Hastings Law Journal

Volume 8 | Issue 3 Article 2

1-1957

Scope of the Legislative Investigational Power and Redress for its Abuse

Gary B. Lovell

SCOPE OF THE LEGISLATIVE INVESTIGATIONAL POWER AND REDRESS FOR ITS ABUSE

By Gary B. Lovell†

Just as the phenomenal rise in the number of administrative agencies in the 1930's and 1940's focused public attention on the brand new field of administrative law, today the equally startling expansion in the field of congressional investigations[1] is raising similarly complex problems of an equally serious nature. The field of administrative law is now crystallized by an ever-expanding body of statutory and case law, but one need not delve too far into the decade past to uncover the abuses and inequities which gave rise to our present day administrative safeguards. Agencies were enforcing in the courts rules and regulations of whose existence a private party had no inkling;[2] farmers were brought face to face with the colossus of government with no means of knowing the nature or structure of the agency they were opposing;[3] immigration and deportation proceedings were conducted without adherence to any statutory or regulatory pattern and in complete disregard of individual rights and dignity;[4] in short, the abuses of the executive branch of our government were creating a crying need for reform. Today, with the passage of the Federal Register Act of 1935,[5] the Administrative Procedure Act of 1946,[6] and the vast body of case law which has grown up thereunder, the worst of these abuses have been curbed. But now we face an equally serious spectre of abuse of individual rights and liberties, this time emanating from the legislative branch of the government. In the decade which has elapsed since World War II, the public has witnessed congressional investigations into the field of government, the professions of law and medicine, the arts, the field of writing, the motion picture industry, education, and, in short, into virtually every

† B.A., 1949, University of California, Berkeley; LL.B., 1954, University of California, Hastings College of Law; LL.M., 1956, New York University; Member, State Bar of California.

1 Since the first inquiry by a House special committee in 1792, it is estimated that more than 1,000 investigations have been conducted by Congressional committees of the two Houses. At the 1953 session of the 83rd Congress, a total of $3.4 million was appropriated for investigations. See GALLOWAY, THE LEGISLATIVE PROCESS IN CONGRESS (1953).

2 See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). During the trial of the Panama Refining case, the government attorney pulled an applicable regulation out of his hip pocket to be introduced into evidence. Counsel for the private party said his client knew nothing of the regulation, and petitioned the court not to enforce such "hip pocket" legislation.

3 See Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380 (1947). See also § 3 of the Federal Administrative Procedure Act, 60 STAT. 237, 5 U.S.C.A. 1003 (1946).

4 See, for example, Colyer v. Skeffington, 265 Fed. 17 (D.C. Mass., 1920), where immigration authorities modified a rule that an arrested alien should at the outset of the hearing be apprised of his right to have counsel.

5 49 STAT. 500, 44 U.S.C.A. § 301 (1935).

6 60 STAT. 237 (1946), 5 U.S.C.A. § 1001 (1946).

phase of American life. In spite of the fact that the vast majority of these investigations have been conducted in a decent and dignified manner, this era has nonetheless produced such spectacles as a United States Army General being subjected to wholly unjustified humiliations,[7] a prominent writer-educator having his character assassinated by innuendo emanating from a Congressional committee,[8] and untold hundreds of others losing their economic livelihood as a direct result of oppressive action which bore no relation to any legitimate legislative purpose.

It is the aim of this study to examine the scope and limitations of this investigational power of the legislature, to review the major defenses which have been advanced against it, and finally to probe the potential existence of an affirmative right of redress against legislative abuse of individual rights in the inquisition process.

Development of Investigative Power

The earliest omen of the events of the past decade occurred in 1792 when this country's first legislative investigation was empowered by the House of Representatives to look into the defeat of General Arthur St. Clair by the Indians on the Wabash.[9] As a result of two highly publicized and disastrous retreats, neither of which were due to any fault of his, General St. Clair was held in great disrepute by the populace. Though the General was completely cleared by the resulting inquiry, the defeat being laid to poor logistics, *he was never vindicated in the public mind,* and as a result, died in poverty and disrepute.[10] The power and scope of authority of this first investigating committee went unchallenged, as St. Clair welcomed it as an opportunity to absolve himself of blame. In subsequent investigations, however, it became necessary to justify this inquisitorial power of the legislature.

