra*. No suspected Communist in the opinion field is too insignificant, apparently, for committee attention.

39. *Abrams v. United States*, 250 U. S. 616, 690 (1919) (Holmes, J., dissenting).

40. *Whitney v. California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring).

41. *Ibid.* "Justices Holmes and Brandeis . . . thought that the greater danger to a democracy lies in the suppression of public discussion . . . that, under the First Amendment, the public has a right to every man's view. . . ." *American Communications Ass'n v. Douds*, 339 U. S. 382, 395 (1950) (Opinion of the Court by Vinson, C. J.).

42. See *Terminiello v. Chicago*, 337 U. S. 1, 4-5 (1949): "Speech . . . may strike at prejudices and preconceptions and have profound unsettling effects. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." And see *Dennis v. United States*, 341 U. S. 494, 550 (1951) (Frankfurter, J., concurring): "The interest, which the [First Amendment] guards, and which gives it its importance, presuppose that there are no orthodoxies—religious, political, economic or scientific—which are immune from debate and dispute. . . ." *International Brotherhood of Electrical Workers v. Labor Board*, 181 F. 2d 34, 40."

the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects."⁴³

Under the *De Jonge* philosophy, the focus must be on the character of the idea, rather than the speaker; on *what* is said rather than *who* says it. The *De Jonge* principle means that anything can be said and anything can be heard, up to the point where the statements in themselves, judged by their content, create a danger in the constitutional sense. The committees work toward the opposite pole from *De Jonge*: they cull over speakers and writers, attempting to eliminate those of a particular type—pro-Communist—from the public forum.

The interrelated condemnation of ideas and persons in congressional investigations of alleged pro-Communist authors, clergymen, or others in the opinion field, demonstrates the prescience and importance of the *De Jonge* doctrine. The investigations proceed from the premise, contrary to *De Jonge*, that the character of authors rather than the content and merit of their expressions is primary. Then, though theoretically directed only at ascertaining the motivation of certain publicists, the investigations result in government designation of what political opinions are permissible or impermissible. The Government thus usurps by indirection a power it could not assume directly, for, to quote Mr. Justice Jackson's succinct statement of democratic faith: "It is not the function of our Government to keep the citizen from falling into error."⁴⁴

Many elements conduce to secure popular acceptance of the committees' ideological leadership and standards. Among these elements are the people's tendency to accept a proffer of authoritarian guidance in an age of confusion, anxiety and fear for national safety, the committees' appeals to patriotism and to personal pride in not being duped, and the threat of being suspected of pro-Communism with social and economic detriment in consequence. All contribute to the committees' power to influence the public away from belief and interest in a free flow of thought and expression.

43. *De Jonge v. Oregon*, 299 U. S. 353, 365 (1937). The holding was that *De Jonge* could not constitutionally be held guilty of a crime, merely because he assisted (through making a speech) at a meeting held under the auspices of the Communist Party. The question of whether criminal syndicalism had been advocated at the meeting, had been ruled to be outside the issues of the case by the state courts. In referring to the relevance of the "purpose" of the meeting, the Court was not speaking of its possible hidden purpose, but of the content of the particular meeting: whether it involved the advocacy of syndicalism or merely peaceful measures.

44. *American Communications Ass'n v. Douds*, 339 U. S. 382, 442 (1950) (Jackson, J., concurring in part).

Effect of Committee Investigations on Publicists Themselves

We have been concerned with the committee's broad effects on traditions and public attitude that are part of first amendment freedom. Only a word need be said about a more obvious result of the committee's investigations of alleged pro-Communists in the opinion field—the effect on publicists themselves.

It hardly needs laborious demonstration to show that the committees' treatment with suspicion of a group of political ideas, tends to make non-Communists who are concerned with protecting their reputations, influence, or positions, hesitant and fearful about expressing a political opinion that may appear to fall in the suspect class.⁴⁵

A spokesman of impregnable standing will of course be relatively unaffected by the fact that an opinion has been branded pro-Communist. Indeed, it is somewhat ironic that not long after the issuance of the McCarran Report castigating Lattimore's opinions, a view similar to Lattimore's as to the possibility of Chinese "Titoism," emphasized so adversely in the Report and the Lattimore indictment, was voiced by Senator Wiley, then chairman of the Senate Foreign Relations Committee.⁴⁶ For the more vulnerable, however, the danger from an expression of views resembling the Communist Party's on political issues is intensified by the fact that any evidence of connection with the party, other than coincidence of views, may be of a type not susceptible to refutation. Thus, in Lattimore's case the chief witness against him, the ex-Communist Louis Budenz, did not maintain that Lattimore was a "card-carrying" member or had any specific position in the party, but rather that he was under Communist Party "instructions" with respect to disseminating opinion on China that would be helpful to the party's purposes.⁴⁷ There is no form of proof that can be submitted against such a charge other than the accused's bare word, if his political views resembled for a period those adopted by the party. Evidence of contradictions on some issues between party positions and Lattimore's would avail nothing, since they might

45. It is true that a person is not likely to be suspected unless there is a coincidence between his views and the Party "line" on a number of points, and there thus would be less inhibition about expressing an isolated coinciding view than a series of them. However, a central non-Communist viewpoint could give rise to a series of the views embraced in the Communist Party "line," as, for example, a particular view as to power politics or the Nationalist regime could give rise to the series of opinions on China treated by the McCarran Committee as pro-Communist.

46. See N. Y. Times, June 30, 1953, p. 1, col. 5.

47. See *Hearings*, *supra* note 32, at 521-59.

be the result of "exemptions" which according to Budenz the party was wont to award on whatever points suited it.⁴⁸ Even testimony by other ex-Communists that they did not know of the person's supposed relation to the party—which in Lattimore's case was supplied by Elizabeth Bentley⁴⁹—would only show that those individuals were not in on the alleged secret of the person's intellectual vassalage.

The impossibility of refutation is again illustrated in the conflict between Joseph Alsop, the well-known newspaper columnist, and Budenz, with respect to John Carter Vincent. Budenz accused Vincent, then a State Department employee, of acting for the Communist Party when he accompanied Henry Wallace on a mission to China in 1944, which also included Alsop.⁵⁰ Alsop established that Vincent had made positive anti-Communist recommendations. Indeed, Alsop explained that it was he rather than Vincent who was the member of the mission who had opposed the appointment of General Chennault to the Chinese command—opposition which Budenz charged was pro-Communist and assumed was attributable to Vincent.⁵¹ But Alsop's expose of the fictitious quality of Budenz' testimony was ignored. For the Committee then asked if Alsop could deny, from first hand knowledge, that the Communist Party was "instructing" Vincent, as Budenz claimed.⁵² Of course, Alsop could not make the denial.⁵³

That a publicist would have a secret and informal connection with the Communist Party, as Budenz claimed, if he had any at all, seems likely. But his consequent difficulty in disproving a fabrication of a connection, facilitates a false charge against him of pro-Communism when he has in fact done nothing more than express views similar to the party line. The possibility of such a fabrication intensifies the threat against a publicist who expresses views resembling those of the party, and by the same token intensifies the discouragement of free expression resulting from the committees' program of attempting to classify publicists as pro-Communist.

48. See *Hearings* at 554, 559. Thus, in view of Budenz' exposition, it would have been futile to point out to the Committee that Lattimore praised Chiang Kai Shek in his 1945 and 1949 book—*Solution in Asia* 80-86 (1945); *Situation in Asia* 174-77 (1949)—though this was contradictory to the Communist Party line in that period. *Hearing* at 551, 1011-21.

49. *Hearings* at 439.

50. *Hearings* at 625-26, 1081.

51. *Hearings* at 1447-48, 1472; also see 1081, 1404, 1086, 1024.

52. *Hearings* at 1451, 1470-72.

53. *Ibid.* Budenz testified that Vincent's alleged Communist connection was a "secret shared by a few people" only. *Hearings* at 626.

III. POSSIBLE DANGERS FROM PRO-COMMUNISTS IN THE OPINION FIELD

The committees' premise that any and every pro-Communist influence on public opinion is to be searched out and eliminated, is, we have tried to show, contradictory to first amendment principles. Under what circumstances would an investigation of suspected pro-Communists in the opinion field be consistent with first amendment principles?

Since one of the purposes of an investigation is to determine whether there are dangers warranting legislation, an investigation may of course be constitutional even though there is not sufficient evidence of danger to support legislation on the same subject. But there must at least be cause for "reasonable concern" that a danger exists on which Congress could constitutionally act.⁵⁴ Thus the first step in considering what circumstances would justify an investigation of alleged Communists in the opinion field, is to consider when their presence in this field would constitute a danger against which Congress could constitutionally legislate.

Effect on Public Opinion About International Issues

The primary danger from pro-Communists in the opinion field would seem to be that the American people might adopt and enforce on the government international positions they would not otherwise favor, under the influence of misrepresentations by pro-Communists in their midst. But, estimating the danger of ideological success by the Communists⁵⁵ with first amendment principles in mind, every insubstantial pro-Communist influence on public opinion cannot be considered to create this danger, as the committees now seem to believe. Regardless of a pro-Communist's guile, he can succeed in propagandizing non-Communists only if he produces an argument that wins out in the non-Communist mind against the opposing point of view. And the Government's toleration of erroneous opinions, mandated by the first amendment, does not envisage a governmental distinction between error by reason of malice, bias, or guile, and error by reason of simple ignorance; the power to distinguish clean from unclean error would obliterate the injunction against government dictation of truth and error.

