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The Application of the Fourth Amendment to Congressional Investigations

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Notes

The Application of the Fourth Amendment
to Congressional Investigations

"We pride ourselves on having created a government of laws, not
men, but our congressional committees remain a notorious ex-
ception to that principle."*

I. INTRODUCTION

In recent years the congressional investigation has become
one of the major forums for expressing social, economic, and po-
litical views. Because of its potential for gaining publicity and
public support, this forum may be utilized by congressmen and
private citizens as an essential tool for collecting information and
bringing about legislation or as a means to attain private advan-
tage.¹ However, the same factors which give the congressional
investigation the potential to bring about benefits also give it the
potential to destroy some of our basic freedoms.²

It is the purpose of this Note to analyze the major protec-
tions afforded a witness testifying before congressional investiga-
tions and to suggest a means by which the courts can make the
constitutional protections more meaningful. The limitations on
these investigations do not adequately shield the private citizen
from persecution, partly because the courts have never ade-
quately recognized all the factors in balancing the congressional
need for information against the individual's right to be free from
governmental interference, and partly because the courts refuse
to recognize the unique problems presented by the political reali-

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* 1 Maslow, Fair Procedure in Congressional Investigations: A
2. E.g., Wilkinson v. United States, 365 U.S. 399 (1961); Braden
v. United States, 365 U.S. 431 (1961); Barenblatt v. United States, 360
which the Court upheld a contempt conviction arising out of a grand
jury investigation. Ullman asserted the fifth amendment as the ground
for his refusal to testify, arguing that since he was given no protection
from public condemnation and economic loss, he was not being given
the required immunity necessary to compel testimony against himself.
The Court explicitly recognized that public condemnation and economic
loss do result from being forced to give testimony against oneself, but
that social sanctions are not grounds for refusal to testify. See also
12 Stat. 333 (1862), as amended, 2 U.S.C. §§ 191-94 (1964), which pro-
vides that no witness is privileged to refuse to testify on the grounds
that his testimony may tend to disgrace him or otherwise render him
infamous.
ties of congressional investigations. The policy considerations which have recently prompted the Supreme Court to protect the individual's right to privacy against other types of governmental interference are equally applicable to congressional investigations. After summarizing the current standards which protect witnesses before congressional investigations and demonstrating the inadequacies of those standards, this Note takes the view that the Supreme Court should require Congress to show both a need for the information and probable cause for believing that the individual has such information before allowing a congressional subpoena of the individual.

II. THE HISTORY OF CONGRESSIONAL INVESTIGATIONS

Congress has traditionally believed that the power to appropriate funds implies the power to investigate to obtain facts pertinent to possible legislation or the proper administration of existing laws. However, no investigation for a lawmaking purpose was conducted in the House until 1827, and in the Senate until 1859. Most of the investigations during the eighteenth and nineteenth centuries dealt with the qualifications of the

3. Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926); Potts, Power of Legislative Bodies to Punish for Contempt, 74 U. Pa. L. Rev. 691, 708 (1926). Since there is no express mention of a congressional power to investigate pursuant to possible legislation, this power must be implied by one of the express powers. McGrain v. Daugherty, 273 U.S. 135, 173-74 (1927). Leacos, Rights of Witnesses before Congressional Committees, 33 B.U.L. Rev. 337, 341 (1953). Such power may be implied from the power to impeach under U.S. Const. art. 1, § 2; more specifically, art. 1, § 3 gives the House the power to investigate all government employees subject to impeachment. The Constitution also allows for investigations of election returns and members' qualifications, art. 1, § 5; and for investigations to aid in ratification of treaties and appointments, art. 2, § 2. However, the most important justification for the power to investigate is the legislative power, art. 1, §§ 1, 7 & 8. The real problem is to define the scope of these powers. Landis, supra at 156.

4. The House Committee on Manufacturers planned to investigate the effect of an upwards revision of tariff schedules upon domestic manufacturers. The power of the House to investigate pursuant to legislation was challenged by some of the legislators, but was sustained. 4 Cong. Des. 889 (1826).

5. The Senate Select Committee planned to investigate the invasion of the Harper's Ferry Armory and report whether legislation was necessary to preserve the peace of the country and safety of property. The resolution empowering such an investigation gave the committee the power to subpoena persons and papers. Cong. Globe, 36th Cong., 1st Sess. 141 (1859). See McGearry, Congressional Investigations: Historical Development, 18 U. Chi. L. Rev. 425 (1951).
members of Congress or alleged mismanagement within the government.6

Since 1792 it has been recognized that the power to investigate implies the power to issue subpoenas, compel testimony, and convict a contumacious witness for civil contempt of Congress.7 However, the effectiveness of a civil contempt conviction was limited by the duration of imprisonment,8 a requirement of a majority vote of the offended house,9 and judicial review of the proceedings.10 As a result, in 1857 Congress passed a criminal statute making it a misdemeanor for a witness to willfully refuse to answer any question pertinent to the subject under inquiry.11 The first important Supreme Court review of

6. Landis, supra note 3, at 168-91; Potts, supra note 3, at 719-25. The first congressional investigation was held in 1792 to determine why Major General St. Clair had been defeated by the Indians. ANNAIS OF CONG. 490 (1792). As the tasks of government have become more complex, the use of investigations has greatly increased. Stamps, The Power of Congress To Inquire and Punish for Contempt, 4 BAYLOR L. REV. 29 (1951). See Fulbright, Congressional Investigations: Significance for the Legislative Process, 18 U. CHI. L. REV. 440 (1951); McGeary, supra note 5; McKay, Congressional Investigations and the Supreme Court, 51 CALIF. L. REV. 267, 290 (1963).


8. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 230-31 (1821). The Court argued that the power to evoke testimony was necessary to keep a contumacious witness in jail. Since Congress cannot evoke testimony if it is not in session, the imprisonment had to cease upon adjournment. Furthermore, civil contempt is more likely to elicit the information sought because a witness may gain his freedom upon complying with the demands.


10. In Ex parte Nugent, 18 F. Cas. 471, 481 (No. 10,375) (C.C.D.C. 1848), the court stated that Congress was the sole judge of its contempt citations. This position was reversed in Kilbourn v. Thompson, 103 U.S. 168 (1880). See Alange, Congressional Investigations and the Fickle Court, 30 U. CHI. L. REV. 113 (1961), for an excellent history.

the constitutionality of this law and the permissible scope of congressional investigation came in *Kilbourn v. Thompson.*\(^\text{12}\)
Since the resolution to investigate contained no indication of a legislative purpose,\(^\text{13}\) the Court held that the investigation was an investigation into the private affairs of an individual and, therefore, beyond the scope of the power of Congress.\(^\text{14}\) The Court maintained that an investigation which could not result in valid legislation was judicial in character and, since the Constitution explicitly divided the functions of government into three separate branches, the legislature could not perform a judicial function. The Court concluded that a valid legislative purpose was necessary for a proper investigation.\(^\text{15}\)

In *McGrain v. Daughtery,*\(^\text{16}\) arising out of the Teapot Dome scandal, the Court was forced to find some rationale to uphold a contempt conviction in order to avoid a head-on collision with Congress and public opinion.\(^\text{17}\) As in *Kilbourn,* the Court asserted that Congress could not investigate in a judicial or administrative capacity, that Congress had the power to investigate only because it "is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change. . . ."\(^\text{18}\)

However, in the absence of a stated legislative purpose, the Court created the presumption that since the subject matter was appropriate for legislation, Congress had a legislative purpose.

In the twenty years following *McGrain* there was very little judicial development in this area.\(^\text{19}\) Although the Court heard a large number of cases involving New Deal investigations into economic problem areas which had previously been thought to

12. 103 U.S. 168 (1880).
13. Id. at 194-95.
14. Id. at 190.
15. Justice Miller, who wrote the opinion, personally felt that Congress could compel testimony only when performing one of the judicial tasks assigned to it by the Constitution. Alfange, *supra* note 10, at 117. See Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 204-24 (1821), for an earlier presentation of the separation of powers argument.
17. Id. at 178. The case is factually indistinguishable from *Kilbourn* on this issue. The difference must be in the notoriety of the scandal under investigation. The public reaction to the Teapot Dome scandal played a major part in the Court's subsequent treatment of the problem. See Landis, *supra* note 3; Potts, *supra* note 3.
19. See Sinclair v. United States, 279 U.S. 263 (1929). This case extended the presumption of a valid legislative purpose from Congress as a whole to a congressional committee.
be outside the realm of congressional investigation, it acquiesced in the judgment of Congress as to the valid scope of the investigatory power, imposing only procedural requirements.

