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CONGRESSIONAL INVESTIGATIONS, FIRST AMENDMENT FREEDOMS AND DUE PROCESS OF LAW

By MARVIN COOPER*

Introduction

What rights and privileges does a witness who has been summoned before a congressional investigating committee possess? The determination of this question in the light of the congressional power of inquiry is one of the most perplexing problems to face the courts in recent years. Since any determination in favor of the individual necessarily puts limitations on the power of inquiry, and vice-versa, consideration of the individual interests cannot properly be made without consideration of the interests represented by a congressional investigating committee.

Congressional Power of Investigation

Although the power of Congress to investigate is not found in express terms in the Constitution, such power has been recognized by the Supreme Court as being necessary and appropriate to carry out the legislative powers expressly granted in the Constitution.[1]

The legislative powers granted in the Constitution cover wide areas.[2] In order to enact effective and desirable legislation in pursuance of its powers, Congress must have the information necessary for sound legislative determination. To obtain the desired information investigation proceedings are often necessary. Since the information is sought for legislative purposes, the power of investigation is co-extensive with the power to legislate, that is, any area in which Congress might properly legislate is an area subject to congressional investigation.[3]

Information which might be necessary to a determination of legislative policy is not always given voluntarily. To prevent a frustration of the legislative purpose, the power of investigation includes the power to compel attendance of witnesses and the power to compel testimony.[4]

Congressional investigations are usually conducted by a committee or a sub-committee of the committee. The committee may be one of the standing committees of the House or Senate, or it may be a committee created for the purpose of conducting a specific investigation.[5] A committee is created

* Member, Second-Year Class.

1 Congress has such ". . . auxiliary powers as are necessary and appropriate to make the express powers effective . . . the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . ." McGrain v. Daughtery, 273 U.S. 135, 173, 174 (1927).

2 See U.S. CONST. art. I, § 8.

3 McGrain v. Daughtery, *supra* note 1.

4 *Ibid.*

5 See Watkins v. United States, 354 U.S. 178 (1956).

by an authorizing resolution which is adopted by either the House or Senate. This resolution is the committee's charter, giving to the committee its power and also limiting its scope of authority.[6]

Although the power of investigation with process to enforce it is necessarily broad, it is not without its limits. Congress may not properly require testimony the subject of which is outside the scope of inquiry as delineated by the authorizing resolution;[7] nor may a witness be required to answer questions which are not pertinent to the subject matter under investigation.[8]

These limitations on a congressional committee's power of investigation were felt to be inadequate for the protection of a witness.

In this respect the common law right of privacy was asserted to bar congressional investigation into private affairs in the early case of *Kilbourn v. Thompson.*[9] The Court held a congressional investigating committee to be powerless to inquire into the private affairs of an individual and force their disclosure. The basis of the decision was that to compel testimony relating to private affairs was a *judicial* power which could not be properly exercised by the legislature.[10] However, in a subsequent case the Supreme Court, without mention of any intention to do so, abrogated the right of privacy apparently recognized in *Kilbourn.* In *Sinclair v. United States*[11] the Court decided that affairs are not private when their disclosure is pertinent to a lawful investigation.

Witnesses appearing before a congressional investigating committee must therefore assert other affirmative rights if they are to justify any refusal to testify.[12] In this respect recalcitrant witnesses have asserted first amendment freedom. This section of the Bill of Rights provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[13]

Although the rights guaranteed by this amendment are not absolute, and its scope does not give immunity for every possible use of language,[14] it does forbid legislation which burdens, abridges, restricts or punishes the advocacy of ideas through the exercise of speech, press, or assembly.[15] It is also now settled that first amendment rights are available to a witness in a congressional investigation proceeding.[16]

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[6] United States v. Rumely, 345 U.S. 41, 44 (1952).

[7] *Ibid.*

[8] Watkins v. United States, *supra* note 5.

[9] 103 U.S. 168 (1880).

[10] *Id.* at 192

[11] 279 U.S. 263 (1929).

[12] A witness may in some cases refuse to answer upon the ground of self-incrimination. It is not within the scope of this article to examine this field. For two recent cases discussing this problem see Emspak v. United States, 349 U.S. 190 (1954), and Quinn v. United States, 349 U.S. 155 (1955).