54. See *Barsky v. United States*, 167 F. 2d 241 (D.C. Cir.) *cert. denied*, 334 U. S. 843 (1948); cited and followed in *Wyman v. Sweezy*, 24 U. S. L. Week 2427 (N.H. Mar. 6, 1956), slip sheet opinion, p. 8.

55. The Supreme Court's reasoning that a physical *attempt* at overthrow of the government could be a substantial evil, regardless of the probability of its success, *Dennis v. United States*, 341 U. S. 494, 509 (1951), does not apply to an attempt to propagandize, which is not in itself an evil and could be dangerous only insofar as it is likely to succeed.

Accepting, then, the first amendment premise that truth will prevail over error in a free market of opinion, there would seemingly be a substantial danger of success for pro-Communist propaganda only if it were disseminated so extensively that normal opportunities for evaluating truth and falsity were lacking. To formulate a fairly cautious test, we could say a danger of Communist ideological success would exist if a substantial proportion of the organs of opinion in any locality or of any one medium of opinion nationally, or if any publicist or group of publicists influential with a substantial proportion of the public, disseminated pro-Communist propaganda.⁵⁶

The supporters of the investigations might argue that even if they agreed with such a test, present investigative procedure is consistent with it and with the first amendment. The argument would be: Even if a committee has suspicious information on only a few people in a medium, it must interrogate them, to find out whether there is a substantial and dangerous monopolization of opinion channels by pro-Communists. The difficulty with this approach, of course, is that by the time the committee discovers that there is no substantial monopolization, as it did for example in the case of the clergy, the damage is done to first amendment traditions and concepts by the investigation itself. In Section IV of this article (p. 549) we shall discuss a possible solution to this problem through a rule on order of proof, which would require the committees to have a more substantial basis for supposing that the alleged danger from pro-Communism in the opinion field exists, before investigating the suspected individuals.

Connection with Communist Party Objective of Overthrow of Government

Even if there is no specific danger to public opinion from the influence of pro-Communists in the opinion field, they and indeed all pro-Communists, regardless of occupation, are said to present a danger warranting governmental action and investigation, be-

56. A more absolutist first amendment position than that indicated in the text would be that expression can only be controlled if it is in the nature of an incitement to violence or other illegal acts; expression, it would be argued, cannot be controlled as long as it merely serves as a stimulus to opinion and entirely legal acts, regardless of the ultimate dangerous consequences for the nation. Compare Meiklejohn, *Free Speech: And Its Relation to Government* c. II (1948), with Justice Holmes, dissenting, in *Gitlow v. New York*, 268 U. S. 652, 673 (1925). The writer suggests, however, that if there were a near-monopolization of the channels of communication, the free flow of opinion envisaged by the first amendment as the corrective for false prophets would not be operating, and other correctives would not then violate the amendment.

cause they are all connected with the Communist conspiracy. The argument here is that the basic objective of the Communist movement in this country is the overthrow of the United States Government; and since our Government is constitutionally justified in taking measures to prevent its overthrow, it is concerned with all members and manifestations of a movement with this objective, no matter whether the particular activity is in the field of opinion or action.⁵⁷ On this theory, there would be no need for a showing of a specific danger as justification for an investigation of suspected Communists in the opinion field. Any suspected pro-Communist from any field would be equally subject to a committee summons. As counsel for one of the investigating committees put it, their justification is that they "... want to run down every angle of the Communist conspiracy."⁵⁸ Thus, in the recent Eastland investigation centering on the New York Times, Senator Eastland repeated several times that he was investigating Communism rather than the press,⁵⁹ though in fact it was clear, as the Senator himself indicated in other statements, that it was Communists in this particular sphere of activity who were under investigation.

Test of conspiracy theory in Subversive Activities Control Act case.

The Supreme Court has not to date considered, either in regard to investigation or legislation, the argument that any connection-

57. See *Barsky, v. United States* 167 F. 2d 241, 243 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948) and see note 116 *infra*.

58. Statement of J. C. Sourwine, chief counsel to Internal Security Subcommittee of Senate Judiciary Committee, in questioning librarian for private library of Plymouth Meeting, Pa. (Quaker community of 600 persons), after she had protested she had no connection with internal security. N. Y. Times, Sept. 16, 1955, p. 14, col. 4. The librarian had been discharged from a previous library job after refusing to answer questions by the subcommittee on her past Communist connections, and the Fund for the Republic of the Ford Foundation had given an award to Plymouth Meeting after it engaged her.

59. N. Y. Times, Jan. 4, 1956, p. 16, col. 3; Jan. 5, 1956, p. 20, col. 2. Despite these verbal attempts to disclaim invasion of the opinion field, Senator Eastland and other committeemen could not avoid articulating on occasion the obvious fact that they were concerning themselves with the press and with those particular suspected Communists who were engaged in newspaper work. At the opening of the January hearings, Senator Eastland stated: "The subcommittee could not be unmindful of the fact that among the persons involved in this investigation have been many who were or are members of the press, and that the internal Communist conspiracy has as one of its primary aims the influencing of public opinion..." Hearings *supra* note 1, at p. 1587. See concluding statement by Senators Eastland and Jenner, that the "investigations had disclosed 'a significant effort on the part of Communists to penetrate leading American newspapers.'" N. Y. Times, Jan. 7, 1956, p. 1, col. 6. Even newspapers that were sympathetic to the Eastland Committee recognized the investigation concerned "attempts to infiltrate and to influence American journalism." See editorial from N. Y. Journal-American, re-printed in round-up of editorials throughout country, N. Y. Times, Jan. 8, 1956, p. 70, col. 3.

with-the-conspiracy is sufficient per se to justify infringement of first amendment rights. It may evaluate this position for the first time in the pending case involving the registration order directed to the Communist Party by the Subversive Activities Control Board.⁶⁰ Under the Subversive Activities Control Act of 1950,⁶¹ organizations determined by the board to be "Communist-action" or "Communist-front" organizations, as defined in the act, are to register the names of all their officers and members in registers open to the public.⁶² The legislative history makes clear that the major objective the draftsmen thought to accomplish by this provision was to expose to the public the identity of Communists in order to protect the public against being misled by party line propaganda.⁶³ With a similar objective a subsidiary section of the act provides that all organizations required to register as Communist action, front, or infiltrated organizations must label their literature and broadcasts as disseminated or sponsored by a Communist organization.⁶⁴ Thus, the act is a more formal effectuation of the same purpose of exposure, particularly in connection with party line propaganda, that bulks large with the congressional committees investigating alleged Communists in the opinion field.

The ultimate objective of the act is to prevent overthrow of the Government⁶⁵ and it was upheld on this basis in the lower court.⁶⁶ The dissemination of party line propaganda by Communists on political questions of general concern, which the act seeks to control as do the congressional investigations, is obviously several steps re-

60. Since this article went to press, the case was decided without reaching this issue. The question will no doubt again be presented to the Court for review. See note 10a *supra*. The order had been upheld by the Court of Appeals. *Communist Party of the United States v. Subversive Activities Control Board*, 223 F. 2d 531 (D.C. Cir. 1954).

61. 64 Stat. 987 (1950), 50 U. S. C. §§ 781-98 (1952).

62. 64 Stat. 993 (1950), 50 U. S. C. § 787 (1952).

63. The Senate Report on the bill which became the Act pointed out: "The purpose of registration is . . . (a) to expose the Communist movement and protect the public against innocent and unwitting collaboration with it;" and "The proposed bill represents . . . (2) a registration statute calculated to effect disclosure of the identity and propaganda of individual Communists and Communist organizations." The propaganda the draftsmen had in mind was that concerning everyday political issues; the Report points out, in justification for the Act's purpose of exposure, that ". . . the present line of the Party . . . is to avoid wherever possible the open advocacy of force and violence." S. Rep. No. 1358, 81st Cong., 2d Sess. 3, 7 (1950).

See also statements of draftsmen on the floor: 96 Cong. Rec. 14535, 14439-40, 14575, 14497-98 (1950).

64. 64 Stat. 996 (1950), 50 U. S. C. § 789 (1952).

65. 64 Stat. 987 (1950), 50 U. S. C. § 781 (1952).

66. *Communist Party of the United States v. Subversive Activities Control Board*, 223 F. 2d 531 (D.C. Cir. 1954), *reversed on other grounds*, see note 10a *supra*.

moved from the objectives of overthrow of the government, espionage, or sabotage. Hence, the connection-with-conspiracy argument is important in the Government's defense of the act. The party's advocacy of overthrow of the government and its seditious connection with the Soviet Union, the Government's brief argues, warrants the registration requirement though it concededly may restrain the party's peaceful and non-seditious activities.⁶⁷ The Government likewise urged this justification for the labeling provision, arguing that this requirement was justified for expressions of opinion which were unobjectionable in their specific content and immediate nature, because of the party's ultimate goal of overthrow.⁶⁸ While neither the act nor the Government's brief articulates the precise nature of the connections between party line propaganda and overthrow of the government, espionage or sabotage, the connection presumably is that people attracted by this propaganda may be led into the party or at least to aid the party, and to eventually engage in the subversive acts.

Inconsistency of the conspiracy argument with first amendment doctrines.

The connection-with-conspiracy approach, de-emphasizing the nature and effect of the particular Communist activity, and treating Communists and Communist activity as, in effect, fungible, precludes attention to the particular relationship between a restriction and first amendment rights, and, in the case of investigations, precludes attention to the special damage to free expression when the investigation of alleged Communists relates to those in the opinion field. We suggest that this approach should therefore be rejected as contrary to important lines of first amendment doctrine.