Under the basic American theory of a government of laws and not of men, the Constitution rules supreme. Thus any authority of a congressional committee essential to the legislative process must be found in the powers granted to Congress in article I, section 1, and in section 5, clause 2 of the Constitution:

> "Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.
> Section 5. . . . Each House may determine the Rules of its Proceedings,

[7] *Communist Infiltration in the Army, Hearings of the Senate Permanent Subcommittee on Investigations,* 83rd Cong., 2d Sess. (1954).

[8] LATTIMORE, ORDEAL BY SLANDER (1950).

[9] ANN. CONG. 490–94 (1792).

[10] TAYLOR, GRAND INQUEST 27 (1955).

> punish its members for disorderly Behavior and, with the Concurrence of two thirds, expel a Member."

With the authorization of Congress impliedly set out in such vague terms by the Constitution, it remained for subsequent case law to place the investigatory power within bounds, which are even today not clearly defined.

One of the earliest cases testing the legislative power to compel testimony in the course of an investigation was *Kilbourn v. Thompson*.[11] This case involved an inquiry by the House into the operations of a real estate pool of which Kilbourn was a member along with Jay Cooke & Co., and the loss of government funds due to an improvident deposit made by the Secretary of the Navy in the London branch of the firm. Kilbourn refused to answer questions propounded by the Committee, and as a result, was ordered arrested by the House to answer for contempt. In an action for false imprisonment, he joined the sergeant-at-arms with the members of the committee responsible for his arrest. The court held that Congress lacked the inherent power to punish for contempt. Mr. Justice Miller also stated that the whole inquiry was "simply a fruitless investigation into the personal affairs of individuals, . . . could result in no valid legislation on the subject to which the inquiry referred," and hence was beyond the constitutional power of the House. Having so decided the basic principles of the case, the important question remained as to the liability of the two categories of defendants—i.e. the sergeant-at-arms who carried out the physical arrest of plaintiff, and the members of Congress who ordered the act. The court looked primarily at the constitutional provision which declares that senators and representatives "shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place."[12] Did the House Resolution authorizing Kilbourn's imprisonment fall within the meaning of the clause? Looking to the probable intent of the framers, with English precedents fresh in mind, the court held that the constitutional clause did grant immunity to the legislative defendants in this case, but added:[13]

> "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow

[11] 103 U.S. 168 (1880).

[12] U.S. CONST. art. VIII, § 6.

[13] 103 U.S. at 204.

> the example of the French Assembly in assuming the function of a court for capital punishment, we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate."

If these words were intended to point out a weak link in the chain of absolute legislative immunity, they led to no serious challenge of the doctrine for some 70 years.[14]

While the *Kilbourn* case did affirm Congress' right to investigate, it remained for later cases to expand this right and then to set limits upon it. In the important 1927 case of *McGrain v. Daugherty*,[15] the supreme court was concerned with this investigatory power as incidental to the congressional power to make law. The case grew out of a Senate investigation of alleged maladministration of the Department of Justice under Attorney General Daugherty. A senate subpoena was served on Mally S. Daugherty, an Ohio banker and brother of the Attorney General. After disregarding the subpoena, he was arrested by the sergeant-at-arms, and thereafter sought release on a writ of habeas corpus. The district judge granted the writ and discharged Daugherty from custody.[16] Citing Justice Miller's opinion in the Kilbourn case, the judge held that the Senate was not acting in a legislative capacity, but was usurping judicial functions by undertaking a trial of the Attorney General. Not wanting to torpedo the power of congressional inquiry, the supreme court reversed the district judge and declared that the Senate could require Mally Daugherty to testify. Justice Van Devanter based this important opinion on two main generalizations:[17]

> "One, that the two houses of Congress . . . possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and the other, that neither house is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule . . . just stated is rightly applied."