[13] U.S. CONST. amend. I.

[14] Murdock v. Pennsylvania, 319 U.S. 105 (1943); Herndon v. Lowry, 301 U.S. 242 (1937); Frohwerk v. United States, 249 U.S. 204 (1919).

[15] Terminielo v. Chicago, 337 U.S. 1 (1949); Thomas v. Collins, 332 U.S. 516 (1945).

[16] Watkins v. United States, *supra* note 5.

A Problem for the Courts

Thus the problem is whether a witness has the right to refuse to answer material questions pertinent to a lawful inquiry by a congressional committee upon the ground that they invade rights protected by the first amendment.

When the problem of resolving this complex issue was first brought before lower federal courts, it resulted in a determination unfavorable to the existence of any such right. In *United States v. Josephson*[17] the issues regarding the first amendment do not seem to have been clearly presented by counsel nor clearly stated by the court. The witness, in refusing to be sworn in and testify before the sub-committee of the House Committee on Un-American Activities, based his refusal in part upon the contention that the committee investigation was an unconstitutional excursion into the area of speech, thought, and ideas protected by the first amendment. In considering this contention the court states, "The theory seems to be that the investigation of Un-American or subversive propaganda *impairs in some way not entirely clear* the freedom of expression guaranteed by the Bill of Rights." (Emphasis added.)[18] Further, it is doubtful that the court recognized any invasion of the witness' first amendment rights, for in considering the possibility of speech being restrained because of fear of disclosure of his unpopular ideas or beliefs the court said, "But this fear is not created by legal restriction. . . . In short there is no restraint (on freedom of expression) resulting from gathering of information by Congress . . . which does not wholly flow from the fact that the speaker is unwilling to advocate openly what he would like to urge under cover."[19] It appears that the court failed to examine the practical results of compelling certain testimony. It also failed to recognize that in compelling testimony congressional action *would be responsible for the results following such testimony*. This problem will be considered more fully later.

In *Barsky v. United States*[20] the court assumed, without deciding, that compelling a witness to answer questions regarding his communist affiliations would "impinge upon speech and not merely invade privacy."[21] The court nevertheless held that ". . . in view of the representations to the Congress as to the nature, purposes and program of Communism and the Communist Party . . .," the witness could be compelled to answer.[22] Thus it appears that the court recognized that in some situations where there is sufficient justification, first amendment freedoms may be restricted. A rational basis for determining when invasion of a witness' first amendment rights is to be allowed is not clearly presented in the opinion.

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[17] 165 F.2d 82 (2d Cir. 1947).
[18] *Id.* at 91.
[19] *Id.* at 92.
[20] 167 F.2d 241 (D.C. Cir. 1947).
[21] *Id.* at 250.
[22] *Ibid.*

The court expressly rejected the clear and present danger test[23] as a possible basis for determining when congressional inquiry may be made into the area protected by the first amendment.[24] This test has been used to determine when speech may warrant criminal sanction, but as the court points out "it would be sheer folly . . . for an existing government to refrain from inquiry into potential threats to its existence of security until danger is clear and present." The court goes on to say that inquiry is justified "when danger is reasonably represented as potential."[25] This test, or lack of test, would seem to require at best only a determination of whether there is a rational basis for the investigation and provides no standards for evaluation.

A Decision by the Supreme Court

The first case to reach the Supreme Court in which the issue of first amendment limitations on the congressional power of investigation was squarely decided was *Barenblatt v. United States*.[26] Barenblatt was summoned before a sub-committee of the House Committee on Un-American Activities and was questioned as to his membership in and affiliation with the Communist Party. He refused to answer and was convicted of contempt of Congress.[27]

The conviction was affirmed by a closely divided Court. Mr. Justice Harlan in the majority opinion said, "where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake . . . in the particular circumstances shown."[28] He concluded that where the governmental interests outweigh individual interests the provisions of the first amendment are not offended.