The contempt cases arising after World War II were of a completely different character. Congress investigated the political beliefs, affairs, and associations of private individuals as a result of the widespread fear of subversion and Communist infiltration into American life and government. Because of this change in the subject matter under investigation and the effect upon the rights of the individuals investigated, the emphasis of the Court's review shifted from the permissible scope of congressional investigations to a balancing of the government's interest in collecting information for possible legislation with the rights guaranteed to the individual by the Bill of Rights.

With very few exceptions, the Court in the last twenty years has refused to apply the legislative purpose requirement so boldly asserted in Kilbourn. In balancing the government's interest in gathering information against the interest in protecting the rights of the individual guaranteed by the Bill of Rights, the Court has never found the balance in favor of the individual.

20. See United States v. Norris, 300 U.S. 564 (1937); Jurney v. MacCracken, 294 U.S. 125 (1935); Barry v. United States ex rel. Cunningham, 279 U.S. 597 (1929); Townsend v. United States, 95 F.2d 352 (D.C. Cir. 1938); McKay, supra note 6. In Townsend the court stated that "a legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress. . . ." 95 F.2d at 361.

21. See cases cited note 26 infra.

22. The House of Representatives created the Special House Committee for the Investigation of Un-American Activities (The Dies Committee) in 1938. 83 Cong. Rec. 7568 (1938). In 1945 it became a standing committee. 60 Stat. 812 (1946). The Committee is authorized to investigate un-American propaganda, activities, and all other questions in relation thereto which might aid Congress in passing remedial legislation.

23. See, e.g., Braden v. United States, 365 U.S. 431 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); Watkins v. United States, 354 U.S. 178 (1957). In these cases, the Court discussed in detail the basic authority of HUAC to investigate the affairs of private citizens. However, since Braden, the Court has consistently refused to consider this issue.


25. E.g., Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Barenblatt v. United States, 360 U.S. 109 (1959). As will be demonstrated, under the present terms of the balance it would be almost impossible for the Court to find in favor of the individual. See C. Beck, Contempt of Congress, App. B (1959), for
The Supreme Court generally has avoided reviewing the underly-
ing authority of Congress to investigate by reversing contempt
convictions on technical errors. While there is some merit in
enforcing strict compliance with technical requirements, it may
be inferred that the sympathy of the Court is now with the re-
luctant witness. Yet the Court apparently wishes to avoid mak-
ing a major decision limiting the congressional power of investi-
gation.

III. THE CONTEMPT PROCEDURE AND ITS
CONSEQUENCES

The cases in which the courts are requested to review the
authority of a congressional investigation to compel testimony
are significant because of the publicity afforded them and the
political and legal implications associated with them. Criminal
proceedings are normally brought to punish a witness for con-
tempt of Congress where the witness refuses to provide either
documents or testimony demanded by a congressional investiga-
tion. Under federal statute every individual summoned has a
duty to answer any question pertinent to the subject under in-

a listing of congressional contempt citations, the defenses asserted, and
the outcome of the cases from 1944 to 1957. The individual has won
in over half of the cases in which his refusal to testify was based upon
the fifth amendment because the Court does not balance this right.
However, witnesses have not been successful in over 30 cases asserting
the first amendment defenses.

26. See, e.g., Gojack v. United States, 384 U.S. 702 (1966) (re-
versing on the basis that the subject of inquiry was never specified or
authorized by the Committee as required by its rules, thus there was no
lawful delegation of power to the subcommittee); Yellin v. United
States, 374 U.S. 109 (1963) (reversing on the basis that the Committee—
HUAC—violated its own Rule IV by failing to consider the witness’s
request that he be interrogated in executive session because of possible
injury to his reputation); Russell v. United States, 364 U.S. 749
(1962) (reversing on the basis that the grand jury indictment did not
state the question under inquiry at the time of the alleged default);
Deutch v. United States, 367 U.S. 456 (1961) (reversing on the basis that
Ithaca, more than sixty-five miles from Albany, is geographically too
far away from the capital area to be within the scope of the authorized
investigation of Albany); Watkins v. United States, 354 U.S. 178 (1957)
(pertinency); United States v. Rumely, 345 U.S. 41 (1953) (strict defini-
tion of lobbying); United States v. Fleischman, 349 U.S. 349 (1950)
lack of quorum). See also Townsend v. United States, 95 F.2d 352
(D.C. Cir. 1938) (reasonable mistake of fact); United States v. Klein-

27. Shapiro, Judicial Review: The Supreme Court’s Supervision
of Congressional Investigations, 15 VAND. L. REV. 535 (1962). See au-
thorities cited note 58 infra.

CONGRESSIONAL INVESTIGATIONS

If a witness fails to fulfill this obligation and the committee refuses to excuse such failure, this fact is reported to and filed with either the President of the Senate or the Speaker of the House who certifies it to the appropriate United States attorney. While no vote of the offended House is required before such complaint is filed, this practice has become established by custom.

Under this procedure the individual must risk criminal prosecution to test his doubts as to the lawful limits of his duty to respond to the subpoena and answer a question. Thus, the individual must risk a criminal conviction to test whether he has construed his duty correctly, although it involves complex problems of statutory interpretation and ad hoc balancing of various constitutional rights. An erroneous decision, even in good faith, does not protect the contumacious witness. No prior determination of the issue is available, either in the form of a hearing for an injunction against the enforcement of the subpoena or for a declaratory judgment to determine the witness' duty to testify. The reluctance to determine the duty of the

31. Sky, supra note 11, at 401 n.7.
32. Sinclair v. United States, 279 U.S. 263, 299 (1929). This gamble becomes particularly dangerous when called before a congressional committee such as HUAC. "It would be difficult to imagine a less explicit authorizing resolution." Watkins v. United States, 354 U.S. 178, 202 (1957). Good faith is no excuse.

It is interesting to speculate whether a misinterpretation of one's duty to testify is a mistake of law or a mistake of fact. If the latter, it would appear that the Court has probably abolished a mens rea requirement. Yet it is hard to believe that this is an appropriate usage of absolute liability.

34. Nelson v. United States, 208 F.2d 505, 513 (D.C. Cir. 1953). The court reasoned that since it could not enjoin Congress from passing an unconstitutional law, it could not enjoin Congress from trying to enforce an unconstitutional subpoena. However, these situations are not analogous for a bill cannot be unconstitutional until it becomes a law while a subpoena may be illegal before enforced. The result of this kind of reasoning is that the witness must guess as to the legality of the subpoena and hope the courts will not enforce it. See N.Y. Times, Aug. 15 & 16, 1966, at 1, col. 1, for an account of a court trying to enjoin an investigation.

witness to testify may result from the feeling by the courts that any restraint of a congressional investigation at this stage would be premature and would violate the separation of powers principle. Yet the Supreme Court, in a similar situation, has realized that the practical effect of such a situation is to leave the individual subject to the discretion of the government official and that this is precisely the situation in which the protections provided by the warrant procedures of the fourth amendment are required. Statutory safeguards are not enough, particularly when those standards can be invoked only at the risk of criminal prosecution.

The consequences of the courts’ refusal to make a prior determination of the validity of a congressional subpoena are particularly onerous. In order for the individual to test his duty to respond to the subpoena he must comply with it, appear before the investigating committee and make his objections known. If he refuses to comply none of the major defenses is available to him. However, once he has appeared at the investigation, the social stigma of being associated with the evil being investigated attaches to him. The mere fact of being subpoenaed by HUAC, for example, and thus associated in the public mind with Communism can be disastrous; refusing to testify merely enhances support. See United States v. Tobin, 195 F. Supp. 588, 616-17 (D.D.C. 1961), rev’d, 306 F.2d 270 (D.C. Cir. 1962). See also S. 2161, 87th Cong., 1st Sess. (1961) (Senator Javits’ bill suggesting the same thing). The courts clearly have the power to enforce congressional subpoenas in a civil action. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 214 (1946); see Sky, supra note 11, at 415-17.

Criminal sanctions are undesirable both because the witness is forced to wage his liberty on his interpretation of the statute against the court’s balancing of his rights, and because the process does not help the investigation get the desired information for it is purely punitive. See Federal Trade Commission Act § 9, 15 U.S.C. § 49 (1964). 36. Fischler v. McCarthy, 117 F. Supp. 643, 648 (S.D.N.Y. 1954). This rationale is correct only insofar as it is limited to decisions based upon scope, pertinency, or validity of the subject matter under investigation. If the defense of the witness is based upon a constitutional privilege to remain silent, a prior determination of the validity of that defense would in no way infringe upon the separation of powers principle. The court would merely be carrying out one of its functions and would not be limiting the power of Congress to investigate as respects scope or purpose (the factors which are within the realm of Congress’ discretion). See generally Baker v. Carr, 369 U.S. 186 (1952); Pauling v. Eastland, 288 F.2d 126, 128 (D.C. Cir. 1960); Fischler v. McCarthy, 218 F.2d 164 (2d Cir. 1954); Sky, supra note 11.