The *Daugherty* case thus clearly affirmed the power of Congress to investigate as an essential and appropriate auxiliary to the legislative function. Van Devanter's opinion also stated that neither House was invested with general power to inquire into private affairs. Since that time, however, legislation has clarified the situation. Investigatory powers were specifically granted to the standing committees of the Senate by the Legislative Reorganization Act of 1946:[18]

---

[14] See *infra*, Tenney v. Brandhove, 341 U.S. 367 (1950).

[15] 273 U.S. 135 (1927).

[16] 299 Fed. 620 (S.D. Ohio 1924).

[17] 273 U.S. at 173–174.

[18] STAT. 812, 2 U.S.C.A. § 190b (1946).

> § 190b. (a) Each standing committee of the Senate, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures (not in excess of $10,000 for each committee during any Congress) as it deems advisable. Each such committee may make investigations into any matter within its jurisdiction, may report such hearings as may be had by it, and may employ stenographic assistance at a cost not exceeding 25 cents per hundred words. The expenses of the committee shall be paid from the contingent fund of the Senate upon vouchers approved by the Chairman."

On the House side, the Act granted general investigatory powers only to the Committee on Un-American Activities. Therefore, authority of other committees must be sought in specific resolutions passed by the House for that purpose.

Having pointed out the legislative affirmance of the basic investigative right, it now becomes necessary to discuss the major case law limitations which have developed subsequent to *Daugherty*.

Pertinency of Questions

One of the defenses most often raised by witnesses who have refused information to congressional committees is lack of pertinency. Section 192 of Title 2[19] of the United States Code makes refusal to answer *pertinent* questions a misdemeanor. To establish pertinency, two elements are required: (1) The material sought or answers requested must relate to a legislative purpose which Congress can constitutionally entertain; (2) such material or answers must fall within the grant of authority actually made by Congress to the investigating committee.[20] A long line of cases says that a witness may refuse to answer a question which is not pertinent. For example, in *McGrain v. Daugherty,* the Supreme Court stated that a witness need not testify " . . . where the bounds of the power are exceeded or the questions are not pertinent to the matters under inquiry." *Sinclair v. United States*[21] established the rule that the pertinency of a question is a matter of

[19] The entire section reads as follows: 2 U.S.C.A. § 192. Refusal of witness to testify or produce papers. Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months As amended June 22, 1938, c. 594, 52 STAT. 942.

[20] United States v. Orman, 207 F.2d 148 (3d Cir. 1953).

[21] 279 U.S. 263 (1929).

law which the court must decide. Later cases have held steadfastly to the rule of pertinency. However, a witness who refuses to answer acts at his peril and will not be saved from contempt charges because he "honestly" thought the question was irrelevant. In *Townsend v. United States*,[22] the court held that intentional or deliberate action is to be considered as "wilful" so far as contempt is concerned. In actual practice, the pertinency defense is somewhat illusory. The relevance and materiality of the question are normally presumed, and the resolution authorizing the investigation is usually so vague that it is hard to ask a question which is not arguably relevant in some way, if only as a foundation for later questions. To compound the problems of the witness, he must make a split-second gamble as to pertinency. If he answers a question which he honestly thinks is not pertinent, he is allowing the committee to inquire into areas of his private life which may be unjustified by the resolution authorizing the investigation. If he refuses to answer, even though in good faith, the committee may later cite him for contempt. He would then find himself subjected to penalties for his original refusal even though he may now be willing to answer after a court ruling as to pertinency.

The most recent case on pertinency concerns a witness who gambled on a refusal to answer, was cited for contempt, gained a momentary victory, and then defeat.[23] The House Un-American Activities Committee was authorized "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 (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."[24] In a 1954 hearing, Watkins, a labor union official, was asked questions concerning the identity of communists in a union between 1942 and 1947. His refusal to answer was based on the claim that the questions were not pertinent to the inquiry authorized by the Committee's enabling resolution. The Court of Appeals for the District of Columbia first ruled in Watkins' favor in January, 1956, with Judges Edgerton and Bazelon denying the pertinency of the questions over Judge Bastian's dissent. On a rehearing En Banc, some 3 months later, the court reversed itself, over the dissents of Edgerton and Bazelon. Judge Bastian, now writing for the majority, stated:[25]

> "It would be quite in order for Congress to authorize a committee to investigate the rate of growth or decline of the Communist Party, and so its nu-

[22] 95 F.2d 352 (D.C. Cir.) *cert. denied* 303 U.S. 664 (1938).

