NOTES

PURPOSE AND PERTINENCY IN CONGRESSIONAL INVESTIGATIONS

An old fable tells of six blind men and an elephant. The first to come upon it touched a leg, and to him the elephant resembled nothing so much as a tree. The second blind man, encountering the tail, concluded that the elephant was like a rope. The third, whose groping hand had found the trunk, was convinced that the beast was much the same as a huge snake. To the others the elephant was like a wall, a great leaf and a sharp spear. Modern “blind men” are still examining and describing “elephants”.

Although mindful of the above admonition, this Note deals with but two facets of congressional investigations (1) the judicial limitation that the investigation be for a legislative purpose, and, (2) the statutory authorization of punishment of a witness who refuses to answer questions “pertinent to the question under inquiry.”

LEGISLATIVE PURPOSE

The history of the judicial limitation that an investigation be for a legislative purpose will be traced with a view toward determining what constitutes legislative purpose, what evidence the courts have considered to be relevant to show the presence or absence of legislative purpose, and what dangers are inherent in tests of legislative purpose proposed by recent cases in lower federal courts. These questions will not be discussed in the order stated, but as they are raised by the cases in their chronological order.

Kilbourn v. Thompson

The first case of any real importance to the present discussion is that of Kilbourn v. Thompson decided by the United States Supreme Court in 1880. It grew out of the financial crisis of 1873, and was precipitated by the failure of Jay Cooke’s banking firm which was a depositary of federal funds. Early in 1876 the House authorized a select committee to investigate financial dealings between Cooke and a “real estate pool” in the District of Columbia. The resolution authorizing the investigation gave on its face no hint of contemplated remedial legislation, rather, it showed only

3. 103 U.S. 168 (1880)
NOTES

Congress' concern over the injury done to the government's interests as a creditor of Cooke's bank. The committee subpoenaed the manager of the pool, Hallett Kilbourn, who refused to answer questions or produce documents. Kilbourn was then brought before the House where he again refused to answer questions, asserting that the House had no authority "to investigate private business in which nobody but me and my customers have any concern." The House cited Kilbourn for contempt and imprisoned him. The Supreme Court subsequently declared that Kilbourn's imprisonment had been unlawful.

Avoiding the question of whether or not Congress ever has the power to compel testimony in aid of legislation, the Court decided that here Congress could not punish a contumacious witness because the particular investigation could result in no valid legislation. The Court's concept of what subjects can or cannot aid Congress in legislating has been severely criticized for being much too narrow. One writer has advanced the idea that Congress should have the power to investigate to find out if the subject is one on which it can act, that is, Congress should have jurisdiction to determine if it has jurisdiction. It will be seen later that one federal court in broadening the permissible scope of congressional inquiry approximated the latter idea.

McCgram v. Daugherty

In the spring of 1924 the Senate launched its investigation of alleged maladministration of the Department of Justice under Attorney General Daugherty. The Senate investigating committee subpoenaed the Attorney General's brother, Mally S. Daugherty, an Ohio banker, who disregarded the command. Thereupon the Senate itself adopted a resolution authorizing the issuance of a warrant to compel Mally to be brought before the Senate. Mally was arrested by the Sergeant-at-Arms and applied to a federal district court for a writ of habeas corpus. The district court granted the writ and discharged Daugherty from custody. The court noted that in the first resolution authorizing the committee to investigate, no mention was made of legislative purpose and in the

4. 4 Cong. Rec. 598 (1876).
second resolution the Senate referred to legislative action and other action. The court said

The extreme personal cast of the original resolutions, the spirit of hostility towards the then Attorney General which they breathe, that it was not avowed that legislative action was had in view until after the action of the Senate had been challenged, and that the avowal then was coupled with an avowal that other action was had in view—are calculated to create the impression that the idea of legislative action being in contemplation was an afterthought.9