It has become an accepted concept in the Supreme Court that the extent to which a particular measure restrains first amendment rights must be weighed against the public interest alleged to justify the restraint, to determine its constitutionality. The Court measures, it says, "... which of these two conflicting interests demands the greatest protection under the particular circumstances presented. ...

67. Brief for Respondent, pp. 90, 95, 100, Communist Party of the United States v. Subversive Activities Control Board, *supra* note 10a 66.

68. "What we have in this case is the Communist Party . . . engaged, among its other activities, in widespread propaganda which, whatever the immediate issue may happen to be, has always as its ultimate objective the domination, by force, of this country. . . . Much of this propaganda is covert, and all of it attempts to sell itself to the public as peacefully and lawfully inspired. . . . The Party frequently . . . plead[s] for various causes which it thinks will advance its own falsely assumed status as a champion of human rights." Brief for Respondent, pp. 167-68, *supra* note 67.

In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the . . . evils of conduct . . ." that Congress seeks to check.⁶⁹

Intertwined with this view that the Court must ponder and weigh the impact of a restraint on first amendment freedoms, the Court has over a number of years admonished that it has a more scrupulous duty of review when first amendment rights are affected than when property interests are being curtailed.⁷⁰ Some decisions go even further than this general admonition, and enunciate a special and strict criterion of validity for first amendment cases. There, they say, the Court must not only consider whether the measure could reasonably be deemed related to a legitimate objective, as it customarily does in determining constitutionality, but also whether the measure imposes on first amendment rights an excessive restraint which is unnecessarily broad to accomplish the legislative purpose.⁷¹ Quite recently, in invalidating the power of a state licensing board to censor sacrilegious movies, the Court said that this was not "the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society."⁷² Finally, as part of this blend and weave of doctrinal threads, it is fundamental in first amendment discussions that the proximate relation between the restrained expression and the threatened evil is the crux of validity: "Government may cut him [every man] off only when his views are no longer merely views but threaten, clearly and imminently, to ripen into conduct against which the public has a right to protect itself."⁷³

69. *American Communications Ass'n v. Douds*, 339 U. S. 397, 399, 400 (1950).

70. *American Communications Ass'n v. Douds*, 339 U. S. 382, 399, 400 (1950); *Kovacs v. Cooper*, 336 U. S. 77, 88 (1949); *Schneider v. State*, 308 U. S. 147, 161 (1939); *United States v. Carolene Products Co.*, 304 U. S. 144, n. 4 (1938).

71. A measure affecting freedom of expression must be "narrowly drawn to meet the supposed evil." *Cantwell v. Connecticut*, 310 U. S. 296, 307 (1940). "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. . . ." *Thomas v. Collins*, 323 U. S. 516, 530 (1945). And see *Winters v. New York*, 333 U. S. 507 (1948); *Murdock v. Pennsylvania*, 319 U. S. 105, 116 (1943); *Thornhill v. Alabama*, 310 U. S. 88, 95, 96 (1940). *Cf. Toth v. Quarles*, 350 U. S. 11, 23 (1955), where the Court, pointing out that subjection of civilians to military trial was a restriction of their constitutional liberties, said: "Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to 'the least possible power adequate to the end proposed'" (citing *Anderson v. Dunn*, 6 Wheat. 204, 230-31 (1821)).

72. *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 504 (1952).

73. *American Communication Ass'n v. Douds*, 339 U. S. 382, 395 (1950). See discussion of the "clear and present danger" test, *Dennis v. United States*, 341 U. S. 494, 501-11 (1951).

These first amendment doctrines, if diligently applied, would, we suggest, confound the approach that all sanctions relating to the Communist movement or anyone connected with it are valid merely by virtue of their connection with a movement to overthrow the government. This connection should only be taken into account in weighing justification, without blotting out concern for the extent the particular measure affects first amendment rights, the possibility of narrower measures to avert the evil of overthrow, and the proximity of the expression restrained to the evil of overthrow.⁷⁴

It is anybody's guess whether the Court will get to the first amendment question in the *Subversive Activities* case.⁷⁵ A holding for or against the connection-with-conspiracy argument in that case would, of course, be highly indicative of the validity of congressional investigations of alleged Communists in the opinion field as well, for the propaganda at issue in both cases is the same number of steps removed from attempts to overthrow the government or the commission of other illegal acts. If it is unconstitutional to pass legislation to control propaganda of a non-violent political nature even though it is a facet of the Communist program, by the same token a congressional investigation could not be justified constitutionally on the ground of this relationship.

IV. PROSPECTS FOR JUDICIAL INVALIDATION OF INVESTIGATIONS IN THE OPINION FIELD

So far we have appraised the investigations with what might be criticized as a blithe disregard of the series of courts of appeals' decisions from 1947 to 1950 upholding the movie investigation and others dealing with alleged Communists in the opinion field.⁷⁶ There the Courts did not take cognizance of the full effects, as we have

74. A caveat as to whether the Supreme Court will apply these doctrines in a case involving the Communist issue: no majority opinion in any such case has used the doctrine of a narrowly tailored restraint, and it has been indicated that the proximity principle may have a tempered application when a measure restricts, but does not directly penalize, expression. *American Communication Ass'n v. Douds*, 339 U. S. 392, 395-98 (1950).

75. The registration provision might be invalidated on various other grounds, such as violation of the privilege against self-incrimination or due process. See dissenting opinion on former ground in *Communist Party of the United States v. Subversive Activities Control Board*, 223 F. 2d 531, 576 (D.C. Cir. 1954), *reversed on non-constitutional grounds*, see note 10a *supra*.

76. See cases cited note 12 *supra*. The confidence of the Court of Appeals for the District of Columbia in its much-cited *Barsky* holding might be thought somewhat shaken in view of its statement in *Rumely* that "The doctrine has since [Barsky] been clarified and sharpened by the Supreme Court." *Rumely v. United States*, 197 F. 2d 166, 173 (D.C. Cir. 1952), *aff'd*, 345 U. S. 41 (1953). However, it has continued to cite *Barsky* as a precedent. See *United States v. Lattimore*, 215 F. 2d 847, 851 (D.C. Cir. 1954).

sketched them, of such investigations on first amendment rights, nor did they seem to consider that the standard first amendment doctrines we have discussed might be applicable to such investigations; they did, on the contrary, give weight to the connection-with-conspiracy argument. However, there have been developments in the law since these decisions, particularly in the *Rumely* case, that might persuade the courts to re-visit and re-appraise the problem. We now turn to this possibility.

The Rumely Decisions, in Perspective

The congressional power to investigate was for the first time in our judicial history braked by the first amendment in *United States v. Rumely*, which reached decision by the United States Supreme Court in 1953.⁷⁷ Edward Rumely was secretary of the "Committee for Constitutional Government," which distributed books and leaflets of a rightist political slant on pending legislation. CCG supporters either bought the publications from CCG in bulk and then distributed them free, or merely paid for a quantity which CCG then distributed free to the individuals or categories of persons the supporters specified.⁷⁸ For instance, Lilly and Co., the drug firm, directed CCG to distribute \$25,000 worth of publications on medical care plans to "school teachers, members of the clergy and other influential groups of our local community;"⁷⁹ and publisher Frank Gannett paid for distribution to other newspaper publishers of a pamphlet favoring Taft-Hartley.⁸⁰

Rumely was called for questioning before a house committee investigating lobbying. He refused to answer on the ground of the first amendment when the investigating committee asked him for the names of all persons from whom CCG had received more than \$500 for the purchase or distribution of books or pamphlets. The United States Court of Appeals for the District of Columbia reversed his conviction for refusing to answer, holding that the question was outside the Committee's authority, and reasoning that it unconstitutionally interfered with first amendment rights.⁸¹ In a unanimous opinion by Frankfurter, J., the Supreme Court affirmed. However, it refrained from ruling directly on constitutionality, and was content to agree with the lower court's results on the less-

77. 345 U. S. 41 (1953).

78. *Rumely v. United States*, 197 F. 2d 166, 170 (D.C. Cir. 1952), *aff'd*, 345 U. S. 41 (1953).

79. *Rumely v. United States*, *supra* note 78, at 184.

80. *United States v. Rumely*, 345 U. S. 41, 50-51 (1953).

81. *Rumely v. United States*, 197 F. 2d 166, 175, 178 (D.C. Cir. 1952), *aff'd*, 345 U. S. 41 (1953).

committal ground that the resolution authorizing the investigation should be given a restricted construction to *avoid* constitutional difficulty. Stressing the court of appeals' opinion as a demonstration that the power claimed by the Committee raised constitutional doubts,⁸² the Supreme Court held that to avoid doubts the enabling resolution should be interpreted as authorizing an investigation of only those lobbying tactics which deal with representations made directly to the Congress and not with "attempts 'to saturate the thinking of the community'" and to indirectly influence the legislative process.⁸³

Because the Supreme Court's opinion was cursory, its significance can best be comprehended by first considering the opinion of the court of appeals, whose view is also important in itself for the purposes of this article because it served as the final court of review in most of the past Communist propaganda cases.⁸⁴ The court of appeals' conclusion that the questioning of Rumely violated the first amendment starts from its recognition that "to publicize or report to the Congress" the names of the purchasers and distributors of Rumely's literature would have discouraged people from buying it, because the "realistic effect of public embarrassment is a powerful interference with the free expression of views."⁸⁵ But, the court continued, efforts to influence public opinion through information and persuasion are a good, not an evil—a fundamental freedom guaranteed by the first amendment against abridgement except for urgent necessity. Here there was no showing that the distribution of CCG literature to the public created a danger which would justify legislative interference or an investigation as an aid to the legislative process.^{85a} Conclusion: Exposing the names of purchasers, and thus embarrassing them out of their attempts to influence public opinion by buying and distributing CCG material, was unconstitutional.