[23] Watkins v. United States, 223 F.2d 681 (D.C. Cir. 1956), *rehearing denied* May 22, 1956.

[24] 60 STAT. 828 (1946).

[25] See note 23 *supra* at 684.

> merical strength at various times, as part of an inquiry into the extent of the menace it poses and the legislative means that may be appropriate for dealing with that menace. Inquiry whether thirty persons were Communists between 1942 and 1947 would be pertinent to such an investigation."

With such confusion in the higher echelons of the judiciary, it is apparent that there are few reliable standards to guide a witness as to the pertinency of any given question during the short interval in which he must make up his mind.

Privilege against self-incrimination

The Fifth Amendment today stands as the most substantial limitation on Congressional inquiries into private affairs.[26] Although it has generally been assumed that the privilege against self incrimination could be invoked by witnesses testifying before congressional committees, the Supreme Court had not ruled on this question until the recent companion cases of *Quinn v. United States*,[27] *Emspak v. United States*,[28] and *Bart v. United States*.[29] Each of the defendants had been convicted of contempt of Congress[30] for refusing to answer questions posed by a House subcommittee on un-American activities. The Supreme Court reversed the convictions in three opinions by Chief Justice Warren. While the major arguments of the parties centered around the proper invocation of the privilege, there was, of necessity, an implied affirmation of the existence of the privilege at Congressional hearings.

With the Supreme Court having so affirmed the existence of the privilege, it becomes important to set out its limits and the type of questioning under which it may be invoked. It is sufficient to make the privilege applicable that testimony in any proceedings may provide the clues or links by which the guilt of the witness may be established.[31] A 1931 New York case set out a well-worded test for invoking the privilege:[32]

> "A witness is not required to show, in order to make his privilege available, that the testimony which he declines to give is certain to subject him to prosecution, or that it will prove the whole crime, unaided by testimony from others. It is enough, to wake the privilege into life, that there is a reasonable possibility of prosecution, and that the testimony, though falling short of proving the crime in its entirety, will prove some part or feature of it, will tend to a conviction when combined with proof of other circumstances which others may supply."

[26] See *e.g.*, Hoffman v. United States, 341 U.S. 479 (1951), Blau v. United States, 340 U.S. 159 (1950), though both of these cases involved proceedings before federal grand juries.

[27] 349 U.S. 155 (1955).

[28] 349 U.S. 190 (1955).

[29] 349 U.S. 219 (1955).

[30] *Supra* note 19.

[31] *Supra* note 27.

[32] Matter of Doyle, 257 N.Y. 244, 256, 177 N.E. 489, 493 (1931).

Under the recent case of *Ullman v. United States*,[33] further limitations were placed on invocation of the privilege. It does not include unpleasant consequences other than possible future prosecution. A witness having knowledge of the commission of a crime or of material facts of concern to a third party or to the public at large is required to testify. This is regardless of his personal inclinations, or his belief that it would cause him injury in the estimation of his friends or in his own estimation, or of his caprice or sentiment, or because the discourse is distasteful to him. Excepting only where his testimony may tend to incriminate him, the right of the inquiring body to know has always been paramount to his preference for silence. An additional facet of the *Ullman* case was its upholding of the Immunity Act of 1954[34] as a valid limitation on the privilege against self-incrimination. The Statute provides that a witness compelled to testify may not be "prosecuted or subjected to any penalty or forfeiture" and his testimony may not be used as evidence "in any criminal proceeding" against him "in any court." According to Mr. Justice Frankfurter in the *Ullman case,* the Fifth Amendment can only be interposed against a question when the witness is asked to "incriminate himself." But where the criminality has been taken away, as under the Immunity Act of 1954, then the amendment ceases to apply. Thus the enactment, without sacrificing the right against self-incriminations, provides the means of obtaining testimony thought to be indispensable to the national security.