The court argued that what was important in the case was not the subject-matter but the nature of the investigation. It found that the investigation was judicial in nature. The fact that some suggestion of needed legislation might come from the investigation, that is, that the subject-matter could aid Congress in legislating, would not validate the investigation. In arriving at its conclusion, the court cited the Kilbourn case as standing for the proposition that an investigation judicial in nature is invalid even though the subject-matter of the investigation could aid Congress in legislating.10

The Supreme Court, in overruling11 the district court, affirmed the power of Congress to compel testimony in aid of legislation12 and said

Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year. The only legitimate object the Senate could have in

9. Id. at 638.
10. This was not the holding of the Court in the Kilbourn case. In that case the Court held that the investigation could result in no valid legislation. The Court did refer to the judicial nature of the investigation, but this reference is susceptible of at least two interpretations: (1) that an investigation judicial in nature would be invalid even though the subject matter of the investigation could aid Congress in legislating; and, (2) that the court took a narrow view of the proper scope of a congressional investigation because it felt that the investigation was judicial in nature.
12. See Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926) and Potts, Power of Legislative Bodies to Punish for Contempt, 74 U. Pa. L. Rev. 691, 780 (1926) for the history of the power of Congress to punish for contempt.
ordering the investigation was to aid in legislating, and we think the subject-matter was such that the presumption should be indulged that this was the real object.\textsuperscript{32}

The presumption raised by the Court seems to be well grounded—at least when a court is reviewing an action of the whole House or Senate as distinguished from an action of a House or Senate committee. A judicial requirement that the Government prove a valid legislative purpose could substantially limit the congressional power of investigation. Depending on how much proof would be required, the burden in some cases could be administratively impossible to sustain. As a result, broad and fearless inquiry so essential to enlightened legislation could be curtailed. An additional reason for the presumption is the respect due official congressional action. It is highly improbable that the whole House or Senate would authorize an investigation for an illegitimate purpose.

At this point in the historical study the test of legislative purpose is quite objective. The Court is avowedly looking only at the resolution authorizing the investigation. If the subject-matter of the investigation, as stated by the resolution, may aid Congress in legislating, then the presumption arises that the purpose of the investigation is to get facts in order to aid Congress in legislating. The resolution need not expressly refer to contemplated remedial legislation.

A hint, however, that the resolution may not always be controlling and that a court may look elsewhere to find legislative purpose can be gleaned from the fact that the Court in \textit{McGram v. Daugherty} referred to a statement made by Senator George in the debate on the resolution authorizing the investigation. The Senator said that the purpose of the investigation was not to try Daugherty but to get facts which would enable the Senate to discharge its legislative duties properly.\textsuperscript{4}

\textit{Sinclair v. United States}\textsuperscript{5}

In 1924 the Senate had directed its standing Committee on Public Lands to investigate the disposition of the naval oil reserves at Teapot Dome by the Interior and Navy Departments. Various contracts and leases had been made in connection with the disposition of the oil reserves. The oil magnate Harry F. Sinclair was called by the committee to testify concerning these contracts and

\begin{itemize}
\item \textsuperscript{13} 273 U.S. at 177-78. (Emphasis added.)
\item \textsuperscript{14} 65 Cong. Rec. 3397-98 (1924).
\item \textsuperscript{15} 279 U.S. 263 (1929).
\end{itemize}
leases to which he was a party, but Sinclair refused to answer the questions of the committee on the grounds that the whole matter was of exclusively judicial concern (the matter was pending before a grand jury), and also, that the questions asked were not pertinent to the inquiry.

Sinclair was tried and found guilty of contempt for his refusal to answer the committee's questions. The Supreme Court affirmed his conviction. It found that the subject-matter of the investigation "might directly aid in respect of legislative action" and that a legislative purpose was avowed in the resolution authorizing the investigation. At this point the Court apparently raised a presumption not only that the Senate had authorized the investigation for a legislative purpose but also that the committee had conducted the investigation for a legislative purpose. The Court said that the evidence introduced by the defendant was not enough to show that "the committee intended to depart from the purpose to ascertain whether additional legislation might be advisable." This seems to indicate that the burden of proof is on the defendant to rebut the presumption of a valid purpose not only of the Congress but also of the investigating committee itself.