Exposure as a restraint.

Though the Supreme Court did not go as far as the lower court, it at least recognized that the questioning of Rumely affected first amendment rights. The most cautious would have to agree that the Supreme Court decision stands for this much. Its reasoning is that if the questioning of Rumely were deemed authorized so that its constitutionality became an issue, the Court would be presented

82. *United States v. Rumely*, 345 U. S. 41, 46 (1953).

83. *Id.* at 45, 47.

84. See cases cited note 12 *supra*.

85. *Rumely v. United States*, 197 F. 2d 166, 174 (D.C. Cir. 1952), *aff'd*, 345 U. S. 41 (1953).

85a. See note 130 *infra* as to Court's view of when the distribution would be dangerous.

with the constitutional problem of balancing the investigatory power against the first amendment.⁸⁶ The only way the first amendment came into play was on the theory that exposure means embarrassment and embarrassment leads to restraint of expression; and it is this theory that the Supreme Court must have implicitly conceded in agreeing that the questioning involved first amendment rights. Against the background of its decisions, this was a major step for the Supreme Court to take. Indeed, considering the present popularity of exposure as a technique of government,⁸⁷ this development has a significance broader than the field of investigations.

While the court of appeals had recognized prior to *Rumely* that exposure by an investigating committee affects constitutional rights,⁸⁸ the Supreme Court had not previously come to this point. Previously, the only way that congressional investigation invaded individual constitutional rights, so far as the Supreme Court had recognized, had been by interfering with the abstract right to privacy and to be let alone.⁸⁹ And a seeming augury against the

86. See *United States v. Rumely*, 345 U. S. 41, 44, 48 (1953).

87. See p. 536 *supra*, as to registration requirement of Subversive Activities Control Act, and p. 544 *infra*, as to previous registration acts; see *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 (1951), as to listing of "subversive" and similar categories of organizations by the United States Attorney General.

88. See *Barsky v. United States*, 167 F. 2d 241 (D.C. Cir.), *cert. denied*, 334 U. S. 843 (1948); compare *Wyman v. Sweezy*, 24 U. S. L. Week 2427 (N.H. Mar. 6, 1956), slip sheet opinion p. 7. The Court of Appeals for the Second Circuit did not seem to share this view. See *Josephson v. United States*, 165 F. 2d 82, 89 (2d Cir. 1947) (dissenting opinion), *cert. denied*, 333 U. S. 838 (1948). The Supreme Court had not passed on the issue and had denied certiorari in the Communist propaganda cases. Cases cited note 12 *supra*.

See *Nelson v. United States*, 208 F. 2d 505, 513 (D.C. Cir. 1953), where the Court emphasized the coercive atmosphere of a committee hearing since "... the 'investigative' activities of Congress have become less distinguishable from the law enforcement activities of the Executive."

89. See *Sinclair v. United States*, 279 U. S. 263, 291, 292 (1929); *McGrain v. Daugherty*, 273 U. S. 135, 173 (1927); *Kilbourn v. Thompson*, 103 U. S. 168, 190 (1880). The premise, generally implicit, was that such an interference violated due process. See *Barry v. United States ex rel. Cunningham*, 279 U. S. 597, 620 (1929); *Hamilton, The Inquisitorial Power of Congress*, 23 A. B. A. J. 511 (1937). The Court has generally followed the same abstract approach in cases of investigations by administrative agencies. See *Jones v. Securities and Exchange Commission*, 298 U. S. 1, 24, 26 (1936); *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 305-06 (1924); *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 478 (1894). In *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 417 (1908), Justice Holmes was more specific and took some note of the practical effect of the disclosure, saying that the I. C. C. was arguing for power to compel the disclosure of "... any facts, no matter how private, no matter what their tendency to disgrace ..." the witness. See also *Utah Fuel Co. v. Bituminous Coal Commission*, 306 U. S. 56, 60 (1939), where the Court took cognizance of the possible detrimental effect of disclosures forced in an investigation, when it was alleged that business competitors would thereby secure knowledge of secret business data.

Court's acceptance of the theory that embarrassing public exposure is an interference with first amendment rights, was its view that pronouncements of investigators or other government agencies did not constitute sanctions affecting legal rights, despite their effect on public opinion. Thus, to a railroad's complaint that an Interstate Commerce Commission report set forth an erroneous valuation for its property which would injure its credit standing, the Court had replied that the order was the "exercise solely of the function of investigation"⁹⁰ and that "neither its [the I.C.C.'s] utterances nor its processes of reasoning, as distinguished from its acts, are a subject for injunction."⁹¹ Despite the railroad's complaint of unfair damage, the Court would not even consider whether the government pronouncement was false, as the company claimed.⁹² The Court showed the same attitude when it considered a statute intended to settle labor disputes through a board's recommendation of settlements and publication of its decisions. Though the very purpose of the publication was to arouse the force of public opinion, and indeed the statute relied on this force to secure the participants' adoption of the settlement, the Court did not recognize the publication of the decisions as an exercise of coercion, nor that any legal or constitutional rights were affected by it. It refused to consider the merits of the board's decision, and in effect said the board could function without judicial control because it used no sanction but public opinion.⁹³

The Court showed more concern with the power the Government can wield by working on public opinion, in the recent *Joint Anti-Fascist* case, when it held that the Attorney General's listing of an organization as subversive was grounds for a cause of action.⁹⁴ But there, for purposes of a motion to dismiss, the Court assumed the listing was false; it thereupon analogized to common law defamation as the basis for its holding that such a listing was a legal injury. It had no occasion therefore, even if it wished, to recognize that government exposure even of the truth could affect legal rights, as it did by implication in the *Rumely* case. When, after *Rumely*, the Supreme Court was confronted with a case testing the constitutionality of the requirement for lobbyists to register, it seemed to

90. *United States v. Los Angeles and Salt Lake R. R.*, 273 U. S. 299, 310 (1927).

91. *Id.* at 314-15.

92. *Id.* at 310.

93. *Pennsylvania R. R. v. United States R. R. Labor Board*, 261 U. S. 72, 79 (1923).

94. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 (1951).

accept as established doctrine that the embarrassment of disclosure and exposure, though of the truth, could work a restraint on the exercise of first amendment rights.⁹⁵

In the pending Supreme Court test of the validity of the order to the Communist Party to register itself as a "Communist-action" organization within the meaning of the Subversive Activities Control Act, the exposure effected by the registration undoubtedly constitutes a restraint on first amendment rights, and the Government so admits in its brief.⁹⁶ Here, by defining a "Communist-action" organization in highly opprobrious terms as an organization engaged in treachery and destruction of this Government, and requiring an organization to register as such, something has been added to the registration technique used in previous acts such as the Foreign Agents' Registration Act⁹⁷ and the Federal Regulation of Lobbying Act.⁹⁸ There, only statements of certain facts were required, and any opprobrium arose from what the facts themselves disclosed; here the Government itself stigmatizes by affixing a label.

In sum, then, starting from a position that the Government was not even imposing a sanction when it effected exposures or worked on public opinion, the Supreme Court proceeded to a recognition that the Government inflicted legally cognizable injury if it made an erroneous disclosure, and has now proceeded to the point that exposure even of the truth is recognized as a restraint. Particularly and a fortiori it would be a restraint, we believe, though the Court has not yet passed on the case, if the Government increases the embarrassment of the exposure by attaching a stigma, as it does under the Subversive Activities Control Act and in effect by the congressional investigations.

Necessity for "accommodation" of the investigatory power to the first amendment.

Though the Supreme Court's decision in *Rumely* may seem rather abbreviated support for an extended exegesis, nevertheless its holding there marks an advance in its view on another aspect of the investigative power, besides the coercion by governmental exposure. The reason the Court gave there for its restricted construc-

95. *United States v. Harriss*, 347 U. S. 612, 625 (1954).

96. Brief for Respondent, pp. 90, 95, 100, *Communist Party of the United States v. Subversive Activities Control Board*, cited note 10a *supra*.

97. At issue on non-constitutional grounds in *Viereck v. United States*, 318 U. S. 236 (1943).

98. At issue in the *Rumley* and *Harriss* cases.

tion of the statute was its wish to avoid the constitutional problem of accommodating the investigatory power to the first amendment.⁹⁹ The Court had not previously employed such a concept of balance and compromise in determining the validity of a congressional investigation.

Since its much criticized decision of *Kilbourn v. Thompson*¹⁰⁰ in 1880, invalidating an investigation, the Supreme Court has invariably upheld the congressional investigative power and countenanced its broad sweep. Giving Congress a loose rein, the Court has asserted that Congress' investigative power extended to investigations "with a view to possible exercise of its legislative function,"¹⁰¹ that no specific legislation had to be in contemplation; that if there were even a possible legitimate purpose, the investigation would be presumed to be in good faith.¹⁰² The question of validity seemed to be settled if an investigation as a whole or a question in its course met this broad test. In effect, if there was a reason in terms of public interest for exercise of the investigative power, the matter under inquiry ceased, by the same token, to be a "private affair" immune from investigation.¹⁰³

In contrast to the judicial process in the old cases, the Court emphasized in *Rumely* the gravity of the issue of "accommodation" of the investigatory power to the first amendment.¹⁰⁴ Thus, the

99. See note 83 *supra* and text thereto.

100. 103 U. S. 168 (1880). As to criticism, see *Rumely v. United States*, 345 U. S. 41, 46 (1953), and articles there cited; Herwitz and Mulligan, *The Legislative Investigating Committee*, 33 Colum. L. Rev. 1, 9 (1933).