First Amendment

To date, the Supreme Court has not ruled directly on whether violation of rights under the First Amendment is sufficient reason for refusal to answer questions of an investigating committee. However, such an argument was advanced in the case of *United States v. Rumely*.[35] Rumely, a registered lobbyist, refused to supply a congressional committee investigating lobbying activities with the names of purchasers of books and pamphlets distributed by him to the general public. He was cited and convicted of contempt of Congress, but the Court of Appeals for the District of Columbia reversed the conviction and this reversal was upheld by the Supreme Court. However, the majority opinion by Justice Frankfurter specifically sidestepped the First Amendment argument, and based the opinion on two main factors: (1) The House Resolution creating the committee did not authorize investigation into efforts to influence public opinion; and (2) as Congress has no power to legislate concerning attempts to influence public

[33] 350 U.S. 812 (1956).

[34] 68 STAT. 745, 18 U.S.C. (Supp. II) § 3486, 18 U.S.C.A. § 3486 (1954).

[35] 345 U.S. 41 (1952).

opinion, it would have no authority to investigate such activities. Justices Black and Douglas, in a concurring opinion, sought to base the holding squarely on the First Amendment. In essence, they held that the effect of the divulgence of the names requested by the Committee would be to impeach those individuals at the bar of public opinion. To allow the Committee to so impeach them would be to sanction direct federal action in violation of the individual's right to freedom of speech, freedom of publication, and right to petition the government—all guaranteed by the First Amendment. This view was further strengthened by the strong dissenting opinion in the *Barsky*[36] case, wherein Judge Edgerton aptly stated the governing principle: "What Congress may not restrain, Congress may not restrain by exposure and obloquy. The First Amendment forbids Congress purposely to burden forms of expression that it may not punish."

Right of Privacy

Prior to the twentieth century expansion of congressional investigation, the right of privacy was given full recognition. In the heyday of the "Robber Barons," Congress created a commission to investigate the lootings of railroads by Huntington, Stanford, and Jay Gould. Justice Stephen J. Field refused to force Stanford to disclose company records, saying,[37] "It cannot be that the courts of the United States can be used in furtherance of investigations in which all rules of evidence may be thus disregarded." Field could not see that the disposition of the money about which Stanford had been questioned was any concern of the United States, and regarded the proceedings as an unjustifiable intrusion. He declared:

> "Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value."[38]

The compulsory production of the private books and papers of a party otherwise than in the course of judicial proceedings or a direct suit for that purpose was, according to Field, "The forcible intrusion into, and compulsory exposure of one's private affairs and papers, without judicial process, or in the course of judicial proceedings, which is contrary to the principles of a free government, and is abhorrent to the instincts of Englishmen and Americans."

---

[36] Barsky v. United States, 167 F.2d 241 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948).

[37] *In re* Pacific Railway Commission, 32 Fed. 241, 259 (C.C.N.D. Cal. 1887).

[38] *Id.* at 250.

Today, there is apparently no such thing as a right of privacy which can be successfully raised against a question which meets the tests of pertinency. In *United States v. Orman,*[39] an Atlantic City gambler had been called as a witness before the Senate Special Committee to Investigate Organized Crime in interstate commerce. In refusing to furnish the committee with certain personal financial information, he raised no constitutional privilege, but merely stated, "It is my personal affair." The court established that the two elements of pertinency were present—i.e. (1) that the material sought or answers requested related to a legislative purpose which Congress could constitutionally entertain; and (2) that such material or answers fell within the grant of authority actually made by Congress to the investigating committee—and on this basis affirmed Orman's contempt conviction under 2 U.S.C.A. section 192. In substance, the court held that the right to be let alone in one's private affairs must be weighed against the policy behind Congressional fact-finding inquiries in aid of legislation—i.e. the right of free speech is not absolute, but must yield to national interests justifiably thought to be of larger importance. The same is true of the right to remain silent.