The Sinclair case differs from McGrain in two respects. First, the Court in Sinclair found an avowal of a legislative purpose in the authorizing resolution before raising a presumption of a valid purpose. The Court in McGrain indicated that such an avowal was not necessary. This difference, however, appears to be immaterial because the body wording the resolution can simply state that the purpose of the investigation is to ascertain what, if any, legislation may be advisable. Such a general statement of purpose was sufficient in Sinclair. Secondly, in McGrain the Court was reviewing an action of the whole Senate, in Sinclair it was reviewing an action of a Senate committee. The distinction may be significant in applying the presumption of a valid purpose. The reasons advanced for applying the presumption when a court reviews an action of the whole House or Senate are not equally applicable in reviewing a committee investigation. Administrative difficulties in proving legislative purpose may fetter a committee equally as much as the whole House or Senate. It is debatable, however, whether or not committee action is entitled to the same respect as an action of the whole House or Senate. More will be made of the distinction later in this Note.

16. The question of pertinency is discussed infra at p. 634.
Cases in the lower federal courts

Since the Sinclair case the Supreme Court has not had occasion to deal squarely with the problem of legislative purpose. Subsequent discussion of legislative purpose must be confined to cases in lower federal courts.

In 1946 the House Un-American Activities Committee subpoenaed the records of the Joint Anti-Fascist Refugee Committee to discover whether or not funds raised by the organization avowedly for postwar foreign relief were in fact being spent for political propaganda. Helen Bryan, secretary of the committee, was subpoenaed to produce the records but refused to do so and was cited for contempt. The district court in ruling on the sufficiency of the indictment laid out what it considered to be the proper scope of a legislative investigation:

If the subject under scrutiny may have any possible relevancy and materiality, no matter how remote, to some possible legislation, it is within the power of the Congress to investigate the matter. Moreover, the relevancy and the materiality of the subject matter must be presumed.

This is not the same presumption that the Court referred to in McGrain v. Daugherty. In McGrain the rule was that if the Court finds that the subject is one which can aid Congress in legislating then the presumption arises that the investigation is for a legislative purpose. In United States v. Bryan the district court presumes that the subject-matter of the investigation can aid Congress in legislation. Adopting the reasoning of the Bryan case, every congressional investigation from its outset is presumed to be for a legislative purpose.

Bryan is a sensible expansion of the Court's reasoning in McGrain. The presumption raised by Bryan gives proper weight to Congress' judgment as to what subjects can or cannot aid it in discharging its legislative duties. This case, however, is weak authority for the proposition that federal courts will presume that the subject-matter of an investigation can aid Congress in legislating. Neither the court of appeals nor the Supreme Court in United States v. Bryan considered this proposition advanced by the

18. 72 F. Supp., at 61. (Emphasis added.)
19. This statement is subject to the qualification that first the Government must prove that the committee was investigating within the scope of its authority. See note 23 infra.
district court. No other case has been found in which a federal court has adopted the presumption raised by the district court in Bryan.

Arising out of the same investigation was the case of Morford v. United States. The House Un-American Activities Committee summoned Morford to produce the records of the National Council for American-Soviet Friendship, Inc., and Morford refused to comply. On appeal from a contempt conviction in the district court, Morford alleged error in the refusal of the lower court to admit evidence that when the subpoena was issued against him the House Committee on Un-American Activities had already passed judgment on the National Council of American-Soviet Friendship and was seeking to obtain names of persons participating in its activities for the sole purpose of adding such names to the committee's blacklist.

The court of appeals said there was no error because a legitimate legislative purpose is presumed when the general subject of investigation is one concerning which Congress can legislate. It said that that presumption arises here, "and it cannot be rebutted by impugning the motives of individual members of the Committee."

Morford was not trying to impugn the motives of the committee-members. He was trying to show that the committee was not pursuing a legislative purpose. The court by labeling as "motive" what is in fact "purpose" indicates that it simply is not concerned with the committee's concept of the purpose of the investigation.