101. *United States v. Norris*, 300 U. S. 564, 573 (1937).

102. See *McGrain v. Daugherty*, 273 U. S. 135, 177, 178 (1927); *Sinclair v. United States*, 279 U. S. 263, 294 (1929); see also *Barry v. United States ex rel. Cunningham*, 279 U. S. 597, 614, 620 (1929); *Tenny v. Brandhove*, 341 U. S. 367, 377-78 (1951). See Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 194 (1926); Herwitz and Mulligan, *op. cit. supra* note 100 at 8; Note, 47 Colum. L. Rev. 416, 423 (1947); compare Coudert, *Congressional Investigation versus Individual Liberty*, 15 Va. L. Rev. 537 (1929).

103. Cases cited note 102 *supra*. Nevertheless, in the cases involving investigations by administrative agencies, rather than congressional committees, the Court condemned "fishing expeditions" into documents on the investigators' mere hope of finding pertinent data; there the right to privacy seemed to be honored despite the fact that the information requested *might* have aided a legitimate administrative purpose. See *Jones v. Securities and Exchange Commission*, 298 U. S. 1, 26 (1936); *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 305-06 (1924); *Ellis v. Interstate Commerce Commission*, 237 U. S. 434, 445 (1915). And see *Hearst v. Black*, 87 F. 2d 68 (D.C. Cir. 1936) (administrative agency aiding congressional committee). Compare *United States v. Morton Salt Co.*, 338 U. S. 632, 642 (1950); see Davis, *Administrative Law* 112-13 (1951), who views the *Morton* case as confirmation of a tendency to weaken "the inhibition against fishing expeditions"; see also Davis *supra* at 92, 106-07, 136.

104. *United States v. Rumely*, 345 U. S. 41, 48, 44 (1953). If the lenient legislative purpose test of the previous cases had been followed, the Court probably could not have regarded the questioning of *Rumely* as of doubtful

Court seems to be talking about its own previous approach to the validity of congressional investigations, as well as President Wilson's,¹⁰⁵ when it declares that he "did not write in light of the history of events since he wrote; more particularly he did not write of the investigative power of Congress in the context of the first amendment."¹⁰⁶

Test of proper "accommodation" of investigating power to first amendment.

What is the gauge of whether a constitutional "accommodation" has been made between the investigatory power and the first amendment, and to what extent will the usual first amendment doctrine of weighing restraint against justification¹⁰⁷ be applied to the investigative power? The Supreme Court's *Rumely* opinion does not go far enough to indicate an answer; but the court of appeals' decision suggests what seems to us a sound and worthwhile test of "accommodation."

One of the Government's arguments in *Rumely* was that the Lobbying Act required the report of all contributions over \$500, and that the investigating committee was interested in violations of this reporting requirement. For this reason, the Government lawyers claimed, the Committee was justified in questioning Rumely as to purchasers of over \$500 worth of CCG literature, in order to investigate whether purchasing was a device to avoid the Lobbying Act's requirement for the report of contributions. The court agreed that disguising contributions as purchases might be an evil within the legitimate interest of the Committee and that one way of discovering concealed contributions might be to obtain the names of alleged purchasers so they might be questioned. Nevertheless, under the circumstances, the Court would not countenance the exposure of their names with the resulting embarrassment and the consequent restraint on the first amendment right to influence public opinion. Before resorting to exposure and restraint, the Committee had to be more certain that there was a violation. It at least had to first

constitutionality; Rumely's interrogation would have met this test if only through the committee's allegation that it had to investigate the "purchases" of Rumely's literature to determine whether they were a device to avoid the Lobbying Act's requirement for the report of contributions. See *Rumely v. United States*, 197 F. 2d 166, 171 (D.C. Cir. 1952), *aff'd*, 345 U. S. 41 (1953).

105. See note 142 *infra* and text thereto.

106. *United States v. Rumely*, 345 U. S. 41, 44 (1953). An indication of the force of *Rumely* is that it was cited by Chief Justice Warren, apparently for its first amendment holding, in discussing limitations on the investigative power in *Quinn v. United States*, 349 U. S. 155, 161, n. 23 (1955).

107. See notes 69-73 *supra* and texts thereto.

examine CCG's financial records to see if there was a factual basis, instead of mere speculation, for suspecting that contributions were being disguised as purchases.¹⁰⁸

As to the questions which the committee directed to Rumely about general propaganda activities, the court of appeals emphasized that a mere vague and tangential connection between a question and a legitimate legislative purpose was insufficient. It pointed out that the Committee's authority to question Rumely in some respects about his lobbying activities did not mean that questions about all his distributions of propaganda were "pertinent" within the meaning of the contempt statute punishing a refusal to answer "pertinent" questions:

"Especially it is true that power over a subject matter involving speech, press, religion, assembly and petition does not go beyond the power to do that which is essential to be done in protection against a public danger."¹⁰⁹

The court of appeals says in essence that in the investigative process it is not enough that the information sought is related to a legitimate legislative objective. In seeking the information care must be taken to guard first amendment rights against unnecessary

108. *Rumely v. United States*, 197 F. 2d 166, 172 (D.C. Cir. 1952), *aff'd*, 345 U. S. 41 (1953).

109. *Id.* at 176. While the Court here emphasized the first amendment, it is to be noted that it recently also applied a strict test of pertinency in a non-first amendment case. In *Bowers v. United States*, 202 F. 2d 447 (D.C. Cir. 1953), the Court held that in an investigation of organized crime's use of interstate facilities, it was not "pertinent" to question a witness as to whether he "knew" an alleged interstate gambler, since such knowledge could be based on a mere casual acquaintance, and in that event would not be significant. And the question could not be deemed pertinent merely because it might be a preliminary to another question which would be pertinent. The *Bowers* case was cited on this point in *Wyman v. Sweezy*, 24 U. S. L. Week 2427, slip sheet opinion p. 2 (N.H. Mar. 6, 1956). Compare *In re Barnes*, 204 N. Y. 108, 97 N. E. 508 (1912), for a similar limited interpretation of pertinency. Compare *United States v. Icardi*, 24 U. S. L. Week 2484 (April 19, 1956) (D.D.C.), (reprinted in N. Y. Times, April 20, 1956, p. 10), where the Court held that the "slim conjecture" that an answer might affect a committee's conclusion in regard to a matter of legitimate legislative concern was not enough to render the answer "material" therefore for the purpose of a perjury prosecution.

The court of appeals' treatment of a purportedly preliminary question as impertinent under the contempt statute, contrasts markedly with the frequent ruling under the perjury statute that testimony is "material" and thus within the scope of the statute if it has a "tendency to influence, impede or dissuade the investigating body from pursuing its investigation." *United States v. Moran*, 194 F. 2d 623, 626 (2d Cir.), *cert. denied*, 343 U. S. 965 (1952) and cases there cited. It would seem appropriate for "pertinency" for the purpose of the Federal contempt statute, and "materiality" for the purposes of the Federal perjury statute, to receive the same construction. In other respects, the two statutes have been treated as analogous. See *Sinclair v. United States*, 279 U. S. 263, 298 (1929); and compare, *In re Chapman*, 166 U. S. 661 (1897) (contempt), with *Seymour v. United States*, 77 F. 2d 577 (8th Cir. 1935) (perjury).

and avoidable restraints. The court's approach is reminiscent of the most liberal strand in the Supreme Court's first amendment decisions: the view that a statute is invalid if the evil could be remedied by a narrower measure, less obstructive of free expression.¹¹⁰ This seems a logical development. Once the courts recognize, as they now do, that questioning and exposure works a restraint on first amendment rights, and that Congress is using part of its legislative power and is subject to the first amendment when it investigates as well as when it legislates,¹¹¹ the next step would be for them to apply to investigations the first amendment precedents developed with regard to legislation.

The law on investigatory power, like all else, is certainly a seamless web, and the court of appeals' approach in *Rumely* has parallels outside the first amendment field, particularly in the Supreme Court's admonitions against "fishing expeditions."¹¹² Still, the *Rumely* case taken with first amendment doctrine generally, supports the view that there must be *special* attention to relevance and necessity when the committee's question results in a restraint on expression and communication of opinion.

Applying Rumely Doctrines to Investigations of Alleged Communists in the Opinion Field

Within this developing legal framework, would a court take cognizance of the serious impact on first amendment freedoms of congressional investigations of alleged Communists in the opinion field, and might it reach a different result from the early decisions upholding such investigations?

There are two branches to a decision on validity under the first amendment: One, consideration of whether there is a restraint on first amendment rights, and its gravity; and two, consideration of whether the restraint is justified. What we shall call, as an abbreviation, the *Rumely* doctrines, could be applied to enlarge the court's view on both branches of the first amendment issue; since the possible developments on the justification phase are the more significant, we shall consider them first.