A Balance of Interest

In adopting the balancing of interests process, the Court is utilizing a test which has long been applied in passing on the validity of state regulations designed to promote the public welfare but which in some manner restrict first amendment freedoms as an incident thereto.[29]

This test has also been used to determine the constitutionality of section 9(h) of the Labor Management Relations Act which required that union officers execute an affidavit stating that they are not Communists and do

[23] This test was formulated by Justice Holmes in Schenk v. United States, 249 U.S. 47 (1919). See CHAFFEE, FREE SPEECH IN THE UNITED STATES 81–82 (1941) for a discussion of this concept as derived from the Schenk case.

[24] Barsky v. United States, *supra* note 20, at 246.

[25] *Id.* at 246, 247.

[26] 360 U.S. 109 (1958).

[27] 52 Stat. 942 (1938), 2 U.S.C. § 192 (1952).

[28] 360 U.S. at 126.

[29] Thomas v. Collins, *supra* note 15; Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. Irvington, 308 U.S. 147 (1939).

not believe in Communist principals.[30] The Court recognized that first amendment freedoms would be abridged stating: ". . . (the statute's provision) undoubtedly lessens the threat to interstate commerce, but it has the further necessary effect of discouraging the exercise of political rights protected by the first amendment. Men who hold union offices often have little choice but to renounce Communism or give up their offices. Unions which wish to do so are discouraged from electing Communists to office."[31]

The Court in the *Barenblatt* case, in considering the opposing interests of the government and the individual, recognized the governmental interest in national security and prevention of overthrow by force and violence. In pursuance of such interest Congress has wide power to legislate in the field of Communism and "to conduct appropriate investigations in aid thereof" because the tenets of the Communist Party include the overthrow of the United States Government by force and violence.[32]

On the other side of the scale the individual interest was recognized as Barenblatt's right to keep silent about his Communist affiliations, thereby avoiding the adverse affects which would follow such disclosure.[33] Of course it is possible that the Court had in mind other factors to be weighed on the side of the individual, but none are mentioned in the opinion.

Exercise of First Amendment Rights is Restricted

In order to determine what effects compelled disclosure of associational relationships and political beliefs has upon first amendment freedoms, it is necessary to consider the nature of the disclosure and the general public attitude regarding the subject of the disclosure.

Where the great majority of the public looks upon certain beliefs with great animosity, to require a witness to profess his faith in such beliefs is to expose him to "public stigma, scorn and obloquy." This is a great deterrent to those who might embrace controversial or unorthodox views.[34]

As pointed out by the Court in *American Communications Ass'n v. Douds,* "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the State may regulate so as to bring the whole within official control."[35] Modern methods are more subtle and are therefore correspondingly more dangerous since they may escape casual appraisal.

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[30] "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, . . . partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances." American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[31] *Id.* at 393.

[32] Barenblatt v. United States, *supra* note 26, at 127.

[33] *Ibid.*

[34] This point has been made by Justice Black dissenting in Barenblatt v. United States, *supra* note 26, by Chief Justice Warren in Watkins v. United States, *supra* note 5, by Judge Egerton dissenting in Barsky v. United States, *supra* note 20, and by Judge Clark dissenting in United States v. Josephson, *supra* note 17.

[35] 339 U.S. at 399.

If this process of compelling testimony causes individuals to refrain from expressing controversial opinions or discussing issues subject to possible congressional inquiry, the *purpose of free speech cannot be attained.* The purpose of speech as stated by Mr. Justice Brandeis makes this quite clear. "Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means inseparable to the discovery and spread of political truth; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principal of the American government."[36]

What Interests Should Be Balanced on the Side of the Individual?

When using the balancing of interest process, a valid judgment cannot be made until all the interests to be balanced are identified and given weight. The government's interest has been stated as maintaining national security, the prevention of overthrow by force and violence. The importance of the governmental interest cannot be denied, but neither can the interest of the individual.