Aside from semantics, the court's reasoning appears to be sound. If a committee is investigating subjects which are within the scope

20. The court of appeals reversed the conviction relying solely on the ground that the trial court erroneously ruled as a matter of law that it was unnecessary to a conviction for contumacious failure to produce subpoenaed records, that a quorum of the committee be present on the day the defendant is required to produce the records, 174 F.2d 525 (D.C. Cir. 1949) The Supreme Court in reversing the court of appeals considered only the quorum issue and the question whether admission at trial of the defendant's remarks when she was called upon by the committee to produce the records was in violation of the immunity section of the compulsory testimony statute. The Court declined to decide other issues raised by the defendant which were not passed on by the court of appeals. 339 U.S. 323 (1950).


22. Concededly, it is difficult to draw a clear distinction between "purpose" and "motive." Purpose is "that which one sets before him to accomplish, an end, intention, or aim, object, plan, project." Black, Law Dictionary 1400 (4th ed. 1951). Motive "is the moving power which impels to action for a definite result. [It is] that which incites or stimulates a person to do an act." Black, Law Dictionary 1164 (4th ed. 1951)
of its authority and if the subject-matter of the investigation may aid Congress in legislating, a court should inquire no further into the purpose of the committee-members. Congress’ fact-finding power is so important to enlightened legislation that “collateral” committee-member ends of blacklisting or exposure should not be sufficient grounds to frustrate that power.

A somewhat clearer statement of the view that an invalid intent of individual members of a committee is not a ground for invalidating an otherwise legitimate investigation was given by the court of appeals in United States v. Josephson. As a by-product of the Eisler hearings, the House Un-American Activities Committee subpoenaed Leon Josephson, accused of helping Gerhart Eisler to obtain a passport fraudulently. Josephson defied the committee’s power and refused to be sworn, and was subsequently convicted of contempt. Josephson contended that the committee’s investigation was made not for any legislative or remedial purpose, but only in order to expose his political beliefs. The court answered by saying:

But we have no occasion now to decide whether a Congressional investigation may have exposure as its principal goal or when, if ever, a statute may. It is sufficient to say that the authorizing statute contains the declaration of Congress that the information sought is for a legislative purpose and that fact is thus established for us regardless of any statement by the Committee or its members intimating the contrary.

According to the majority of this court, the only important criterion for determining purpose is the authorizing resolution. If the resolution shows legislative purpose of the House or Senate in authorizing the investigation the presumption of a valid purpose becomes irrebuttable.

To complete the study of legislative purpose two recent cases which deal with the requirement of legislative purpose should be considered. In Watkins v. United States the defendant was subpoenaed by a subcommittee of the House Un-American Activities

23. The Government must always prove that the committee was investigating within the scope of the committee’s authority. There is no presumption of authority. See United States v. Kamn, 136 F. Supp. 791 (D. Mass 1956), United States v. Lamont, 18 F.R.D. 27 (S.D.N.Y. 1955), aff’d, 236 F.2d 312 (2d Cir. 1956).
24. “Collateral” as used in this Note extends to the situation where the sole purpose of the entire committee is something other than gathering facts to aid in legislating.
25. 165 F.2d 82 (2d Cir. 1947), cert. denied, 333 U.S. 838 (1948).
26. 165 F.2d at 89.
Committee. He came and answered questions relating to his past membership in the Communist Party. Watkins refused to answer questions as to past membership of others who to his knowledge had long since removed themselves from the Communist Party. Both the majority and dissenting judges in the court of appeals reviewing Watkins' conviction for contempt thought that it was important to judge the purpose of the subcommittee in asking the questions rather than the purpose of the House in authorizing the investigation. The judges held opposite opinions as to the sufficiency of evidence of words and conduct of the House Un-American Activities Committee on other occasions to show purpose of this particular subcommittee. The majority found that there was a valid legislative purpose and went on to say

Appellant would have us judge the present controversy upon the basis of speeches made by members of Congress and others, and upon newspaper articles, etc. We cannot do so. Such material is not evidence. The question is an individual one, whether the inquiry is indeed pertinent to a valid legislative purpose. It cannot be solved by generalities culled from speeches—many of them no doubt partially extemporaneous—or from partisan assailants, critics, friends or defenders of some project or cause. Moreover, even if the unbridled power of exposure were claimed by some members of Congress, the claim would not establish its use in any particular inquiry. We must judge each inquiry in its own setting and upon its own facts.