110. See cases cited note 71 *supra*.

111. The investigative power is an adjunct of the legislative. See notes 145, 146 and 147 *infra* and texts thereto.

112. See note 103 *supra*. Particularly significant is *Ellis v. Interstate Commerce Commission*, 237 U. S. 434, 445 (1915), where the Court did not merely condemn the general breadth of an investigation but also the sequence of proof. While most of the "fishing expedition" cases concern blanket seizures of papers in the hope of turning up something material to the investigation, Justice Holmes in *Ellis* condemned as a "fishing expedition" questions about a company's affairs because the investigators only hypothesized, and did not first establish, its relationship with another company on which their pertinency to the investigation hinged.

Closer scrutiny of justification for investigation—order of proof.

One wing of the judicial reasoning in the early decisions upholding the investigations was: the committee was investigating whether the public was being propagandized against our form of government; Communists believe in overthrow of the government; it was therefore appropriate to ask people in an opinion media, such as script-writers, whether they were Communists in order to determine whether there was such subversive propaganda in the movies.¹¹³

In this syllogism, the Court ignored the first amendment doctrine which came into play in *Rumely*—that the means used to investigate whether an alleged evil exists must be those least damaging to freedom of expression. In *Rumely*, it is to be recalled, this doctrine led to the holding that *Rumely* could not be asked the names of the "purchasers" of CCG literature in order to discover whether they were disguised contributors, until there was a showing from the financial records of grounds for this suspicion. If such a test had been applied to the Hollywood Ten, a basis should have been laid for questioning them by a showing that the supposed evil—movie propaganda against the government—existed. Instead, this evil was a theoretical conjecture, which was never established.¹¹⁴

113. *Lawson v. United States*, 176 F. 2d 49, 53 (D.C. Cir. 1949), *cert. denied*, 339 U. S. 934 (1950).

114. The most the committee could find were three or four movies with a sympathetic view of labor in labor-management disagreements, or a sympathetic and laudatory attitude towards Russia during this country's wartime alliance with Russia. See Carr, *The House Committee on Un-American Activities 58-67* (1952). Even under the *Morford* case, *infra* note 131, this would hardly qualify as propaganda against our form of government.

Compare the investigative procedure and judicial approach in *Wyman v. Sweezy*, 24 U. S. L. Week 2427 (N.H. Mar. 6, 1956). The State Attorney General, under authority to investigate advocacy or teaching of overthrow of the government, questioned Sweezy on whether he had made certain statements on Socialism in a lecture he had given to state university students. Sweezy was an acknowledged Marxist and had written an article which could be interpreted as showing some receptivity to the idea of violence under some circumstances. The court, while upholding the questioning, held that the Attorney General was limited to "school lectures...concerning which he possesses reasonable or reliable information indicating that the violent overthrow of existing government may have been advocated or taught... [He] could not legally... examine private citizens indiscriminately in the mere hope of stumbling upon valuable information" (slip sheet opinion, p. 5). The court also held Sweezy could be questioned about the formation of the Progressive Party and its connection with the Communist Party, since the Attorney General had information as to the influence and infiltration of the former by the latter. *Id.* at 6. It is to be noted that the questioning, particularly with regard to the delivery of the lecture, related to actual content rather than the character of the speaker. The decision is subject to criticism from the first amendment standpoint because the court was not concerned with whether there was any indication of any substantial danger of advocacy of violence in the state. However, its view that even an isolated incident can justify an investigation is less detrimental to freedom of expression when the issue is

Again, if it were argued that an investigation in the opinion field was justified as a means of determining if the party line was substantially influencing or dominating public opinion,¹¹⁵ the first step in the investigation would be to establish that a substantial amount of propaganda coinciding with the party line was being disseminated. Only after there was at least this much objective evidence that Communists might be exerting a substantial pro-Communist influence on political opinion, could the committee investigate whether persons in the media were pro-Communist.¹¹⁶ If there were no reasonable indication of substantial pro-Communist propaganda in the movies, radio, newspapers, or other medium, so there would be no justification for questioning writers or other employees in that medium to discover its source, there would be no basis for questioning them as to suspected Communism at all; questioning people in the opinion field in the vague hope of getting data on some Communist activity other than propaganda, would be a pure "fishing expedition."¹¹⁷ We must add the caveat: If there were evidence specifically connecting an individual in opinion work with some dangerous activity outside this field, he might well be investigated in that other connection.^{117a}

whether violence was advocated than when the investigation concerns the expression of peaceable party line views (See *supra*, pp. 524-8).

115. See p. 534 *supra*.

116. Reasoning of this type in regard to an investigation outside the opinion field, was employed in *Watkins v. United States*, 24 U. S. L. Week 2329 (D.C. Cir. Jan. 31, 1956), in a decision by three judges of the court. It was, however, reversed by the court sitting *en banc*, 24 U. S. L. Week 2498 (D.C. Cir. April 23, 1956); petition for *certiorari* will probably be filed. *Watkins*, a union organizer, had refused to tell the House Un-American Activities Committee, which purportedly was investigating the need for additional legislation to combat Communist infiltration in unions, whether certain individuals had been Communists in the period between 1942 and 1947. The first decision concluded that the question was not pertinent to the inquiry authorized by the enabling resolution, because the Government had not shown it had any purpose and effect other than to expose the names of the individuals. Important to this conclusion was the following reasoning:

"The Committee made no attempt to learn from *Watkins* either the total number of Communists in his union, or what position Communists held in the union, or whether or how, or how far, or in what direction, they influenced the union. The Committee showed no interest in anything but a list of names. Whether Communist infiltration of unions creates a need for legislation would seem to depend on the number, and the nature, extent and effectiveness of the activities, of Communists in unions." (Slip sheet decision, pp. 7-8.) The full court, in reversing, held that it was pertinent to the "numerical strength at various times" of the Communist Party, "as part of an inquiry into the extent of the menace it poses," to inquire "whether thirty persons were Communists between 1942 and 1947"; further, it was pertinent to an investigation of Communist infiltration into labor unions to inquire "whether certain persons, members of the union, were indeed Communists."

117. See note 112 *supra*.

117a. See *United States v. Icardi*, 24 U. S. L. Week 2483 (D.D.C. April 19, 1956): "The Court does hold that if the committee is not pursuing

This rule as to order of proof would have invalidated the Eastland Committee hearings insofar as they concerned the New York press. These hearings consisted primarily of calling up more than a score of newspapermen to ask them if and when they had been Communists and the names of anyone they had known to be Communists.¹¹⁸ The view of Senator Henning, a member of the Committee that the "end product, the newspaper itself" should be examined to see if there was subversion, was totally ignored in the public hearings.¹¹⁹ And, at the close, Senator Eastland declined to comment on whether the "significant effort on the part of Communists to penetrate leading American newspapers," which he and Senator Jenner said had occurred,¹²⁰ had achieved any success. It was clear from this refusal and the omission in the public sessions of any mention of subversive or subverted content of the papers, that the rumored attempt in executive session¹²¹ to find evidence of slanted reporting on the part of the accused newspapermen, if made, had failed.

If an "order of proof" rule was adopted from the court of appeals' decision in *Runnely* and similar decisions¹²² to the investigations of alleged Communist subversion in the opinion field, we would no longer be faced with the contradiction of first amendment principles on the basis of preconceived evils that theoretically might appear but do not in fact materialize. There would have to be some reality of danger, rather than hypothesis and speculation, before we would suffer the serious curtailment of freedom of expression that results from the investigations.¹²³

a bona fide legislative purpose when it secures the testimony of any witness, it is not acting at a 'competent' tribunal; even though that very testimony be relevant to a matter which could be the subject of a valid legislative investigation."

118. See Hearings *supra* note 1, *passim*; and see column by James Reston, N. Y. Times, Jan. 6, 1956, p. 7, col. 2.

119. Hearings *supra* note 1, at p. 1588.

120. N. Y. Times, Jan. 8, 1956, p. 70, col. 6. It is interesting to consider whether, despite the inconclusive outcome, the hearings contributed to such action as the cancellation by a school board of subscriptions to the New York Times for high school social studies classes. As to this action in Solvay, N. Y., see N. Y. Times, March 10, 1956, p. 20, col. 3.

121. Closed hearings were held in December. See N. Y. Times, Dec. 8, 1955, p. 25, col. 3.

122. See notes 103 and 109 *supra*.

123. Even supposing that the pre-conditions for investigating alleged Communists in the opinion field were established—that is, that propaganda against our form of government or substantial dissemination of opinion coinciding with the Communists' were found—so that under our rule of order of proof the committee could proceed to investigate the alleged Communists, the investigation would have a less serious effect on free expression than under the present wide-open procedure. Under this order of proof, the pre-conditions that justified the investigation would be its focus and the mere free play of opinion would not, as now (*supra*, pp. 523-4, 526-530) be treated as, and appear to be, the evil.

Recognition of full extent of restraint imposed by investigation.

Taking a leaf from the court of appeals' *Rumely* opinion, the courts might well give closer study not only to the justifications alleged for the investigations, but also to the scope of the restraint on expression resulting from them. The courts did not in the early cases see the first amendment problem in the round, we believe, for they saw the investigations as a restraint only on the right to believe in Communism and associate with the Communist Party; it may be noted that this restricted view probably was in part due to the emphasis of the defendants on this right.¹²⁴ Now, following through on the exposure results in non-participation view, developed by the court of appeals in *Rumely*, the courts should take cognizance of the broader restraints on first amendment rights that result from investigations of alleged Communists in the opinion field.

With the guidance of the *Rumely* precedent, a court could recognize that an investigation of suspected Communists in an opinion medium—whether they be script-writers, clergymen, or newspapermen—not only affects the right to subscribe to Communism but also restrains the ones investigated from participating in the medium.