One thing that should be balanced on the side of the individual interest is the adverse effects which follow the compelled disclosure of unpopular ideals and associations, *i.e.* loss of prestige, employment and friends. Reports to the House of Representatives by the Un-American Activities Committee cite many examples of witnesses being forced from their jobs following their appearance before the Committee.[37]

Another thing that should be balanced on the side of the individual interest is the more important *public* interest in the free exercise of first amendment rights. Mr. Justice Black in the dissenting opinion of *Barenblatt* points out that the public interest is ". . . the interest of the people as a whole in being able to join organizations, advocate causes and make political 'mistakes' without later being subjected to governmental penalties for having dared to think for themselves."[38]

The investigating committee does not impose the more modern penalties of fine or imprisonment on a witness who testifies. The punishment that Justice Black was speaking of is an older form of punishment, that of public scorn, shame and hatred.[39] This punishment follows the exposure of extremely unpopular associational relationships and beliefs. It is fear of this type of punishment that will prevent the free exercise of first amendment rights. It operates as a deterrent upon the exchange of ideas or views, excepting those that enjoy current approval.

Thus, the public interest in the free exercise of first amendment rights

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[36] Whitney v. California, 274 U.S. 357, 375 (1927).

[37] See H.R. Rep. No. 2431, 82d Cong., 2d Sess. 5 (1952); H.R. Rep. No. 2516, 82d Cong., 2d Sess. 3 (1952); H.R. Rep. No. 2747, 77th Cong., 2d Sess. 5 (1942).

[38] Barenblatt v. United States, *supra* note 26, at 144 (dissenting opinion).

[39] ANDREWS, OLD-TIME PUNISHMENTS 1–145, 164–187 (1890 ed.).

must be included on the side of the individual interest and balanced against the interests of government in obtaining the desired information.[40]

A Lack of Standards for Evaluation

The Court's opinion in the *Barenblatt* case does not mention any consideration of "public interest" being included on the side of the individual interest. It is possible that the majority of the Court felt that the individual interest did not properly include any public interest and therefore was not to be included in the balancing process. If this were true, then the governmental interest in national security would readily justify the compulsion of testimony. Of course the Court may have considered the individual interest as including a measure of public interest and still determined the weight of interest in the government's favor, but nothing to this effect was mentioned.

As said before, the balancing process cannot be done properly unless all the interests to be balanced are recognized and given proper weight. Only then can an articulate judgment be made. The balancing process does not, however, provide any definite standards upon which the court can rely in making its judgment. The process merely ascribes to the courts the duty of determining when individual freedoms protected by the first amendment must yield to the subordinating interests of the government. The lack of any standards upon which the judgment is made tends to put the witness in a precarious position. He must determine at the time of the investigation whether his interests are to be subordinated to the government's interest without any guides for his decision. If the witness fails to anticipate the court's decision, he is subject to a penalty for contempt.

Judicial Control of the Power of Investigation

In establishing some sort of ascertainable limits to the congressional power of investigation, the courts may have to resort to something other than the balancing of interests process. The power of the court to inquire into the purpose of a congressional investigation appears to be firmly established.[41] The power to declare an investigation bad when the court determines that no valid legislative purpose is being served is also firmly established.[42] An investigation purely for the sake of exposure has been recognized as not furthering a legislative purpose.[43] Therefore, Congress is without power to require a witness to reveal his associational relationships or political beliefs if the purpose of the investigation is exposure for the sake of exposure.[44]

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[40] "The First Amendment protects two kinds of interests in free speech. There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way." CHAFFEE, *op. cit. supra* note 23, at 33, 34.

[41] Sinclair v. United States, *supra* note 11; Kilbourn v. Thompson, *supra* note 9.

[42] United States v. Rumely, *supra* note 6.

[43] Watkins v. United States, *supra* note 5.

[44] *Id.* at 200.

By using these controls which the court has over the power of investigation, in connection with a test which the court has adopted in other types of cases, it is felt that more definite standards for evaluation could be attained. The test to which the writer is referring has been termed the "rational legislator test."

Why the Judicial Reluctance to Assert Its Control

Before discussing this test, it seems necessary to determine the reason for the Court's reluctance to exercise its control over the power of investigation. Although the reason has not been clearly stated, it appears to be based on the doctrine of separation of powers. The courts feel that they would be intruding into the legislative domain of Congress if they inquired into the purpose of the investigation when it is conducted in an area where Congress might properly legislate.