39. Watkins v. United States, 354 U.S. 178, 197-98 (1957); see HUAC Rule IV.
the publicity and the resultant social stigma.40

IV. THE LIMITATIONS ON CONGRESSIONAL INVESTIGATIONS

Although the individual undeniably has a duty to testify and to cooperate with Congress in its efforts to gather information,41 this duty does have limits.

A. THE SCOPE OF INQUIRY

In *Kilbourn v. Thompson*,42 the Court decided that since the Constitution divided our government into a triparte system, and since it did not expressly give Congress the power to investigate, Congress could constitutionally investigate only when exercising an expressed power which implied the power to investigate.43 The valid legislative purpose limitation requires that the congressional purpose for the investigation must be the collection of information helpful in its legislative function, and that the area must be one in which Congress can, in fact, pass valid legislation. This is the only limitation on the scope or subject matter of congressional investigations.

Although the requirement was boldly asserted in *Kilbourn*, the Court has, through a series of presumptions, effectively emasculated this requirement. The first such presumption was that since the topic investigated was within the scope of the congressional power to legislate, Congress had a valid legislative purpose.44 Two years later, in 1929, the Court extended this presumption of legislative purpose to investigations by congressional committees.45 The valid legislative purpose requirement was further emasculated in *United States v. Bryan*,46 which involved the validity of a subpoena *duces tecum* issued by HUAC. Since a declaration of purpose was presented, the court presumed that the subject matter under investigation was appropriate for valid legislation.47 This presumption was made almost irrebut-

42. 103 U.S. 168 (1880).
43. See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 204-21 (1821); *Alfange*, supra note 10.
47. Id. Judge Holtzoff stated:
table in United States v. Josephson.\textsuperscript{18}

Subsequently, two cases have attacked the illusion of legislative omnipotence. First, in United States v. Rumely,\textsuperscript{40} a case dealing with right-wing lobbying activities, Justice Frankfurter found certain lobbying to be outside the scope of HUAC's authorizing resolution. Then, in United States v. Icardi,\textsuperscript{56} a case arising out of an investigation by the Subcommittee on Armed Services, a lower court held that the presumption of innocence outweighed the government's presumption of a valid legislative purpose. Moreover, there have recently been some "respectable doubts" whether the actual purposes of HUAC are consistent with its statutory purposes.\textsuperscript{51} Thus, the government may again

\textit{Id.} at 61. See Fulbright, \textit{supra} note 6, at 442.


49. 345 U.S. 41 (1953). Justice Frankfurter came to this decision by giving a very limited definition to lobbying activities. This case could have been analyzed as a pertinency, scope, or first amendment question; but the Court, after discussing some of the constitutional problems of the authorizing resolution, decided that the case could be resolved most easily by pardoning the defendant on the definition rationale.

50. 140 F. Supp. 383 (D.D.C. 1956). This was the first case since Kilbourn which directly held an investigation lacked legislative purpose. See Shapiro, \textit{supra} note 27, at 539.

51. See Gojack v. United States, 384 U.S. 702 (1966); Watkins v. United States, 354 U.S. 178, 209 (1957). These cases attacked the presumptions but maintained the separation of powers argument and the legislative purpose requirement. It has been suggested that the Court should abandon the legislative purpose requirements. The argument is that Congress investigates for many purposes other than to legislate and the Court should recognize this by abandoning the legislative purpose limitation. Acceptance of this position would permit the Court to shed the presumptions which insulate it from reality, thereby allowing it to look more realistically at the situation. The Court could allow non-legislative investigations which are necessary and strike down investigations which, although clothed in legislative purpose, are designed to expose the witness. Such a decision should be acceptable to Congress for it would expand as well as contract the investigatory power. Sky, \textit{supra} note 11. The problem with this position is that the Court will have to judge the validity of an investigation solely upon the motives of Congressmen.

\textit{Watkins} also attacked the authorization of HUAC for vagueness, stating that it was so nebulous that it was impossible to determine a valid scope of inquiry. The Court set out four ways in which the investigation could inform the witness of the subject under inquiry: 1) resolution authorizing the investigation; 2) statement of the chairman;
have to prove a legislative purpose. However, this burden may be meaningless, for the Court has held that the motives of the investigators are irrelevant so long as Congress has a valid purpose for authorizing the investigation. Enough of this purpose is usually mixed into the rhetoric of the investigators to satisfy the Court. Moreover, the Court still maintains the presumption of a valid legislative purpose.

B. The Pertinency of the Question

Another limitation on congressional investigations is based upon statute. Under federal statute a witness before a congressional investigation is guilty of a misdemeanor if he willfully fails to answer any question pertinent to the subject under inquiry. This statute imposes two requirements on an investigation. First, the witness must be made aware of the pertinency of the question. If he objects to a question and refuses to answer, he must be told the subject under inquiry and the manner in which the propounded question is pertinent to such topic.

3) delegation of power to the subcommittee; and 4) a direct statement to the witness.

53. Gojack v. United States, 384 U.S. 702 (1966); Hutcheson v. United States, 369 U.S. 599 (1962); Barenblatt v. United States, 360 U.S. 109, 127-33 (1959); Watkins v. United States, 345 U.S. 178, 200 (1957). In each of these cases the record clearly indicates that the motive of the investigators, which the Court refused to recognize, was exposure. This may be irrelevant for the Court has held that bad motives would not invalidate an investigation so long as a congressional purpose is being served. Watkins v. United States, supra. See Shapiro, supra note 27, at 550-52. Senator Fulbright argues that since any problem can be a subject for federal legislation, no fields are immune from congressional investigations. Fulbright, supra note 6, at 442.
Next, because the government has the obligation to overcome the individual's presumption of innocence, the government must prove, beyond a reasonable doubt, every element of the crime, including the pertinency of the question and the willingness of the refusal to testify. However, the pertinency asserted. McPhaul v. United States, 364 U.S. 372 (1960). The requirement that the witness must be made aware of the pertinency may eliminate a mistake of law defense on this issue.


58. Quinn v. United States, 349 U.S. 155, 165 (1955); Bowers v. United States, 202 F.2d 447, 448 (D.C. Cir. 1953). Although it can hardly be considered a limitation on the congressional power of investigation, obviously the committee, subcommittee, and Attorney General must follow the rules and procedures. These rules are for the protection of the witness. Yellin v. United States, 374 U.S. 109 (1963); Liacos, Rights of Witnesses Before Congressional Committees, 33 B.U.L. Rev. 337, 383 (1953); 1963 U. Iln. L.F. 507. The Court in recent years, after appeal to the great platitude, has decided the cases on enduring trivial, apparently to avoid deciding how much weight will be given to the individual when balancing his rights guaranteed by the Bill of Rights against the national interest in having a well-informed legislature. Thus, the Court boldly asserts that there is no power of exposure:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes . . . But, as broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. Watkins v. United States, 354 U.S. 178, 187 (1957). See Gibson v. Florida Legislative Investigating Comm., 372 U.S. 539, 544-46 (1963); Barenblatt v. United States, 360 U.S. 109, 111-12 (1959); Kilbourn v. Thompson, 103 U.S. 168, 180 (1881). Yet, the Court makes its decisions upon trivial errors. Text accompanying note 26 supra; see McKay, Congressional Investigations; Significance for the Legislative Purpose, 18 U. Chi. L. Rev. 440 (1951). If the investigators fail to respond to the technical objections raised by the witness, the witness has no remedy other than refusing to answer and risking contempt. Yellin v. United States, 374 U.S. 109 (1963). While there is some merit to these decisions, the fact that in earlier cases technical errors were not fatal indicates that a more reasonable interpretation of these cases is that the sympathy of the Court is now with the accused. E.g., Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Barenblatt v. United States, 360 U.S. 109 (1959). Yet the Court at this time finds it politically expedient not to attack the Congress and divide the Court on this issue.

requirement has become almost meaningless\textsuperscript{60} since the courts have allowed testimony of a much wider scope than would be allowed under the relevancy limitation of the rules of evidence.\textsuperscript{61} Furthermore, because of politicians' tendencies to frame resolutions in grandiose terms\textsuperscript{62} and the courts' willingness to allow testimony on the basis that the answers might be helpful in evaluating the testimony,\textsuperscript{63} pertinency has become almost impossible to determine.\textsuperscript{64} The willfulness requirement demands only that the refusal to testify be deliberate.\textsuperscript{65}

C. THE BILL OF RIGHTS PROTECTIONS

The duty of an individual to testify is premised on the congressional need to collect information. The courts, when interpreting this duty, assume that the rights guaranteed to the witness by the Bill of Rights will be respected by the congressional committee.\textsuperscript{66} However, this duty may become a burden upon the individual because those protections are not absolute and their scope has not been defined adequately by the Court.