It is true that participation in the medium of expression is not the sole reason the alleged Communist is investigated; one factor obviously is his alleged Communism. But his work in the medium is certainly a but-for cause of the investigation and of his possible embarrassing exposure as a Communist. Even the titles the committees usually give their investigations (*e.g.*, "Infiltration of the Movie Industry") recognize that they are focusing an alleged Communist in a particular medium or occupation; the tenor of the investigation is certainly that the alleged Communists are being investigated *because* they have "infiltrated" a particular field; it is apparent that the committees are not attempting to call every Communist in the country, and that if the person lies low, and does not participate in his medium of expression, he is not as likely to be investigated by the committee.¹²⁵ As in *Rumley*, where the price of expressing one's views through CCG would be exposure as a contributor (and the court of appeals considered exposure to be a restraint on the right to contribute), so also possible exposure as a Communist is the price of writing for newspapers, lecturing, or

124. See *Lawson v. United States*, 176 F. 2d 49, 51-52 (D.C. Cir. 1949), *cert. denied*, 339 U. S. 934 (1950); *Barsky v. United States*, 167 F. 2d 241, 244 (D.C. Cir.), *cert. denied*, 334 U. S. 843 (1948).

125. See note 59 *supra*.

participating in other opinion media, and acts as a restraint on the right to so participate.

A distinction to be noted from *Rumely* is that if the question had been permitted—if Rumely had had to name his contributors—their embarrassing exposure would necessarily result; in the Communist investigations embarrassment will result, theoretically, only if the investigatee answers the question in the affirmative by stating that he is a Communist.¹²⁶ But even on the hypothesis that the investigation would embarrass the investigatee and interfere with his right of expression only if he were a Communist, the investigation none the less restrains a fundamental first amendment right; for, under the *De Jonge* doctrine, the right of expression belongs to every man, regardless of his past, present, or future, except for statements that transcend constitutional limits.¹²⁷

There should be a greater possibility of a court's invalidating an investigation if it were recognized as a restraint on the alleged Communist's right to participate in a medium of expression rather than merely his right to subscribe to Communism. For one thing, with advocacy of overthrow of the government viewed as the central belief of Communism, the right to subscribe to Communism is a first amendment right easily outweighed by the danger presented.¹²⁸ Then, too, as a concomitant of recognition that the investigation restrains participation in a medium of expression, and infringes on the *De Jonge* principle, the court could well take cognizance of the

126. This distinction might well be disregarded by the courts. In the early courts of appeals' decisions on the Communist investigations, the courts recognized that questioning the defendants as to whether they were Communists exposed them to embarrassment, though they did not admit in the judicial proceedings that they were Communists. See *Barsky v. United States*, 167 F. 2d 241, 244 (D.C. Cir.), *cert. denied*, 334 U. S. 843 (1948). The situation is similar to that of self-incriminating questions, where the privilege is upheld if the question is such that a certain answer would be incriminating, without the necessity for the person invoking the privilege to show what would be his answer. See *Hoffman v. United States*, 341 U. S. 479, 486-87 (1951):

"... [I]f the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. . . ."

Similarly it would not be feasible to say that a person can refuse to answer whether he is a Communist because the question is an unconstitutional restraint, only if he is a Communist. His refusal would under this doctrine accomplish the embarrassment the doctrine would be intended to avoid.

127. See note 43 *supra* and text thereto.

128. See *Frankfurter, J.*, in *Dennis v. United States*, 341 U. S. 494, 544-45 (1951).

serious effect of the investigation on the enjoyment of free expression by the public as a whole.¹²⁹

While we believe that the investigations in the opinion field as presently conducted, could, with good logic from both the investigations and the first amendment cases, be held invalid, whether any court would go that far in defense of the first amendment is difficult to foretell. To date, even when Communism has not been involved, the courts have been lenient about "indirect" restraints on expression through registration measures and the like.¹³⁰ When Communism has been involved, they have seemed untroubled by the thought that the free flow of political opinion for all the people is discouraged when restraints are imposed on opinion on the basis of its coincidence with the party line.¹³¹ And, to date, except for the

129. See, for examples of the Court's concern for the broad and indirect repercussions of an interference with the first amendment rights, *Wieman v. Updegraff*, 344 U. S. 183, 191 (1952); *Thornhill v. Alabama*, 310 U. S. 88, 97 (1940); *Schneider v. State*, 308 U. S. 147, 164 (1939).

130. See, e.g., *United States v. Harriss*, 347 U. S. 612 (1954) where the Court upheld the requirement for registration of lobbyists, despite the restraint it imposed on first amendment rights, because congressmen need to know whether they are being addressed by "special interest groups . . . masquerading as proponents of the public weal [and] cannot be expected to explore the myriad pressures to which they are regularly subjected." *Id.* at 625. And the Court was undisturbed by the view that there might be a restraint of "self-censorship" on those who are not in fact within the Act but may fear that they are. *Id.* at 626. The Supreme Court overrode the more libertarian thought expressed in an earlier case by the court of appeals, which had questioned the need for registration of lobbyists on the ground that ". . . members of Congress need read only that which they want to read." *Rumely v. United States*, 197 F. 2d 166, 176 (D.C. Cir. 1952), *aff'd*, 345 U. S. 41 (1953).

It is to be noted, however, that even in the latter opinion, the court of appeals suggested that influences on public opinion might be considered an evil if they were "bought or prostituted," or were in fact a "vast operation." *Id.* at 174.

131. Thus, in *Morford v. United States*, 176 F. 2d 54 (D.C. Cir. 1949), *reversed on other grounds*, 339 U. S. 258 (1950), the Court apparently saw little distinction between advocacy by Communists of violent overthrow of the government and their peaceful propaganda on other issues, despite the great difference in the effect of restraints in these two areas on free expression by others. The Court there held that adverse criticisms of United States foreign policy and praise of Russia's were open to investigation because they could be taken as ". . . an attack on the principle of our form of government. . . ." *Id.* at 56. See, for a decision with the same tendency, *Marshall v. United States*, 176 F. 2d 473 (D.C. Cir. 1949), *cert. denied*, 339 U. S. 933 (1950). See also *United States v. Lattimore*, 215 F. 2d 847 (D.C. Cir. 1954) (appeal on first indictment), where the court upheld the materiality, as a matter of law, of questions to Lattimore on whether there were Communist contributors to a magazine he edited since it was an ". . . admitted source of scholarly matter on Asiatic problems. . . ." *Id.* at 851. And it dispatched the bulk of defendant's first amendment arguments with the statement: "Even if Lattimore, as the editor of a publication, had a right not to speak, he did not have a right to speak falsely." *Id.* at 855. It ignored the possibility that the question should not be considered "material" to a lawful inquiry if it infringed the first amendment, and therefore a false answer would not be perjury.

United States District Court which sat in the Lattimore cases¹³² and except for dissenting opinions,¹³³ there has been little indication in the cases involving Communism of the usual awareness and protectiveness of first amendment rights.

O'Connor case.

How much the courts will respond to a first amendment plea will receive a test in the pending appeal of Harvey O'Connor, who was sentenced for contempt of Congress for his refusal to answer whether he had been a member of the "Communist conspiracy" when he wrote certain books on the American social scene.¹³⁴ Like many of the interrogations of alleged Communists in the opinion field, the added wrinkle in the case is that the investigation was allegedly justified on the ground that the writer had some type of connection with the executive branch. Senator McCarthy, who called O'Connor for questioning before a sub-committee of the Committee on Government Operations, maintained that one or more of his books was in an overseas library of the United States Information Service, and whether or not he was a Communist when he wrote it bore on the question of maladministration of the Service.

In rejecting O'Connor's first amendment plea, the district court said:

"... the avowed purpose of this program... was to disseminate information abroad 'about the United States, its people, and policies promulgated by the Congress...'... Congress... has the right to know if the ideas being disseminated are truly representative of the avowed purpose. To such an end, it is quite pertinent to know whether, at the time authors wrote books being used in furtherance of the purpose, they were supporting... communism...."

"The facts justifying pertinency also justify the abridgement

132. *United States v. Lattimore*, 112 F. Supp. 507 (D. D.C. 1953), *aff'd*, 215 F. 2d 847 (D.C. Cir. 1954) (first appeal); 127 F Supp. 405 (D. D.C. 1955), *aff'd by an equally divided court*, (D.C. Cir. 1955) (second appeal).

133. See, *e.g.*, dissent by Edgerton, J., in *Barsky v. United States*, 167 F. 2d 241, 252-63 (D.C. Cir.), *cert. denied*, 334 U. S. 843 (1948); dissents by Justices Douglas and Black, *Adler v. Board of Education*, 342 U. S. 485, 496, 508 (1952); partial dissent by Frankfurter, J., *Garner v. Board of Public Works*, 341 U. S. 716, 726 (1951). The majority frequently had failed to take cognizance of any effect of the anti-Communist measures upon first amendment rights. See, *e.g.*, majority opinions in *Adler v. Board of Education*, *supra*, and *Garner v. Board of Public Works*, *supra*.

134. See *United States v. O'Connor*, 135 F. Supp. 590 (D. D.C. 1955), *appeal pending*, D. C. Cir., Case No. 13049.

of the defendant's rights under the First Amendment to the Constitution."¹³⁵

Adopting the reasoning from *Rumely* that we have already discussed,¹³⁶ the restraint on first amendment rights resulting from the questioning of O'Connor, as here conducted, is clear. The price of his or anyone's writing a book which may be used by the Government is possible exposure and consequent embarrassment as a Communist, if one has had any associations which might be grounds for suspicion of Communist adherence. Thus, O'Connor's questioning meant a restraint, through exposure and embarrassment, on the *De Jonge* right of everyone to express opinions within constitutional limits, regardless of his affiliations or motives.