In the recent questioning of Arthur Miller by the House Committee on Un-American Activities, the author put forth a novel off-shoot of the right of privacy. When asked by the committee counsel to name those with whom he had admittedly attended communist party meetings, he replied:[40]

> "I will be perfectly frank with you in everything relating to my activities. I take the responsibility for everything I have ever done, but I cannot take responsibility for another human being. . . . All I can say, sir, is that my conscience will not permit me to use the name of another person . . . "

On the basis of this reply, the Committee voted to cite Miller for contempt and the recommendation was accepted by the House of Representatives. In spite of a strong moral justification for his conduct, there appears to be no legal defense which can be fashioned from Miller's reply.

Absence of a Quorum

In *Christoffel v. United States,*[41] a decision based on the perjury statute, it was held that a quorum of a committee had to be present at the time a perjury or contempt was committed. The court said the act required the presence of a "competent tribunal" and that unless a majority of the committee were actually present, such a body could not be the instrument of a criminal conviction. The court further said that the objection could not

[39] *Supra* note 20.

[40] New York Post, July 13, 1956.

[41] 338 U.S. 84 (1949).

properly be made until the trial for perjury, thus placing a rigorous limitation on the conduct of investigations. However, the court appeared to limit its position in the later cases of *United States v. Bryan*[42] and *United States v. Fleischman*[43] where the charge involved was contempt rather than perjury. Chief Justice Vinson held that the burden is on the witness to raise the quorum question at the time of the hearing, and his failure to do so, with the intent to save the objection until the trial, is wilful obstruction of the committee's process. It was pointed out by Mr. Justice Jackson in his concurring opinion that the court had at least tacitly overruled the *Christoffel* decision.

By way of internal regulation, the Senate passed Senate Resolution 180, 81st Congress, authorizing standing committees and subcommittees to fix a lesser number than one-third of its entire membership who shall constitute a quorum for the purpose of taking sworn testimony. Thus these Senate committees and subcommittees can authorize interrogation by a single member. This provision is not carried in the House rules, but there is apparently no objection to the designation of small House subcommittees for the purpose of taking testimony. Under the rule of the *Bryan* case, a witness may rightfully demand the presence of a quorum, and if this is done, the committee should show specifically in the transcript at that point that a quorum was present.

In *United States v. Moran,*[44] the enabling resolution authorized the committee to fix the number necessary for taking testimony. It was held that testimony could be taken by one member sitting alone, even though three members constituted a majority. Thus there remains little judicial restraint on the power of Congress to conduct one man investigations.

Affirmative Redress for Investigative Abuses

The foregoing discussion has sought to point out only the major defenses which have been raised by witnesses before congressional investigating bodies. But even assuming the future survival of these legal defenses, the past 8 to 10 years have shown the serious economic[45] and social[46] stigma which attaches to any witness who incurs the animosity of some of today's more vociferous congressional investigating committees. Thus it becomes apparent that wrongs are being committed under the guise of government authority for which there is no present redress. One bold attempt has been

[42] 339 U.S. 323 (1950).

[43] 339 U.S. 349 (1950).

[44] 194 F.2d 623 (2d Cir.) *cert. denied,* 343 U.S. 965 (1952).

[45] See COGLEY, REPORT ON BLACKLISTING (The Fund For The Republic, Inc., 1956).

[46] FELIX JACKSON, SO HELP ME GOD (The Viking Press, 1955).

made in recent years to puncture the circle of legislative immunity and obtain affirmative redress for abuses.

In the 1950 case of *Tenney v. Brandhove*,[47] plaintiff sued California's Tenney Committee on Un-American Activities. Alleging violation of the federal Civil Rights Statutes[48] based on his being ordered to appear before the committee to explain a petition he had circulated amongst members of the state legislature, plaintiff asked for expenses incurred in attending committee hearings as well as punitive damages. He charged that the hearing was held to, and did, deprive him of his constitutional rights of free speech, to petition the legislature for redress of grievances, equal protection, due process, and constitutional privileges and immunities. The Federal district court dismissed the complaint, but the court of appeals for the 9th Circuit reversed,[49] holding that the complaint stated a cause of action. The supreme court took the case on certiorari and reversed the 9th Circuit, holding that the remedies created by the Civil Rights Statutes do not abolish the ancient rule under which legislators are immune from liability for acts done within the sphere of legislative activity.[50] In short, the majority said that legislative immunity is not destroyed by a mere claim of unworthy purpose. But Mr. Justice Douglas, in a thought-provoking dissent, sought to hold the legislators to the same rule of law which governs ordinary citizens. Opining that the committee brought the weight of its authority down on plaintiff solely for exercising his right of free speech, Douglas stated:

> "Reprisal for speaking is as much an abridgment as a prior restraint. If a committee departs so far from its domain to deprive a citizen of a right protected by the Constitution, I can think of no reason why it should be immune . . . . It is *speech* and *debate* in the legislative department which our constitutional scheme makes privileged. Included, of course, are the actions of legislative committees that are authorized to conduct hearings or make investigations so as to lay the foundation for legislative action . . . . But when a committee perverts its power, brings down on an individual the

[47] 341 U.S. 367 (1950).

[48] U.S.C. § 43 (1946): "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 8 U.S.C. § 47 (3) (1946): "If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or equal privileges and immunities under the laws . . . whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

[49] 183 F.2d 121 (9th Cir. 1950).

[50] Tenney v. Brandhove, 341 U.S. 367 (1950).

whole weight of government for an illegal or currupt purpose, the reason for the immunity ends." (Emphasis added.)[51]

The full impact of Douglas' words, coupled with the fact that both executive[52] and judicial[53] privilege have fallen where violation of Civil Rights Statutes has been shown, would seem to indicate that legislative immunity too should fall where gross excesses are shown to violate individual rights.

Rules of procedure are today being promulgated by many of the committees.[54] But in the event that those committees who are guilty of the most serious abuse of individual rights continue their present course of conduct, the time would seem to be ripe for a wronged party to seek affirmative redress similar to the civil law remedy against the sovereign for wrongs of its agents.[55] Strong backing for such an action may be found in the closing words of the *Kilbourn v. Thompson* opinion, and is bulwarked by Douglas' dissent in the *Brandhove* case.

Under the French civil law system, the state is responsible in every case where damage has been caused by its acts.[56] While legislative investigation in France has not developed to the prominent position it enjoys in the United States, it has existed in one form or another since early in the 19th century.[57] However, the rule of state liability for legislative acts which damage particular individuals did not evolve until 1938. In that year, the French administrative court, the "Conseil D'Etat," granted recovery for a legislative act which deprived plaintiff of "equality of the citizenry."[58] It could be argued that United States courts could accomplish the same end result by their power to declare legislative action unconstitutional, which power has never been asserted by the French courts. However, the French courts have come much closer to the desired goal—that of actually making the abused plaintiff whole—by their granting of monetary damages.

In suits against the sovereign for wrongful acts of its agents, the French courts distinguish between "fautes de service" (service-connected faults) and "fautes personnelle" (personal faults). Personal faults include those that involve willfulness, malice, gross negligence, or action by the officer outside the scope of his official functions. Actual recovery for both types of

---

[51] *Id.* at 382-83.

[52] Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955).

[53] Picking v. Pennsylvania R. Co., 151 F.2d 240 (3d Cir. 1945).

[54] See *e.g.*, H.R. RES. 78, 84th Cong. 1st Sess. (1955).

[55] SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD, 250 *et seq.* (1954).

[56] *Id.* at 302.

[57] Ehrmann, *The Duty of Disclosure in Parliamentary Investigation: A Comparative Study*, 11 U. CHI. L. REV. 1 (1943).

[58] Societe des produits Laitiers La Fleurette, January 14, 1938.

faults is invariably against the state, but the state then has a right of action against the wrongdoing agent for his personal faults.

It is submitted that an action against a United States legislator should be allowed to proceed on the basis of this distinction between "faute personnelle" and "faute de service"—i.e. at a certain point in the inquisitorial process, the "overbearing" legislator is no longer acting with a legitimate purpose as his motivation, but has deviated so far in his attack on the individual that malice or evil motive should be inferred. When the inquisition has reached this state of affairs, where personal bias appears to constitute the major motivation, the inquisitor should no longer be dignified with legislative immunity. Allowing such a right of action against a legislator would be wholly consonant with the basic common law theory of equal protection of the laws for all, and would still allow bona fide legislative processes to go forward without restriction.