1. The Fifth Amendment

Although literally the fifth amendment right not to be a

\textsuperscript{60} E.g., Barenblatt v. United States, 360 U.S. 109, 124 (1959).
\textsuperscript{61} United States v. Orman, 207 F.2d 148 (3d Cir. 1953).
\textsuperscript{63} Sheldon v. United States, 280 F.2d 701 (D.C. Cir. 1960); Trumbo v. United States, 176 F.2d 49 (D.C. Cir. 1949). These cases held that questions such as "are or were you a communist" are pertinent to investigations by HUAC. Consequently, the broad interpretation of pertinency gives a witness almost no protection against mind-probing ventures by Congressmen.
\textsuperscript{64} Watkins v. United States, 354 U.S. 178, 206 (1957).
\textsuperscript{65} Barsky v. United States, 167 F.2d 241 (D.C. Cir. 1948). See United States v. Lamont, 18 F.R.D. 27 (D.C.N.Y.), aff'd, 236 F.2d 312 (2d Cir. 1956), for an excellent analysis of the steps that must be taken by the committee in order to bring a contempt citation.
The applicability of this privilege before congressional investigations has long been recognized and is now firmly established. The reasoning of the Court in allowing the application of the privilege in noncriminal proceedings is that if the witness could be forced to testify, he might be forced to provide the first link in a chain of evidence which would eventually lead to criminal prosecution. Despite the fact that the fifth amendment does grant the witness the privilege of refusing to answer if his testimony might lead to criminal prosecution, Congress may eliminate this privilege by granting him immunity from criminal prosecution if it feels that his testimony is more valuable to society than any possibility of criminally prosecuting him. 

67. U.S. Const. amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

68. Boyd v. United States, 116 U.S. 616, 633 (1886). See McCarthy v. Arnstein, 266 U.S. 34, 40 (1924); Brown v. Walker, 161 U.S. 591 (1896); Counselman v. Hitchcock, 142 U.S. 547 (1892); Note, Applicability of the Privilege Against Self-Incrimination to Legislative Investigations, 49 Colum. L. Rev. 87 (1949). However, it was not until 1950 that the fifth amendment was used to protect a witness before a grand jury investigation. See Blair v. United States, 340 U.S. 159 (1950), in which defendant refused to answer questions concerning her activities in the Communist Party because of possible prosecution under the Smith Act. The possibility of application to congressional investigations was first explicitly recognized in United States v. Bryan, 339 U.S. 323 (1950) (dictum).

69. Bart v. United States, 349 U.S. 219 (1954); Embspack v. United States, 349 U.S. 190 (1954); Quinn v. United States, 349 U.S. 155 (1954). The main issue in these cases was whether the witness had adequately invoked the protection of the fifth amendment in choosing to rely primarily upon the first amendment right to silence. The Court did recognize the stigma attached to invoking the fifth amendment, Quinn v. United States, supra at 164, but rejected the first amendment argument as novel. Embspack v. United States, supra at 195. In Boyd v. United States, 116 U.S. 616 (1886), the Court held that forcing the production of papers to be used against Boyd was a violation of the fourth amendment and that part of the fifth protecting a man from being a witness against himself. However, the holding has been limited to the facts of the case. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

70. Embspack v. United States, 349 U.S. 190 (1954); see also Wheel-din v. Wheeler, 373 U.S. 647 (1963). However, the fifth amendment appears to protect against both state and federal prosecutions. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

71. Immunity Act of 1954, 18 U.S.C. § 3486 (1964). The constitutionality of the Act was upheld in Ullmann v. United States, 350 U.S. 422 (1956). The Court stated that the Act gave immunity from state as well as federal prosecutions. The statute was passed in response to the large number of witnesses before HUAC who invoked the fifth amendment. D. Fellman, THE DEFENDANT'S RIGHTS 170 (1958). The technicalities of the Act are: 1) a vote of two-thirds of the members of
though this has often been called an exchange, it is doubtful that the immunity from criminal prosecution adequately compensates the witness for he may be socially persecuted because of the elicited testimony.\footnote{72}

Even if Congress does not grant immunity, the fifth amendment does not afford the congressional witness adequate protection. Because the privilege of refusing to testify is limited to testimony which might tend to incriminate, if a witness does decide to invoke its protection, the implication is that he has reason to fear criminal prosecution.\footnote{73} Thus, although the fifth amendment should be regarded as a protection of the innocent from unfounded and tyrannical prosecutions,\footnote{74} the requirement

the committee is required to grant the immunity; 2) the immunity is complete as to "any transaction, matter, or thing" concerning which the witness is required to testify or produce evidence; 3) the witness must have claimed the privilege against self-incrimination; 4) an order of a federal district court must be secured to require the testimony; 5) the testimony so compelled cannot be used as evidence in any criminal proceeding "in any court;" and 6) the Attorney General must be notified before Congress or the committee votes on it. A previous immunity statute was repealed in 1862 because of the rush of willing witnesses who desired to be free from criminal prosecution. A. Barth, Government by Investigation 131 (1955).


It has been argued that forcing a witness to give testimony which leads to social sanctions is a deprivation of life, liberty, or property without due process of law under the fifth amendment. Hannah v. Larch, 363 U.S. 420 (1960). The Court denied the defense on the theory that the administrative commission was acting in a purely investigatory capacity and was not trying to ascertain individual guilt. The Court said:

It [the commission] does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make any determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual right. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

Id. at 441. The essence of the opinion is that the public, not the commission, has deprived the defendant of his life, liberty, and property without due process of law, and this is not prohibited by the fifth or fourteenth amendments.

73. The fear is that by invoking the fifth amendment the witness will be admitting his guilt, such as becoming a "Fifth Amendment Communist."

that the witness must clearly assert the privilege before the committee forces the witness to reveal many matters by implication. These revelations may contain information which the witness wishes, and has a constitutional right to keep private. Thus an assertion of the fifth amendment privilege exposes him to social persecution. The great number of witnesses who refuse to utilize the fifth amendment's absolute defense against contempt conviction and base their refusal to answer on other grounds evidences the efficacy of the social sanctions that are brought to bear against a witness who intimates his guilt by pleading the fifth amendment. These people would rather risk the outcome of criminal prosecution than face the social sanctions and the moral perjury involved in relying upon the fifth amendment.

2. The First Amendment

Although the first amendment is narrowly worded, it is well established that its protection of freedom of speech and association restricts all forms of governmental action. It was first thought that action which did not prohibit the free exercise of these rights, but only invaded the privacy of the beliefs and exposed them to the public, was not prohibited. Congressional

75. The reason for requiring the witness to clearly assert the privilege is to prevent his "toying" with the committee. Hutcheson v. United States, 369 U.S. 599, 614 (1962); Quinn v. United States, 349 U.S. 155, 164 (1955); Emspack v. United States, 349 U.S. 190, 195 (1955).


78. Refusing to testify on the basis of the fifth amendment when the motivation to assert the privilege is reluctance to testify rather than fear of criminal prosecution is a form of perjury.


80. It is arguable that the first amendment's freedom of speech implies the freedom not to speak. Comment, Rights of Witnesses Before Congressional Investigating Committees, 7 VILL. L. REV. 84 (1961). Yet the Court has never accepted this position and has implicitly rejected it by the repeated assertion that the individual has a duty to testify. E.g., Watkins v. United States, 354 U.S. 178, 198 (1957).
investigatory committees imposed no direct interference with the witness' freedoms, and it was argued that the Constitution did not protect the timid from governmental actions which would bring about social sanctions. United States v. Watkins, however, reversed this position, by recognizing that the first amendment did protect the privacy of the contents of speech. Yet this right is not unlimited because society's need for and the individual's right to privacy must be balanced against the government's need for information.

The idea of balancing the first amendment rights has long given the Court difficulty. As stated in Konigsberg v. State Bar, the first amendment does not protect certain types of speech and, hence, does not prohibit all legislation restricting speech and association. Although the early cases which upheld such legislation were limited to legislation which was general in nature and nondiscriminatory, since World War II courts have upheld legislation which discriminates against the expression of particular political beliefs if connected with the threat of subversive physical activity. By removing the qualification of time for counterargument the Court materially altered the clear and present danger doctrine, thereby eliminating the possibility for effective review of legislation in any area in which Congress determines that there is a clear and present danger. The Court will yield to the decision of Congress that there is the possibility of an eventual danger and thus has made its test as to whether this danger is clear and present meaningless. Since the Court allows such legislation, it follows that the Court also allows investigations for the purpose of exposing such dangers, although such investigations may infringe upon the rights of the individual. Moreover, since the Court presumes that valid legislation may follow an investigation in an area appropriate for legislation, there can be no true ad hoc balancing of each case. Furthermore, the governmental need for information should not be presumed by the courts. The danger in such a presumption

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82. 354 U.S. 178 (1957).
86. E.g., Dennis v. United States, 341 U.S. 494 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).
87. See Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring). This was emasculated by Judge Learned Hand in United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).
is that it permits Congress to establish by fiat the specific need and, a fortiori, the weight to be accorded such need. Such an abdication to Congress is undesirable.