In the case of *McCray v. United States*[45] the Court considered alleged abuses of congressional power in imposing taxes which resulted in the regulation of use of artificial coloring in making oleomargarine. The Court, after deciding that Congress was acting within the scope of its lawful power in passing the tax law, determined that the judiciary lacked the authority to restrain the exercise of such power even if the power was abusively exerted. The Court reasoned that to restrain such power "... would be to overthrow the entire distinction between the legislative, (and) judicial ... departments of the government...."[46]

The reasoning of the *McCray* case was approved in the *Barenblatt* case.[47] Thus the Court seemed to be recognizing that while the congressional power of investigation might be abusively exerted the Court was powerless to remedy such abuse, because to do so would be an abuse of judicial power.

The judiciary is charged with the duty of upholding the Constitution and, since the case of *Marbury v. Madison*,[48] has exercised the power of judicial review. In exercising this power the court determines "... whether a given manifestation of authority has exceeded the power conferred by that instrument (the Constitution)...."[49] The Court has recognized that the congressional power of investigation is necessary to carry out the express legislative powers granted to Congress, but such power is valid only so long as a valid legislative purpose is being served. Thus the power of investigation differs greatly in its scope from the power to tax which was attacked in the *McCray* case. The taxing power, being expressly granted in the Constitution,[50] knows no other limits than those imposed by that instrument. So the judiciary is without authority to impose limitations on the power even if it is exercised abusively and for some purpose other than raising

[45] 195 U.S. 27 (1904).
[46] *Id.* at 54.
[47] 360 U.S. at 132, 133.
[48] 5 U.S. (1 Cranch) 137 (1803).
[49] McCray v. United States, *supra* note 45, at 54.
[50] U.S. CONST. art. I, § 8, cl. 1.

revenue unless the purpose is prohibited by the Constitution.[51] The validity of the power of investigation, on the other hand, depends upon it being exercised for a specific purpose, *i.e.* in aid of legislative processes. So the Court would not be exceeding the bounds of judicial authority by defining and limiting the power of investigation to prevent its abuse, and setting up a test as a basis for determining when such power is improperly used.

Reasons other than the doctrine of separation of powers have been advanced by the courts as grounds for the judiciary's lack of authority to prevent abuses of the power of investigation. One such reason is that if the authorizing resolution which creates the committee declares that the information sought is for a valid legislative purpose, then such declaration is conclusive on the courts, even though statements by the committee members suggest the contrary.[52] This appears to be no more than an instrument put forth by the court to avoid court review of the committee's purpose in compelling certain testimony. Although the court may presume that such inquiry is in furtherance of a valid legislative purpose, such presumption should not be conclusive. The courts presume that *legislation* passed by Congress does not offend the Constitution, yet this presumption *is not conclusive*. Where the Court has determined that legislation does in fact violate the Constitution, it has been struck down.[53] There is no reason for indulging a stronger presumption in the one situation than in the other.

Another reason which has been advanced is that a possible abuse of the congressional power of investigation is no reason to deny the power.[54] This again appears to be no more than an instrument used to avoid court review of the committee's action. There is no need to deny the power of investigation in order to correct possible abuses of the power. All that is necessary is that the judiciary define the limits of the power and devise standards to insure to the fullest possible extent that the power is not exercised beyond its proper limits. This would not result in a stifling or denial of the power of investigation; it would merely be limiting its operation to its proper scope.

In order to justify the position that the Court lacks authority to remedy abuses of the power of investigation, the power to correct such abuses is said to be in the hands of the people.[55] As a practical matter this affords little if any protection to witnesses who have embraced political doctrine which is extremely unpopular with the great majority of the people. In the first place the majority of the people are not inclined to criticize the action

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[51] McCray v. United States, *supra* note 45; Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

[52] United States v. Josephson, *supra* note 17, at 89.

[53] Carter v. Carter Coal Co., 298 U.S. 238 (1936); Hill v. Wallace, 259 U.S. 44 (1922).

[54] Barsky v. United States, *supra* note 20, at 250.