In his dissenting opinion Judge Edgerton came to the opposite conclusion. He said that "words and conduct of the Committee on other occasions go far to confirm the inference that its purpose on this occasion was exposure."

The argument of the majority of the court seems the better one. To hold otherwise would allow a court too much discretion to pick off statements by committee-men made in communications to the public or on the floor of Congress, selecting only those which supported the court's preconceived idea as to the committee's purpose in conducting the investigation.

The last important case for purposes of this section is United States v. Icardi. The House had passed a resolution authorizing

28. 233 F.2d at 687
29. 233 F.2d at 692. "Conduct of the Committee on other occasions" encompassed statements made by Congressmen who at the time of making the statements were members of the Committee but were not members of the Committee at the time of the investigation in question. It is at least questionable whether statements of past committee-members are relevant in determining the purpose of present committee-members.
the Committee on Armed Services or a subcommittee thereof to investigate whether existing law adequately covered crimes committed overseas by members of the Armed Forces, and whether the Defense Department was being efficiently administered. Under authority of that resolution, the chairman of the Committee on Armed Services appointed a special subcommittee to investigate the circumstances surrounding the disappearance and death of Major William V Holohan while a member of the Armed Forces on assignment to the OSS in the Italian Campaign of 1944. The subcommittee wrote to Icardi, a former member of Holohan's OSS team who was alleged to have been instrumental in causing Holohan's death, requesting him to testify. Icardi came and testified. Subsequently, the subcommittee charged him with having given perjured testimony. In the trial of Icardi for perjury, the chairman of the subcommittee admitted that he had discussed with the other member of the subcommittee and the subcommittee counsel, prior to Icardi's appearance, the possibility of a perjury indictment as the result of Icardi's testimony.

The court found that "while the subject-matter confided to the subcommittee for investigation was relevant to a valid legislative purpose," the purpose of the subcommittee in requesting Icardi to testify was to try him and was not to get information for any valid legislative purpose. In arriving at this conclusion the court considered the resolutions authorizing the inquiry, the transcript of the subcommittee hearings, the subcommittee's letter requesting Icardi to testify, the report of the subcommittee, and the testimony at trial of the chairman of the Armed Services Committee and the chairman of the special subcommittee. The court did not say that there was no longer a presumption that the purpose of the investigation was valid, it did say that the presumption of innocence outweighs the presumption of a legislative purpose. Thus, the Government must support the presumption of a valid purpose by proof beyond a reasonable doubt that the purpose of requesting the testimony was a legislative purpose. However, it seems obvious that if, in a criminal prosecution, the Government must prove beyond a reasonable doubt that an investigation was for a valid legislative purpose, then any assertion of a presumption of valid purpose is sheer verbiage. A possible rationalization of the court's holding, as distinguished from its language, may be that the evidence, which in the opinion of the court indicated that the subcommittee conducted the hearing to adjudicate crime, was sufficient to rebut the presumption of a valid purpose of the subcommittee.
Even if this rationalization is accepted the *Icardi* case differs materially from *Morford* and *Josephson*. In *Icardi* the purpose of the committee-men was controlling. In *Morford* and *Josephson* the purpose of the committee-men was not considered to be relevant to the question of the validity of the investigation. The merits of the *Icardi* view were discussed in this Note in connection with the *Morford* case.