The idea of affording the individual no greater protection from investigations than from legislation appears reasonable on its face. Yet this argument is specious in two respects. First, investigations lack the safeguards built into the remainder of the legislative process. In addition, the protections afforded during investigations, qualified as they are by the presumptions that the legislation is valid and for a legislative purpose, are not comparable to those afforded the individual after legislation has been enacted.

Even accepting the premise that the Court truly does balance on an ad hoc basis, the terms in which it balances the individual’s right of silence against the nation’s interest in gathering information dictate that the interests of the congressional investigation will always prevail. The Court weighs the rights of one individual against the needs of an entire nation. The Court fails to recognize that it is not one individual’s interest in free speech but the nation’s interest in free speech that is in the balance. The protection afforded the privilege of one person to remain silent affects the manner in which all other people exercise the privilege. On the opposite side, the Court does not weigh Congress’ need for the particular information sought, but

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88. See Uphaus v. Wyman, 360 U.S. 72 (1959), in which the Court balanced the individual’s right to privacy against the state’s interest in self-preservation. See also C. Beck, CONTEMPT OF CONGRESS, App. B (1959). Beck points out that the witness has been unsuccessful on first amendment grounds in all 30 cases from HUAC in which the witness asserted this defense.


90. The Court has said that it would independently weigh the need of Congress for this information. Barenblatt v. United States, 360 U.S. 109, 132, 134 (1959); Watkins v. United States, 354 U.S. 178, 188-99 (1957). See Alfange, Congressional Investigations and the Fickle Court, 30 U. Cin. L. Rev. 113, 130-39 (1961). Yet there is no evidence of this. For example, the Court allows purely cumulative evidence. Liveright v. United States, 280 F.2d 708 (D.C. Cir. 1960). See Deutch v. United States, 367 U.S. 456 (1961); Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Barenblatt v. United States, 360 U.S. 109 (1959). It has been argued that the congressional committee should have to prove a need for the evidence and that it is not merely cumulative, Uphaus v. Wayman, 360 U.S. 72, 82-84 (1959) (Brennan, J., dissenting); Frantz, Wilkinson, Braden, and Deutch: The Legislative Investigation Cases, 21 LAW IN TRANSITION 219 (1961); 10 Am. U.L. Rev. 64 (1962); that if the information comes from hostile witnesses it is meaningless, Kalven, supra note 72, at 327; and that
rather the interest in possible legislation which would affect the whole country.

Regardless of the terms in which it is done, balancing does not afford the witness satisfactory protection, for the individual will always fear that his freedom may be eventually balanced away at a time when it becomes most important that these rights be recognized. For freedom of speech to be meaningful it must be consistently recognized so that the individual may rely upon it when determining his general course of conduct. Furthermore, the privilege must prevent unnecessary exposure. If the freedom is not recognized before the individual is forced to appear at an investigation, the committee can use the same procedure as it does under the fifth amendment: force the witness to refuse to answer, issue a contempt citation, publicly expose the witness as being unwilling to testify, and then let the court

the information could be gathered in other ways, Auerbach, Some Comments on the Case for the House Un-American Activities Committee, 47 Minn. L. Rev. 593 (1963).

91. Numerous commentators have advocated that the Court should look beyond the legitimacy of the investigation and actively balance the need for such information against the deprivation of liberties which such an investigation would cause. Alfange, supra note 90, at 169; Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424, 1438-50 (1962); Summers, The First Amendment As a Restraint on the Power of Congress To Investigate, 43 Marq. L. Rev. 459 (1960); The First Amendment: What Factors Should Be Considered in Striking the Balance Under Barenblatt?, 20 Law in Transition 41 (1960). It may be argued that the clear and present danger doctrine is not applicable to investigations as it is to legislation. If Congress can legislate in the face of a clear and present danger, it would be sheer folly not to investigate a potential danger. United States v. Josephson, 165 F.2d 82 (2d Cir. 1947). Contra, United States v. Harriss, 347 U.S. 612, 625 (1954); Alfange, supra note 90, at 130-32. However, since the fifth amendment grants absolute immunity while the first amendment's immunity can be balanced away, this would imply that the fifth amendment is more preferred than the first. Meiklejohn, supra note 79. Yet Congress can avoid the fifth amendment by granting immunity.

92. Between 1944 and 1957 there were a substantial number of contempt citations originating from HUAC. Of these, about 70% were defended on the fifth amendment. Convictions in these cases were few. See C. Beck, Contempt of Congress, App. B (1959). The cases look suspicious and one tends to think that HUAC was aware of a valid defense on the part of the witness but wanted to be sure that the witness was exposed, so the contempt citation was brought on the theory that if the court did not agree that there was contempt, the court could refuse to convict. If the committee maintains this apparently obnoxious attitude, it could achieve the same thing even if the first amendment were a valid defense. The contempt citation could be brought and the court or grand jury could refuse to convict or indict, but the publicity is present and the witness has been exposed. See United States v. Welden, 377 U.S. 95, 118 (1964) (Douglas, J., dissenting).
refuse to convict after the harm has been done.

3. The Fourth Amendment

As a result of the abuses of general arrest and search warrants, the fourth amendment guarantees the right of the people to be secure in their persons, papers, and homes against unreasonable searches and seizures. The framers of the amendment realized that happiness of the individual depended upon spiritual as well as material rights, and that the right to be protected from unjustified and arbitrary governmental intrusion was one of the rights most valued by civilized men and a right essential to a democratic society. The fourth amendment effectuates this belief by interposing as a standard between the governmental action and the individual the requirement that, upon an application for a warrant, there be a showing of reasonableness and probable cause as determined by an independent judicial officer. This standard must be met before the government

93. Due to the procedural requirements of bringing a contempt citation, the case may never reach a court since the grand jury may refuse to indict or merely ignore the citation. See C. Beck, CONTEMPT OF CONGRESS, App. B (1959).

94. Olmstead v. United States, 277 U.S. 438 (1928). This case involved the use of evidence in a criminal trial obtained by wiretapping. In a dissenting opinion, Brandeis stated:

The protection guaranteed by the [fourth and fifth] Amendments is much broader in scope. The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.


97. See cases cited note 95 supra. Where the fourth amendment requires that a warrant be issued, the standard for the issuance of the warrant is reasonableness which is determined by whether there is probable cause for the search.

is allowed to interfere with the individual. It prevents a fishing expedition on the chance that something discreditable might turn up.\textsuperscript{99}

Because of its historical background, the fourth amendment has traditionally been limited to cases in which there has been an actual physical search or a seizure in the tort sense of taking into custody.\textsuperscript{100} Thus, as applied to a subpoena \textit{duces tecum}, under which a congressional investigator orders a witness to produce papers or documents, the fourth amendment requires that the search be both reasonable and based upon probable cause. The Court has interpreted the reasonableness standard to limit the quantity of documents subpoenaed, and to require that the documents be identified with reasonable specificity.\textsuperscript{101} In applying the probable cause standard, the Court requires that material subpoenaed must reasonably appear to contain information pertinent to the inquiry and that the subpoena not be merely exploratory.\textsuperscript{102} Even though the Court requires reasonableness and probable cause for a subpoena \textit{duces tecum},\textsuperscript{103} it appears


\textsuperscript{100} W. Prosser, \textit{Law of Torts} § 12 (2d ed. 1964).


\textsuperscript{102} It is arguable whether the Court really requires probable cause. The Court does apply a reasonableness standard, but it may not be the same as probable cause. The language of the Administrative Procedures Act § 6, 5 U.S.C. § 1005 (1964), seems to require something very similar to probable cause, but in Powell v. United States, 379 U.S. 48 (1964), the Court gave that provision an interpretation which does not correspond with the clear meaning of the Act. The requirements of the Act may, however, be different from the requirements of a congressional subpoena, even though the Court never distinguishes between congressional and administrative constructive searches. The protections afforded a witness against an administrative subpoena are more substantial than those afforded a witness under a congressional subpoena which gives the Court a ground upon which to distinguish the cases.