[55] Barenblatt v. United States, *supra* note 26 at 132, 133. The Court quoting from McCray v. United States, *supra* note 45, approves the principle there stated which declares the judiciary has no authority to restrain a lawful exercise of power by another department of government, even though it may result in an abuse of such power. The remedy for the abuse lies with the people.

of a congressional committee which is dealing with people who are or have been associated with organizations which have been declared by Congress to be subversive in character. Secondly, where a committee's methods have been criticized, those who ventured such criticism were stigmatized by the committee even though they had no connection or affiliation with any organization under investigation.[56] Thus the possibility of the people taking effective action to remedy possible abuses of the congressional power of investigation, when an extremely unpopular minority is the object of the investigation, seems rather far fetched.

Congressional Investigations and "Due Process of Law"

The rights and liberties guaranteed by the Constitution are not absolute. Under particular circumstances the right to life itself may be forfeited without doing violence to constitutional guaranties.[57] Although the language of the first amendment is unequivocal, the Supreme Court has decided that speech is not beyond legislative control. When the legislature has determined, subject to court review, that certain kinds of speech represent a substantial evil which the legislature may rightly prevent, the prevention of such speech may warrent criminal sanction.[58] Thus a penalty may be imposed upon the use of certain kinds of speech without violating the provisions of the first amendment.

Congressional investigations do not directly operate to impose a penalty on the use of speech. The restrictions on the first amendment freedoms arise only as an incident to the investigations. The restrictions flow from the compelled disclosure of political beliefs and associational relationships which are extremely unpopular to the majority of the people.

This situation may be likened to that where a state in the exercise of its police power passes legislation which indirectly operates to restrict personal liberties guaranteed by the Constitution. Although the Constitution does not guaranty any absolute liberty, it does guaranty that no person shall be deprived of liberty without "due process of law."[59]

State regulation for the public welfare has resulted in the control of the use of private property,[60] in restriction of the types of buildings that may be erected in certain areas,[61] and the direct control of the price at which a merchant may sell certain products.[62] Such regulations impose restrictions on personal liberties. However such limitations on personal liberties as are necessary for the protection of the health, safety, morals and welfare of

[56] See H.R. Rep. No. 3248, 81st Cong., 2d Sess. 1 (1950); see also H.R. Rep. No. 2277, 77th Cong., 2d Sess. 2 (1942).

[57] Kawakita v. United States, 343 U.S. 717 (1951).

[58] Dennis v. United States, 341 U.S. 494 (1951).

[59] Thomas v. Collins, *supra* note 15.

[60] Thomas Cusack Co. v. City of Chicago, 242 U.S. 562 (1916).

[61] Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926).

[62] Nebbia v. New York, 291 U.S. 502 (1934).

the general public are upheld if the regulation meets the requirements of "due process of law."[63]

"Due process" requires that a law or exercise of a power "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[64] The courts through the process of judicial review determine whether a law or exercise of power is unreasonable or arbitrary and whether the means selected are reasonably related to a proper legislative purpose.[65]

In considering whether a regulation or exertion of power meets the requirements of "due process," the court does not substitute its judgment for that of the legislature. The court considers the question in the light of whatever is relevant to a legislative judgment, and such judgment is not to be ". . . overturned merely because the court would have made a different choice . . . had the initial choice been for it to make."[66]

While the court does not substitute its judgment for that of the legislature, neither does it evaluate the regulation from the point of view of legislators who are elected to give expression to majority views. In considering whether a law or exertion of power is reasonable, the court is really asking itself this question: Could a *rational* legislator *reasonably* believe that this law will accomplish a proper legislative purpose? If the court decides this question affirmatively, then the regulation or exertion of power is upheld.[67]

The determination of this judicial question involves the consideration of existing ills or threats to the general public welfare, the possible effectiveness of the regulation designed to remedy the existing situation, and the deprivation of individual liberty or property which will result from such regulation.[68] The court also considers the possibility of attaining the desired results by alternative methods which would result in less deprivation of liberty or property.[69]

It would not seem to be an abuse of judicial authority by the courts to require the proceedings of a congressional investigation to meet the demands of substantive "due process." In fact, since the effects of the investigations tend to limit the free exercise of first amendment rights, the demands of "due process" seem very much in order.