Summary of "legislative purpose"

Congress is pursuing a legislative purpose, as judicially defined, when using the investigatory power (1) As a means of furnishing itself with information necessary to the intelligent use of its constitutional power to enact laws.31 The permissible scope of inquiry may be as broad as the lawmaking powers of Congress.32 Since *Kilbourn v. Thompson* no case has held that the subject matter of the investigation could not aid Congress in its lawmaking function.33 In *Bryan* the district court presumed that the subject matter could aid Congress in legislating. *Bryan*, however, represents the opinion of only one district court.34 (2) To supervise and check the operations of administrative agencies established by Congress. This type of investigation is related to the lawmaking function in so far as laws changing the administrative structure may be enacted as a result of the investigation.

Whether or not Congress is pursuing a legislative purpose when attempting to exercise an independent power of exposure unrelated to legislation appears to be an open question.35 The question, however, may be moot since it is difficult to conceive of an investigation totally unrelated to legislation—except when Congress is investigating in connection with the exercise of its power of impeachment.

33. An alternative holding in *Icardi* casts some doubt on this statement. The court in *Icardi* held that the false statements of *Icardi* "did not relate to a material matter" inasmuch as the statements were incapable of influencing the committee on the issue before it. This holding might indicate that the court thought that *Icardi's* testimony could not aid Congress in legislating.
34. See note 20 supra. The *Bryan* case is discussed supra at p. 627
35. The United States Supreme Court has not squarely decided the question. Decisions in the lower federal courts are not determinative. See, e.g., *Watkins v. United States*, 233 F.2d 681, 687 (D.C. Cir.) ("Congress has power of exposure if the exposure is incident to the exercise of a legislative function") (emphasis added), cert. granted, 352 U.S. 822 (1956). *United States v. Josephson*, 165 F.2d 82, 89 n.8 (2d Cir. 1947) (raises but does not decide the issue), cert. dened, 333 U.S. 838 (1948).
Evidence which the courts have considered in determining the presence or absence of legislative purpose are: (1) The resolution authorizing the investigation. Federal courts which look no further than the language used in the resolution are apparently concerned only with the purpose of the authorizing body.\textsuperscript{36} (2) Minutes of the particular hearing giving rise to the contempt or perjury charge. Federal courts which recognize statements of committee-men made during the hearing as bearing on purpose apparently are ascertaining the committee's purpose in conducting the investigation.\textsuperscript{37} (3) Statements and actions of the committee-men prior in time\textsuperscript{38} to the investigation in question but relevant to ascertaining the purpose of the particular investigation. The conversation in the Icardi case between the members of the subcommittee and the subcommittee counsel relating to a possible perjury indictment against Icardi is illustrative. (4) The investigating committee's report, correspondence between the committee and the witness, and testimony at trial of committee-members.\textsuperscript{39} The one federal district court whose scope of inquiry extended this far proceeded on the premise that the presumption of legislative purpose yielded to the presumption of innocence. Courts following this view presumably will consider any relevant evidence.

Weighing heavily in the search for legislative purpose is the presumption of a valid legislative purpose once it is shown that the subject-matter of the investigation is germane to a legislative function. The presumption apparently attaches not only to the action of the authorizing body, but also to the actions of the committee in conducting the investigation. The challenge to this proposition by the Icardi case relates only to the presumption as applied to the actions of a committee in conducting an investigation.

Dangers inherent in the tests of legislative purpose as advanced by the Watkins and Icardi cases are (1) That a court would have too much discretion in judging legislative purpose. As an example, the court could accept statements by past committee-men made on the floor of Congress or in communications to the public as relevant to show the purpose of the present committee-men in conducting an investigation.\textsuperscript{40} (2) That “collateral” purposes of the committee-

\textsuperscript{37} See, e.g., Sinclair v. United States, 279 U.S. 263 (1929).
\textsuperscript{38} Post-hearing statements made out of court by the committee-men are not entitled to consideration in ascertaining the purpose of the investigation. See United States v. Rumley, 345 U.S. 41 (1953).
\textsuperscript{40} See Watkins v. United States, 233 F.2d 681, 692 (1956) (where the dissenting opinion relied on such information).
members could invalidate an otherwise valid investigation. (3) That requiring the Government to prove legislative purpose may be casting too difficult a burden on the Government.