\textsuperscript{103} The Court has decided congressional and administrative investigation cases on the basis of the reasonableness standard, and has applied this only to limit the amount of information which may be subpoenaed. See Oklahoma Press Publishing Co. v. Walling, 327 U.S.
that it does not apply these standards to subpoenas *ad testificandum.*

However, the interpretation of the scope of the fourth amendment should not be limited by its history. Even under a literal interpretation of the amendment, the right to be free from invasions of one's mind may be protected. The right of the people to be secure in their persons from unreasonable searches certainly can be interpreted to include searches of the mind as well as searches of the physical person. This interpretation is only reasonable, for the privacy of the mind should be accorded at least as much, if not more protection from unwarranted searches as the individual's body, his house, papers, and effects. The essence of the offense is not the searching of

186, 209 (1946); Hale v. Henkel, 201 U.S. 43, 76 (1906); ICC v. Brimson, 154 U.S. 447 (1894). Most of the cases deal with the subpoenas of an administrative agency, but the Court does not distinguish these searches from those by a congressional committee as both are "constructive" searches. See also Driver, Constitutional Limitations on the Power of Congress To Punish Contempts of Its Investigating Committees, 38 VA. L. REV. 887, 898-902 (1952). As to the requirement of probable cause for grand jury investigations, see Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkel, 201 U.S. 43 (1906). It is enough that the congressional investigation be for a lawful purpose. Wilkinson v. United States, 365 U.S. 399, 411-12 (1961); Shelton v. United States, 280 F.2d 701 (D.C. Cir. 1960). In both these cases, however, the Court emphasized that petitioner was not summoned as a result of an indiscriminate dragnet. See Mr. Justice Black's dissent in Wilkinson v. United States, supra at 417-20, wherein he argues that the committee did not have probable cause, and if an uncontested statement by an informant provided probable cause, all the members of the Court would be subject to investigation. See generally FTC v. American Tobacco Co., 264 U.S. 298, 306 (1924); Smith v. ICC, 245 U.S. 33 (1917); Baltimore & O.R.R. v. ICC, 221 U.S. 612 (1911). The investigation is not limited by a forecast of the probable result. Blair v. United States, 250 U.S. 273, 282 (1919).

104. The lack of authority as to whether a subpoena *ad testificandum* can be an unreasonable search and seizure results from the Court's definition of "unreasonableness." It is much easier to prove that the burden of producing a vast number of records is unreasonable than that producing testimony is unreasonable. This is especially true in congressional investigations where there is a strong presumption that the testimony sought is pertinent to a valid legislative purpose. In administrative cases it is documents rather than testimony which the agencies primarily seek. There is, however, indirect authority to support this requirement. See Uphaus v. Wyman, 360 U.S. 72, 84-88 (1959) (Brennan, J., dissenting); Watkins v. United States, 354 U.S. 178, 188 (1957); Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963); ASP, Inc. v. Capital Bank & Trust Co., 174 So. 2d 809, 816 (La. App. 1965).


physical objects, but the invasion of the indefeasible right of personal security.  

Moreover, a literal interpretation of the specific language is not necessary for the Court has become increasingly aware that the rights guaranteed by the Bill of Rights are not limited to the specific rights mentioned. Such a restricted interpretation would make these rights meaningless. Instead, the Court has stated that the Bill of Rights encompasses not only those activities specifically mentioned but also activities peripheral to those—a penumbra of rights. Thus, the right to be secure from unwarranted searches of one's mind should be protected as sufficiently peripheral to the fourth amendment security in one's person. Furthermore, the penumbra theory could be applied not through a special amendment, but through the due process clauses.

V. THE REALITIES OF INVESTIGATIONS

Both the overt and the covert motivation behind investigations greatly affect the manner in which the investigation is

109. Id. at 484, 486-99.
110. See, e.g., Camara v. Municipal Court, 389 U.S. 523 (1967); Griswold v. Connecticut, 381 U.S. 479, 484 (1965). The Court protects privacy in certain cases under the due process clauses of the Constitution. The theory behind such protection is that various amendments of the Bill of Rights indicate a right of privacy which can be protected under the penumbra theory of the due process clauses. Also, due process does not even require that the protection stem from any or all of the first ten amendments, but it may come as an individual right reserved to the individual by the ninth amendment or a right basic to an ordered and free society.
111. There are basically four types of investigations other than congressional ones: criminal, civil, grand jury, and administrative investigations. Each of these has its own procedures and protections for witnesses which, for the most part, eliminate the problems which are present under congressional investigations and provide a basis upon which to distinguish these from congressional investigations in the application of a probable cause standard.

Criminal and civil investigations protect the witness through the adversary system and the rules of evidence. A witness will not be called to testify unless he has some information relevant to the inquiry and can be compelled to testify. Also, there is usually less publicity, thus the social consequences imposed upon a witness for refusing to testify are not as great. Furthermore, the civil pretrial investigations are usually private and not subject to the publicity of congressional investigations. See Note, The Fourth Amendment and the Exclusionary
conducted and, consequently, the rights of witnesses. While there is undeniable value in allowing congressional investigations, several factors unique to the political atmosphere in which Grand jury investigations pose the same problems as criminal investigations, except that the grand jury proceeding is usually not open to the public, thus allowing a witness to plead the fifth amendment without social repercussions. The grand jury may, however, provide immunity, but until it is a known fact that he has information relevant to the investigation, this testimony is not made public by forcing the witness to testify at trial. See Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455 (1965); Note, Rules of Evidence as a Factor in Probable Cause in Grand Jury Proceedings and Preliminary Examinations, 1963 Wash. U.L.Q. 102.

The administrative investigations may have the same deficiencies as congressional investigations. Administrative investigations involve primarily two types of searches, actual and constructive. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1945). When there is a search by an administrative agency, it deals with the enforcement of some law already in existence and is limited to searches necessary to carry out the function of the agency in enforcing the law. Spot checks are allowed because they are necessary to enforce a constitutional law and because they carry no intimation of guilt but generally only a warning to the person checked. However, the Court has recently held that a warrant is required for such a search. Camara v. Municipal Court, 389 U.S. 523 (1967). Moreover, if the search is constructive, different standards are applied. Under the Administrative Procedure Act § 6(c), 5 U.S.C. § 1005 (1964), the requirements for issuance of subpoenas appear similar to probable cause. However, in United States v. Powell, 379 U.S. 48 (1964), the Court said the only requirements were that the subpoena not be a fishing expedition, and that the tax records subpoenaed must reasonably appear to be relevant to the inquiry. Also, when a law already exists, the duty to testify is stronger than the duty to testify in congressional investigations. This is evidenced by the fact that there may be no fifth amendment plea in many administrative investigations. However, although most of these investigations do not produce adverse social consequences, this is foreseeable. In that case, there would be substantial justification for applying a probable cause standard before subpoenaing a witness to testify.

112. Even HUAC is not valueless. See, e.g., Auerbach, Some Comments on the Case for the House Un-American Activities Committee, 47 Minn. L. Rev. 593 (1963). Professor Auerbach points out that 35 of HUAC’s recommendations have become law while 61 others have not. HUAC also provides valuable information to Congressmen and can inform the public about antidemocratic movements operating in this country. However, this could be accomplished without any use of the subpoena power.

113. Neither the procedures nor the personalities involved in congressional investigations is comparable to investigations held by courts or even administrative agencies. Many committees operate without adequate rules defining the rights of witnesses. Because this is not a judicial proceeding, the principles of due process do not apply. Congressmen who conduct these investigations are often seeking publicity...
these investigations function operate to restrict the constitutional rights of witnesses testifying in these proceedings. As seen in the foregoing, the basic philosophical limitation upon the scope and motivation of congressional investigations is the view of our government as a tripartite unit. This structure dictates that congressional investigations be carried on only to collect information for possible legislation. However, it is not startling that this view of our government is not correct, and it is widely recognized that all three branches of government carry out functions which are within the theoretically exclusive realm of another branch.

Congress does investigate to collect information for effective legislation; it also investigates to maintain the balance of power between itself and the other branches,114 to supervise the vast administrative branch of government,116 to educate or inform the public,116 and to propagandize.117 Exposure is one of the major

and personal agrandizement. Furthermore, and perhaps most significant, there is the role of the press. Because of the controversial nature of many investigations, the press gives complete, and at times spectacular coverage to these hearings. Because of the chairman's power over the hearing, all sides do not always get a complete hearing. These all work to the detriment of the witness.

114. Shapiro, Judicial Review: The Supreme Court's Supervision of Congressional Investigations, 15 VAND. L. REV. 535, (1962). But cf. Liacos, Rights of Witnesses Before Congressional Committees, 33 B.U.L. REV. 337, 348 (1953). This argument is based upon the idea that the Congressmen conducting the investigations are our chosen protectors while the administrative agents are appointed. The selectivity in subpoenaing witnesses by a congressional committee implies a connection between the witness and the subject matter investigated, so the committee should be required to balance the individual protection against the need to maintain a balance of power in this way. See also McCray v. United States, 195 U.S. 27, 55 (1904) (the solution lies with the people, not the Court).