If congressional investigation proceedings which operated to restrict the exercise of first amendment freedoms were subjected to the requirements of substantive "due process," the court would have sound standards for determining the propriety of such inquiries and preventing abuses of the power of investigation. The exertion of the committee's power of investi-

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[63] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
[64] Nebbia v. New York, *supra* note 62, at 525.
[65] Meyer v. Nebraska, 262 U.S. 390, 399, 400 (1923).
[66] Dennis v. United States, *supra* note 58, at 540 (concurring opinion).
[67] *Id.* at 539–41.
[68] See Nebbia v. New York, *supra* note 62.
[69] Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).

gation would have to meet the requirement of reasonableness, and it could not adopt a course which had no substantial relation to a proper legislative purpose. If a witness could demonstrate that the power had been exercised *substantially* as a means of exposure, then the investigation would be invalid because the power's exercise would bear no *"reasonable relation"* to the gathering of information in aid of the legislative processes.

It is not suggested that the rights of a witness appearing before a congressional investigating committee be determined upon the basis of "due process" alone. The Supreme Court has made it clear that the fundamental rights guaranteed by the first amendment will not yield to legislation which in other areas would be sustained in the face of attack on "due process" grounds.[70] It is only suggested that the exertion of the congressional power of investigation be conditioned by the demands of "due process." Where the court has determined that the power has been properly exercised, the "balance of interests" process would be used to determine the paramount interest as it was used in the *Barenblatt* case.

Conclusion

The *Barenblatt* case has given us another example of the never ending conflicts between an individual and his government. This discussion has described how the United States Supreme Court resolved this conflict by balancing the interests of the individual against those of the government. The conflict arose when a congressional sub-committee engaged in investigating subversive activities called Barenblatt to testify about his Communist affiliations. Barenblatt refused to answer and was cited and convicted for contempt. Barenblatt's refusal was based in part upon the contention that the first amendment barred such inquiries.

The power of investigation was found to have its source as a power necessary and appropriate to carrying out the express legislative powers granted to Congress in the Constitution. The governmental interest which the sub-committee represented was recognized as that of national security, the prevention of overthrow of the government by force and violence.

Balanced against the government's interest was Barenblatt's interest in keeping his unpopular associations and beliefs to himself. Based upon the interests put in balance the Court understandably determined those of Barenblatt to be subordinate to those of the government. The Court did not discuss the possibility of Barenblatt's interest in remaining silent as including *any public interest* in first amendment rights.

Failure to recognize any public interest in Barenblatt's silence, or failure to discuss it if it were recognized, leaves the issue somewhat doubtful. If the Court could be convinced that public interest in first amendment rights should be balanced on the side of the individual, then a different decision might be forthcoming in later cases. In either event it would be desirable

[70] Thomas v. Collins, *supra* note 15, at 529, 530; West Virginia Board of Education v. Barnette, 319 U.S. 624, 639 (1943).

for the Court to spell out the interests to be balanced as rough guides for future decisions. A witness would then be in a better position to determine whether his interests would be subordinated to those of Congress prior to any refusal to testify.

In considering alleged abuses of the power of investigation, the Court recognized that there is no congressional power of exposure. However the Court went on to say that the motives of the committee members would not vitiate an investigation if the legislative purpose of Congress was being served. It would not seem to make any difference whether the motive which impells the exercise of a power is good or bad—a good motive does not necessarily mean that an exercise of a power is valid, nor a bad motive mean that such exercise is invalid.

However in the case of the congressional power of inquiry the *purpose* for which the power is exerted *is important.* As has been pointed out the power of investigation is valid only when used to augment the legislative functions of Congress. This entails the gathering of information for purposes of passing legislation or making appropriations. It is not valid when exercised for the purpose of exposure. Therefore the court has the power to declare an investigation bad if it is not serving a valid legislative purpose.

In order to prevent possible abuses of the power of investigation, it is felt that the suggested standards of "due process" should be met by committee proceedings. The restrictions on the exercise of first amendment rights which result from such investigations clearly justify such requirements.

It is hoped that the court will recognize the need for some such control of the power of investigation and will not relegate the protection of the rights of minorities to the people of the majority.