Pertinency

Every person who having been summoned as a witness to give testimony upon any matter under inquiry before any committee of either House of Congress refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor. 41

In the discussion of "pertinency" three questions are presented (1) what is the accepted test of pertinency of the question in a congressional investigation, (2) what are the objections to this test, (3) is there a more acceptable test of pertinency These questions will be discussed in that order.

In the Sinclair case, discussed above, the Court said that the burden of proof was on the Government to show that the questions asked of Sinclair were pertinent to the inquiry the committee was authorized to make. Attempting to define pertinency the Court said

The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be "pertinent to the question under inquiry" 42

A further attempt to define pertinency under the statute was made by the court of appeals in United States v. Orman. 43 A subcommittee of the Senate's Special Committee to Investigate Organized Crime in Interstate Commerce asked witness Orman to produce and allow to be entered into the record a book containing a record of Orman's 1951 financial transactions. Orman refused to do so unless he was assured by the subcommittee that the newspapers would not publicize his affairs. Orman was cited for contempt and convicted in the lower federal court. On appeal, Orman argued that the lower court erred in keeping from the jury evidence of the actual contents of the book. The contents of the book apparently were not pertinent. The circuit court said that there was no error because pertinency is not measured by the true answer but by the possible answer to the question asked. At the time the subcommittee asked Orman to produce the book the subcommittee had sufficient

42. 279 U.S. at 299.
43. 207 F.2d 148 (3d Cir. 1953).
reason to believe that the book would show Orman's connection with gambling. This information would have been pertinent to the authorized scope of the subcommittee's investigation. If one possible answer would be pertinent then the question is pertinent.

Both Sinclair and Orman measure pertinency of the question by the relation between the possible answer and the authorized scope of inquiry. The term pertinency itself is not defined: the courts apparently assume the common law definition of the sister term, relevancy. But whereas in a trial the relevancy of particular evidence may be judged by the issues as set forth in the pleadings and during other trial procedures, pertinency in a congressional investigation has no such limited yardstick. The courts have been forced to judge pertinency in relation to the broad grant of authority given to the committee. Such a test gives a court little on which to judge pertinency. As an example, the House Un-American Activities Committee is authorized

(2) To make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

This grant of authority, necessarily broad, is no guide to a court in judging pertinency of a possible answer to a question.

Pertinency and due process

... Although lower federal courts appear to disagree, due process would seem to require that a witness in a congressional investigation be informed of the subject-matter of the investigation with some degree of particularity. When failure to answer some ques-

. 44. Legislative Reorganization Act of 1946, 60 Stat. 828. (Emphasis added.)

. 45. This proposition has not prevailed in two federal courts of appeal. See United States v. Josephson, 165 F.2d 82 (2d Cir. 1947), cert. denied, 333 U.S. 838 (1948) (defendant was not forced to measure pertinency against a standard he alleged was too vague, since he refused to answer any of the questions asked him); Watkins v. United States, 233 F.2d 681 (D.C. Cir.), cert. granted, 352 U.S. 822 (1955) (contempt statute and authorizing resolution too vague as to be invalid).

In United States v. Bryan, 72 F. Supp. 58 (D.D.C. 1947), rev’d per curiam on other grounds, 174 F.2d 525 (D.C. Cir. 1949), rev’d on other grounds, 339 U.S. 323 (1950), the defendant argued before the district court on motion to dismiss the indictment that the House Resolution under which the Committee on Un-American Activities acted (see note 44 supra and re-
tions is a crime, a witness who may have substantial interest in not answering should be able to ascertain with reasonable certainty which questions he must answer. The argument against this proposition is that neither Congress in authorizing the investigation nor the committee in conducting the investigation will know beforehand precisely what course the investigation will take. By holding a committee within too narrowly defined a subject-matter a court may be throwing out the baby with the bathwater. Granting the validity of the argument, a court could still require that the committee state the subject-matter of the investigation with more particularity than that given by the broad resolution granting investigatory powers to the committee. The resolution authorizing a standing committee must of necessity be broad. However, the committee conducting an investigation should be able to state more specifically the subject-matter of the particular investigation without seriously limiting itself. Just how much particularity should be required is a difficult question. It can only be solved by weighing the interests of the witness in a highly particularized statement of the subject-matter as against the interests of the committee in a loosely drawn statement.