Thus, if the court of appeals in the O'Connor case views first amendment rights as it did in *Rumely*, it may invalidate O'Connor's conviction because the investigation worked a restraint on first amendment rights which might have been avoided by a different "order of proof." Under an order of proof protective of the first amendment, before investigating O'Connor's alleged Communism, the committee first would have had to investigate its suspicion of misfeasance in the Information Service by methods less interfering with first amendment right; that is, by first inquiring into its procedure for selecting its books, its standards, and its personnel.¹³⁷ The next step would have been to consider the content of the books by O'Connor used by the Service. Even if O'Connor had then finally been questioned, the interrogation would have been set in the perspective of the propriety of the procedures of the Information Service, rather than of opprobrium towards an alleged Communist's publication of a book, and fear of its distribution.^{137a} Government operations are so ramified that some connection could be alleged between them and the activities of almost any publicist. Development of an order-of-proof rule would help prevent investigating committees from launching unjustified inquiries that diminish the appreciation and zest for free expression in this country.

135. *Id.* at 596.

136. See pp. 552-4 *supra*.

137. Even aside from the deference due first amendment rights and the strict pertinency requirement when they are affected (see note 109 *supra* and text thereto), the Court's view that questioning authors was one of the most "direct" ways of investigating the operations of the Service seems odd; even under the ordinary test of pertinency and the right of freedom from unnecessary infringement of privacy, this type of questioning should be considered invalid. See notes 103, 109 and 112 *supra*.

137a. Compare probably effect on public attitudes towards free expression resulting from the type of investigation conducted in *Wyman v. Sweezy*, *supra* note 114, with that in *United States v. O'Connor*, *supra* note 134.

V. CONGRESS' FUNCTION TO INFORM THE PUBLIC

The investigations could burst the bounds of all judicial restraint and the first amendment, if one of the justifications put forward by their defenders was accepted—that Congress can and should inform the public on the dangers of Communism and expose to the public the identity of persons of Communist sympathy.

Despite the constant assumption by the committees¹³⁸ and even by some commentators that a function of congressional investigative committees is to inform the public,¹³⁹ there is little support in legal doctrine for the view that the objective of informing the public furnishes a basis for exercise of investigative power. Congress' informing function was not even mentioned by the courts until the past few years. In the *Josephson* case, the United States Court of Appeals for the Second Circuit remarked that since exposure of Communists appeared to be merely incidental to the legislative purpose of the House Un-American Activities Committee, it had no occasion to determine if exposure in itself would justify an investigation.¹⁴⁰ Without deciding whether or not Congress had an informing function, the United States Court of Appeals for the District of Columbia indicated in *Rumely* that in any event that function was not of sufficient stature to justify an investigation interfering with first amendment rights.¹⁴¹ Only in the Supreme Court's *Rumely* opinion, in what must be labeled the purest dictum, is the informing function given definite recognition.

The opinion first quotes Woodrow Wilson's statement:

" 'Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.' Wilson, *Congressional Government*, 303."¹⁴²

Justice Frankfurter, the author of the opinion, whose interest in the

138. See note 22 *supra*.

139. See 18 Chi. L. Rev. 421 (1951) (Introduction by Dean Edward H. Levi of Chicago Law School to issue of Review devoted to articles on Congressional investigations); Herwitz and Mulligan, *The Legislative Investigating Committee*, 33 Colum. L. Rev. 1 (1933).

140. *United States v. Josephson*, 165 F. 2d 82, 89 (2d Cir. 1947), *cert. denied*, 333 U. S. 838 (1948).

141. *Rumely v. United States*, 197 F. 2d 166, 177 (D.C. Cir. 1952), *aff'd*, 345 U. S. 41 (1953).

142. *Id.* at 43.

informing function precedes his judicial career,¹⁴³ then declares that "... the indispensable 'informing function of Congress' is not to be minimized."¹⁴⁴

But Wilson's statement, as quoted by Justice Frankfurter, need not lead to the conclusion that there is an informing function independent of the legislative, since he was adverting only to investigations into the conduct of the executive branch, which is of course a customary and proper subject for legislation. And all the Supreme Court pronouncements on the rationale of the investigative power argue against the existence of an informing function as a basis for committee jurisdiction. For the Court has said that Congress possesses investigative power only because it "is so far incidental to the legislative function as to be implied,"¹⁴⁵ that the test of validity is whether Congress has undertaken the investigation either "with a view to possible exercise of its legislative function or possible discharge of its duty to determine the validity of the election of its members,"¹⁴⁶ that Congress has no general power to investigate, but only the "auxiliary... limited power of inquiry... necessary and appropriate to make the express powers effective."¹⁴⁷ Recently the Court went out of its way to emphasize in dictum that "the power to investigate... [does not] extend to an area in which Congress is forbidden to legislate. Similarly, the power to investigate must not be confused with any of the powers of law enforcement...."¹⁴⁸

Only by keeping the investigative power tied to the legislative function, can it be kept the limited power prescribed by the Court. And in appraising the dangers of a free-swinging "informing function," one must not be misled by the innocuous connotation of the phrase. Obviously any congressional investigating committee in any field does more than merely inform, or as Wilson put it, "... report what it sees,"¹⁴⁹ it inevitably propagandizes for a point of view, starting with its very selection of subjects for investigation.

Even if some type of informing function should be recognized, the court of appeals' view in *Rumely* that it could not justify inter-

143. See Frankfurter, *Hands Off the Investigations*, 38 New Republic, May 21, 1924, p. 329.

144. *Rumely v. United States*, 345 U. S. 41, 43 (1953).

145. *McGrain v. Daugherty*, 273 U. S. 135, 161 (1927).

146. *United States v. Norris*, 300 U. S. 564, 573 (1937).

147. *McGrain v. Daugherty*, 273 U. S. 135, 173 (1927); repeated in *Sinclair v. United States*, 279 U. S. 263, 291 (1929). See *Jones and Ellis* cases, note 103 *supra*.

148. *Quinn v. United States*, 349 U. S. 155, 161 (1955) (court's footnote omitted).

149. *United States v. Rumely*, 345 U. S. 41, 43 (1953).

ference with first amendment rights, seems clearly right; and Justice Frankfurter's declaration in the Supreme Court opinion that Wilson "did not write . . . in the context of the first amendment"¹⁵⁰ shows some approval of this view. Certainly, the right guaranteed to the people, as against the Congress, to express themselves and inform each other, cannot be subordinated to a congressional power of expression whose constitutional status is at best tenuous and tangential.

Value of Committees' "Informing" Public on Communism

Whether the information given to the public by the investigations has had much significance in the decline of the Communist Party seems dubious. Disillusionment with the party, according to numerous ex-Communist witnesses, generally antedated the investigations, and none have indicated they were at all influenced by the committee exposures.¹⁵¹ More important, the committees can hardly claim credit for the decline in the "front" organizations of Popular Front days, which were an integral part and a concrete embodiment of the Communists' efforts to influence public opinion. These organizations, like the League against War and Fascism, favoring various then-popular positions such as international collective security against Fascist countries, kept large memberships only as long as they expressed views in agreement with those held by a large section of the American public. When the Communists adopted positions such as that lauding the Nazi-Soviet pact, to which the public was inimical, they were no Pied Pipers except for the inner core of the party; their popular-front organizations withered.¹⁵²

150. *Id.* at 44.

151. See, e.g., testimony of Robert Gorham Davis, Daniel J. Boorstin, and Granville Hicks, *Hearings Before the House Committee on Un-American Activities*, 83d Cong., 1st Sess. 5, 59, 107-08 (1953); Wechsler, *Age of Suspicion* c. 6 (1953). Compare testimony of Mortimer Riemer, given before the House Un-American Activities Committee on December 14, 1955, as to his former membership in the Communist Party and activity in organizing the National Lawyers Guild. He testified that he had resigned an executive position in the Guild in 1939 or 1940, "... after having been charged at a guild convention [in 1939] with using the organization for Communist Party purposes and getting 'Moscow gold'" Mr. Riemer denied these accusations before the Committee. *N. Y. Times*, Dec. 15, 1955, p. 18, col. 3. The Committee seemed more interested in Mr. Riemer's protestations than the Guild had been.

152. See *Hearing* cited *supra* note 151 at 5, 11-12, 13, 57, 59, 65-66, 105, 106-07; Wechsler, *op. cit. supra* note 151. Compare Carr, *The House Committee on Un-American Activities*, 337-39, 351 (1952), respecting influence of congressional investigation in the final collapse of the Southern Conference for Human Welfare. As to the probative standards in the investigation of that organization, see Gellhorn, *Report on a Report of the House Un-American Activities Committee*, 60 *Harv. L. Rev.* 1193 (1947).

To give the devil of this article its due, the atmosphere of fear that the investigations help create no doubt help to hinder the Communists from re-animating another round of "front" organizations. For certainly the fear of non-conformist expression and association makes it harder for Communists as well as non-Communists to get people to express themselves on political issues except in ultra-nationalist terms. The discouragement of "front" organizations may well be healthy for the body politic. But if this discouragement is accomplished by inhibiting free exchange of opinion generally, it would seem a transient benefit at the cost of a far-reaching sacrifice.