The effectiveness with which Congress can carry out many of its traditional functions is in large part indirectly dependent upon the power to investigate. Shapiro, supra at 540-42. For example, Congress has to compete with the President for public attention and support to be able to pass an independent judgment on legislative proposals made by the President. See Liacos, supra at 344.

115. Watkins v. United States, 354 U.S. 178, 187 (1957); J. BURNHAM, CONGRESS AND THE AMERICAN TRADITION 233-34 (1959). See Sinclair v. United States, 279 U.S. 263 (1929); McGrain v. Daugherty, 273 U.S. 135 (1927). The first congressional investigation was of a blunder by the Department of War. This power may be pursuant to U.S. CONST. art. 1, § 2, which gives Congress power to supervise government personnel subject to impeachment, but it is exercised far beyond this limited purpose. J. BURNHAM, supra.

116. Shapiro, supra note 114.

117. C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 297 (rev. ed. 1950); W. WILSON, CONGRESSIONAL GOVERNMENT 183, 198
congressional sources of power for it creates an independent source of public support and, as such, it may be a valid congressional purpose for investigations.\textsuperscript{118} It is difficult to accept the validity of this purpose when investigations are directed against individuals rather than problem areas, for it is not the proper function of Congress to judge the conduct of an individual\textsuperscript{119} and then both persecute and prosecute him because of it. Yet the publicity and other factors which make the congressional investigation an effective tool in bringing about benefits may be so perverted that they infringe upon the constitutionally protected rights of the individual.

The effectiveness with which a congressional investigation can execute any of the foregoing functions is, in large part, dependent upon the publicity accorded the investigation\textsuperscript{120} A calm, quiet, orderly, and intelligently conducted investigation may receive little or no publicity while a spectacular investigation will capture the public's attention.\textsuperscript{121} The spectacular investigation, however, works to the detriment of the witness. Even before the witness appears to testify, the mere fact of being subpoenaed to appear before a notorious committee and of being associated with the subject matter under investigation and the testimony of prior witnesses may lead to public condemnation and economic reprisals.\textsuperscript{122} Once before the committee, the attempts of the Congressmen to create a spectacular atmosphere by over stating and dramatizing the testimony of a witness\textsuperscript{123}


\footnotesize{118. Shapiro, supra note 114; see Yellin v. United States, 374 U.S. 109 (1963).}

\footnotesize{119. Except in the case of impeachments, Congress cannot carry on a judicial function. Kilbourn v. Thompson, 103 U.S. 168 (1880).}

\footnotesize{120. "Publicity is the antiseptic of the democratic body politic," Finer, Congressional Investigations: The British System, 18 U. Chi. L. Rev. 521 (1951).}

\footnotesize{121. Compare the lack of publicity given the recent investigations by the Senate Foreign Relations Committee, Time, April 7, 1967, at 15, with the widespread publicity given to Senator McCarthy's investigations of Communist infiltration and the Army.}

\footnotesize{122. Note 2 supra; Watkins v. United States, 354 U.S. 178 (1957); cf. HUAC Rule IV.}

\footnotesize{123. Shils, Congressional Investigations: The Legislator and his Environment, 18 U. Chi. L. Rev. 571 (1951).}
increase the social sanctions imposed upon the witness.

The power of exposure, when used against the individual, leads to the most obnoxious abuses of the congressional power of investigation. A Congressman, seeking personal aggrandizement, may decide to attack an individual who, though not violating any law, is morally culpable in the opinion of the Congressman. By subpoenaing the individual, the Congressman

124. See Gojack v. United States, 384 U.S. 702 (1966); Jones v. SEC, 298 U.S. 1 (1936). In reversing the contempt conviction, the Court said:

The fear that some malefactor may go unwhipped of justice weighs as nothing against this just and strong condemnation of a practice so odious. And, indeed, the fear itself has little of substance upon which to rest. The federal courts are open to the government...

The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government.

Id. at 27.

Justice Holmes, in dissent, stated: "More important still, the enforcement of the Act is aided when guilt is exposed to the censure of the world, though the witness in the act of speaking may make punishment impossible." Id. at 31. It is interesting to observe the switch in position. Until the late 1940's, it was the "liberals" who were calling for more investigations and more freedom of exposure. In the past twenty years the position has exactly reversed.

Jerry Voorhis, U.S. Representative (D. Cal. 1937-1947) and member of HUAC, argues that congressional investigations may be democracy's most effective method of guarding against movements which operate within the law but seek to destroy our freedom. The primary purpose of these investigations is not to legislate, but to expose people to the public. Voorhis, Congressional Investigations: Inner Workings, 18 U. Cin. L. Rev. 455 (1951). Richard Nixon felt that HUAC has a solemn responsibility to find people who had been Communists but were immune from grand jury investigation because of the statute of limitations.

A court would have to be blind not to see that investigations are used to carry out personal goals. United States v. Rumely, 345 U.S. 41, 44 (1953). See NAACP v. Alabama, 357 U.S. 449 (1958); Sweezy v. New Hampshire, 354 U.S. 234 (1957). Congressmen also use investigations to set the standards for acceptable political thought and to quiet dissent or criticism by intimidating with threat of exposure. See Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961).

There are numerous other personal motives involved. A legislator may be trying to soften an administrative agency, to soften or strengthen the effect of a particular bill, or to satisfy a personal vengeance. Marx, Congressional Investigations: Significance for the Administrative Process, 18 U. Cin. L. Rev. 503, 513 (1951). The legislator lives in a general environment of distrust and suspicion; consequently, he may be more critical of deviant behavior than the average citizen. Also, because of political activities, a legislator tends to propagandize issues in black and white and overstate his case. Shils, supra note 123, at 571. Chief Justice Warren, in Watkins v. United States, 354 U.S. 178, 197 (1957),
may bring the wrath of the almighty public down upon the individual although the individual actually had no connection with the topic under investigation. None of the protections considered basic to an ordered scheme of justice applies, for this is a trial by public opinion, not by law. The ability of a witness

states that investigations which are carried on solely for personal aggrandizement or to punish those investigated are indefensible.

125. The inadequacy of the protection afforded summoned witnesses can best be demonstrated by relating the saga of Robert Shelton. The Senate Internal Security Subcommittee heard testimony by Winston M. Burdett, a foreign journalist who had been a member of the Communist Party from 1937 to 1940, that Communists had infiltrated the newspaper industry. Subsequent to this testimony the Subcommittee received a letter from a reliable source that one "Sheldon" who worked for the New York Times was informed about if not a member of a Communist group. This letter was never produced in court. At first the government refused to release it as it contained confidential information, and by the time the court ordered its production, it had been inadvertently destroyed.

On the basis of this information the Subcommittee authorized a subpoena in the name of Willard Shelton. In attempting to serve the subpoena it was learned that there was no one by that name working for the Times, but that a Robert Shelton worked as a news copy editor, and several other Sheldons worked in the printing department. The Subcommittee reauthorized the subpoena in the name Robert Shelton. When Robert Shelton appeared to testify the Subcommittee admitted that there was no reason to believe he, Robert Shelton, was a Communist or had information concerning Communist activities, but, in order to clear up the matter, asked him whether he was a Communist. Robert Shelton refused to answer this question, arguing that the Subcommittee must have probable cause to believe that a person has information pertinent to the subject matter under lawful inquiry to compel an answer. In United States v. Shelton, 148 F. Supp. 926 (D.D.C. 1957), the court argued that the pertinency requirement gave ample protection, and that the judiciary should not judge matters within the discretion of Congress. There was no probable cause requirement. Id. at 933. On appeal, the court affirmed. Shelton v. United States, 280 F.2d 701 (D.C. Cir. 1960). The court recognized that there could be no pillory or indiscriminate dragnet of witnesses, but believed that non-Communists knew about Communist activities and the information as to whether Shelton was a Communist would be helpful in evaluating his testimony. Id. at 706–08. The court avoided the problem that Robert Shelton had not given any testimony to be evaluated. The Supreme Court reversed on the basis that the grand jury indictment did not specify the subject under inquiry. Russell v. United States, 369 U.S. 749 (1962).

Shelton was again convicted on a new certificate of contempt, United States v. Shelton, 211 F. Supp. 869 (D.D.C. 1962), but this conviction was reversed on the basis that the subpoena was illegally issued since the Subcommittee counsel, not the Subcommittee, made the decision to subpoena Shelton. Shelton v. United States, 327 F.2d 601 (D.C. Cir. 1963). See Bendick, First Amendment Standards for Congressional Investigations, 51 Calif. L. Rev. 311 (1963).

to rely upon constitutional or technical defenses is reduced by the fear that the assertion of such defenses will be an implicit admission of guilt in the eyes of the public. Because of the Court's refusal to consider the motives of Congressmen, it has, in the face of clear evidence, consistently refused to see that there is in fact exposure for exposure's sake. The Court, by not taking affirmative action to control this evil, has permitted a few legislative investigators, using the techniques of mass hysteria, to control the expression of ideas. The individual has no means to evade this method of control except to avoid the expression of any ideas which might become controversial and therefore come to the attention of a notorious committee. Once the individual appears before the investigation the damage has been done and his assertion that he is ignorant of the evil under investigation will be of no avail.