The House of Representatives does have a rule which provides that “the chairman at an investigative hearing shall announce in an opening statement the subject of the investigation.” This rule if judicially imposed on both the House and Senate as a requirement of due process would give both the witness and the courts a standard against which to judge pertinency. The chairman’s statement would

46. See the district court opinion in United States v. Bryan, supra note 45, 72 F. Supp. at 63.

47. H.R. Res. 151, 84th Cong., 1st Sess., 101 Cong. Rec. 3020 (daily ed. March 23, 1955) It is too early to tell whether or not the House committees are following the rule.
be the yardstick against which to judge pertinency of the questions asked by the committee.\footnote{In debates on H.R. Res. 151, one Representative said that the chairman's statement would not bind the committee. See 101 Cong. Rec. 3021 (daily ed. March 23, 1955). Due process, however, does not turn on legislative intent.}

A more satisfactory solution was offered by Senator Hennings while testifying before the Subcommittee on Rules of the Senate Committee on Rules and Administration in June of 1954. He recommended that a majority of a committee be required to pass a motion or resolution scheduling hearings or ordering a particular investigation. The motion or resolution was to state with particularity the subject-matter of the investigation. In support of his recommendation he said.

I think it well to point out the advisability of requiring a motion or resolution scheduling hearings or ordering investigations to be stated clearly and with particularity. It will, first, provide a witness with the indication of what the line of interrogation will be once he appears before the committee. Second, it will define the scope of the investigation or hearing and will be of invaluable assistance to the committee itself and to the witness, and perhaps even to the courts, in determining the materiality or the pertinency of certain questions.\footnote{Rules of Procedure for Senate Investigating Committees, Hearings Before the Subcommittee on Rules of the Committee on Rules and Administration, United States Senate, 83rd Cong., 2d Sess., pt. 1, at 31 (1954).}

It is extremely unlikely, however, that any federal court would impose such a formalized procedure on the committees as a requirement of due process.

\textbf{Conclusions}

The courts have made little use of the judicial limitation that a congressional investigation be for a legislative purpose. Possibly the courts have recognized that the limitation is unworkable. First, a court is not being realistic if it says that a particular investigation is not for a legislative purpose in that the subject-matter of the investigation cannot aid Congress in legislating. It is almost inconceivable that the subject-matter of any authorized congressional investigation could not aid Congress in legislating. Secondly, it is doubtful whether invalid purposes of committee-members in conducting an investigation should negate a valid legislative purpose of the House or Senate in authorizing the investigation. At best, then, the limitation is a weak crutch of possible support to a judge in striking down a contempt or perjury charge arising out of an in-
vestigation which the judge feels was just too much of a witchhunt or trial.

A more satisfactory solution to the problem of weighing the interests of the witness as against Congress' need for adequate investigatory powers seems to lie in the proper application of the statute authorizing punishment of a witness who refuses to answer questions pertinent to the question under inquiry. The standard for judging pertinency used by the courts in most cases has been the broad resolution of the House or Senate initially granting investigatory powers to the committee. This standard is vague. It was suggested in this Note that a court should require the committee chairman to state the subject-matter of the investigation at the outset of the hearing. The statement if binding on the committee could answer due process objections to the present vague standard and also give the courts a yardstick against which to judge pertinency of the questions asked during the hearing.

The standard suggested is not a panacea. However, it may be a partial solution to the problem of abuses of congressional investigations. If the chairman's statement is binding on the committee, the committee may wish to participate in phrasing the statement before the hearing. This may foster responsible committee consideration of why a particular witness is being called.