VI. THE SOLUTION

Once a congressional investigation gains public support it is nearly impossible to limit or stop it. The same factors which lead to abuses of the rights of witnesses ensure the continuation of the investigation. For example, if the public is led to believe that Communism poses a serious threat to national security, an individual subpoenaed by HUAC will be socially convicted of being a Communist. Although the danger may be exaggerated or nonexistent, few Congressmen will be willing to risk their political future by voting to limit or abolish such an investigating committee. Furthermore, because the whole Congress has authorized the investigation, the Court will assume that there is sufficient potential danger to warrant the investigation.

The rights of the individual which must be protected are

127. See, e.g., Gojack v. United States, 384 U.S. 702, 710 & n.8 (1966). "By this means," Congressman Francis E. Walter, D. Pa., said, "Active communists will be exposed before their neighbors and fellow workers; and I have every confidence that the loyal Americans who work with them will do the rest of the job." Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961).

128. This violates the principle that we are a government of laws, not of men, for it allows certain individuals, unrestrained by legal processes, to punish. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 136 (1951). See Olmstead v. United States, 277 U.S. 438, 475, 478 (1928) (right to be let alone); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 109-10 (1902). Attempts by other members of Congress to stop these abuses in favor of formal discipline would lead to honorable martyrdom. H. Lasswell, NATIONAL SECURITY AND INDIVIDUAL FREEDOM (1950).
the rights to freedom of belief and expression; yet, because of the admitted need of Congress to gather information necessary for effective legislation, these rights must be balanced against the national interest in legislation. As seen in the foregoing, the standards used to judge the duty of the individual to testify are inadequate in two respects. They fail to protect the individual from the social abuses which result from being subpoenaed and testifying, and they fail to adequately recognize the motives behind the investigations. Numerous legislative safeguards have been proposed, but while these might afford the witness more rights while actually before the investigating committee, they are inadequate for they fail to guard the individual from the public exposure and harassment caused by the initial governmental interference of being subpoenaed. Moreover, the legislative solutions are unrealistic because Congress will not impose these limitations upon itself.

Because the situation has reached a political impasse, it is the duty of the Court to step in and protect the rights of the individual. It is suggested that the Court should require a showing of probable cause, as required by the fourth amendment, before allowing the issuance of a subpoena requiring an appearance before a congressional investigation. Many of the same competing factors as in criminal investigations are at work and the idea of fair play, essential to the Bill of Rights, is equally applicable.

The whole philosophical basis for the fourth amendment's protection against searches and seizures without probable cause is the notion that the individual has the right to keep the affairs of his life private. While this right is admittedly not absolute, for it must be balanced against the moral and statutory duty of the individual to aid the legislature by revealing certain information, it is a right so basic to our concept of a limited govern-

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130. At times when Communism is a threat to the United States, it would be almost certain political suicide for most Congressmen to propose such restrictions. See H. Packer, Ex-Communist Witnesses: Four Studies in Fact Finding 241 (1962).

ment that it should not be lightly disregarded.

To be of any real worth to the individual, the right of privacy must be recognized by all forms of governmental activity. Although the Court is willing to recognize the invasion of privacy if it results in criminal sanctions, the Court must recognize that governmental exposure which results in social sanctions can be just as disastrous to the individual. Indeed, "law" itself has been defined as those beliefs which are imposed on every member of society by those persons in control of the monopoly of legitimate force.

Furthermore, the right of privacy must protect the individual's mind as well as his possessions. The Court has protected certain contents of the mind from governmental invasions in criminal proceedings under the fifth amendment. However, the basic recognition that a person's mind is his most sacred possession and should be accorded the greatest protection from governmental invasion is equally applicable to all forms of governmental action. Moreover, the individual's mind should be accorded as much, if not more, protection than his possessions for he therein keeps his most private possessions—his memory and his thoughts. Certainly the exposure of thoughts should be prohibited as repugnant to our notion of a limited government. A democratic form of government can exist only in a climate in which the right to think, question, and disagree is guaranteed. If the right to privacy is abolished, the freedom to think may be destroyed.

The factors on the other side of the balance must also be recognized; it is admitted that Congress does need information to be able to legislate effectively. While the vast majority of committee investigations can be conducted without compelling testimony, Congress may need the power to compel testimony in order to collect information in certain areas. The requirement that a congressional investigation demonstrate a need for the testimony of a particular individual and show probable cause to

1. Griswold v. Connecticut, 381 U.S. 479 (1965); see Brandeis, J., dissenting, in Olmstead v. United States, 277 U.S. 438, 478 (1928); see also text accompanying note 105 supra.


4. The first, fourth, fifth, and ninth amendments to the Constitution set up an idea of government with which the exposure of thoughts is surely inconsistent.

5. It is interesting to note that, with one exception, all the contempt citations brought under either 2 U.S.C. § 192 (1964) or 2 U.S.C. § 194 (1964) were for contempt of HUAC or SCIC.
believe that a particular individual possesses information pertinent to the subject under inquiry would provide an effective method of safeguarding the individual’s right to freedom of expression and privacy. It would also allow Congress the necessary power to collect information.

The two major objections to such a requirement appear to be, first, that such a requirement would restrain the legislature prior to passage of legislation and would consequently violate the separation of powers principle; and, second, that it would put an overwhelming burden on both Congress and the courts. However, these fears appear to be unfounded. The restraint placed upon the legislature would not be significant for the courts would not be determining which topics Congress could and could not investigate, but rather the limited issue as to whether Congress could validly subpoena a specific individual. Such limited restraints have been imposed on Congress in the past; it is unrealistic to believe that Congress would rebel at this. The fear that such a requirement would place an overwhelming burden on Congress and the courts is also unrealistic. The vast majority of individuals willingly appear to testify; it is only in the small minority of investigations in which Congress seeks information from hostile witnesses that it would actually have to demonstrate a need for the information and probable cause for believing that the individual did, in fact, possess information pertinent to the subject under inquiry. In these few instances the requirement of showing probable cause will provide both a formal and an informal check on abuses.137

The inconvenience that this requirement would cause Congress is not dispositive, for the Court has stated that if the burden of obtaining a warrant will not frustrate the governmental purpose, such requirement will be imposed.138 In determining the standard for probable cause the Court balances the governmental interest which allegedly justifies the official intrusion against the constitutionally protected interests of the private citizen.139

The protection which this requirement would afford the witness, in comparison with the burden it imposes upon Congress, is significant. The individual will be able to force investigators to show reason to believe that he will be able to provide useful information before they can interrupt his life. This will force

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137. If a committee does not have probable cause, it can use one of the federal agencies to investigate and get the necessary information. 138. Camara v. Municipal Court, 387 U.S. 523 (1967). 139. Id.
the investigation to evaluate its need for his testimony before going to the trouble of subpoenaing him. Once subpoenaed, the individual will have a basis upon which to contest his duty to testify. He will not have to risk criminal prosecution in order to contest this duty for he will be able to challenge the probable cause for his subpoena prior to testifying. If the court finds that the individual does have a duty to testify, he will either have to rely on the fifth amendment, risk criminal prosecution for contempt, or provide the information required. This will work to the advantage of both the investigation and the individual—the committee will not waste its time examining a reluctant witness unless it needs his testimony, and in the latter situation it will more likely get the desired information. If the individual was correct in his belief that he had no duty to testify, he will have avoided most of the social and economic consequences of being subpoenaed and appearing before the investigation as a hostile witness. Although the determination of the validity of the subpoena would be public record, it is unlikely that it would receive the same amount of publicity as the actual investigation.  

Under the present system, although the threat of criminal contempt may coerce a hostile witness into testifying, all Congress usually accomplishes is causing the witness to violate the law and go to jail as a consequence. By requiring the showing of probable cause the rights of the individual can be effectively protected while still allowing Congress the right to investigate.

140. The factors militating against extreme exposure in a court proceeding testing the probable cause for the issuance of the subpoena are 1) the parties in the action are less likely to be as flamboyant and publicity minded as in certain congressional committees; 2) only probable cause is being questioned rather than socially condemned actions or attitudes; 3) the procedure is in a judicial atmosphere with a tendency to protect the rights of individuals; 4) the attorneys representing the parties are more likely to be somewhat conservative in their statements to the press than would be the investigators; and 5) the press will probably not focus as directly on such judicial proceedings as important news as they would on a failure to testify before a notorious committee.

141. In reality, however, the threat of going to jail may not be significant because of the Court's tendency to reverse convictions on the basis of technical errors.