LEGISLATIVE INVESTIGATIONS AND INDIVIDUAL LIBERTIES

"The history of liberty is the history of limitations upon the powers of government." — *Woodrow Wilson.*

Government is a force.[1] It is the most potent force known to man. It controls and determines the lives, the happiness, the destinies of everyone.

Herein lie paradoxes. This force called government is a man-made force. And yet, once it is set in motion, it can enslave and destroy man. Man's long and laborious climb up to liberty and freedom is found written in the limitations he has been able from time to time to place upon this power called government. It is said that while man has learned to cope with the forces of nature, he has yet to learn how to cope effectively with this force which he himself creates.[2]

Man ordained a constitution to serve as a barrier between liberty and abuse of power. But at times, this wall is overleaped and liberty invaded. This is the recurrent quandary that besets man.

The present paper deals with a particular phase of that problem: Congress' power of inquiry, sometimes inquisitorial in character, and the resultant encroachment on the civil liberties of individuals.

SCOPE OF THE POWER

The investigatory power of Congress is not expressly conferred by the Constitution, but its existence is not questioned. It is an essential and appropriate auxiliary to the legislative function.[3] "To deny Congress power to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness."[4]

Legislative investigations through committees are an everyday occurrence in the functions of Congress. One frequently hears of the Senate Blue Ribbon committee, the Committee on Anti-Filipino activities, committees to investigate school supplies scandals, committees to probe junkets. Subjects of inquiry range from matters of extreme public importance to those which are patently frivolous.

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[1] See McDermott, *Government Unlimited* cited in STRONG, F. R., AMERICAN CONSTITUTIONAL LAW 3 (1950).

[2] *Ibid.*

[3] McGrain v. Daugherty, 273 U.S. 135 (1927).

[4] Landis, *Constitutional Limitations on the Congressional Power of Investigation,* 40 HARV. L. REV. 153 (1926). After surveying the experiences of the Weimar and French Republics, the parliaments of which lacked effective power to compel the testimony of witnesses, a writer concludes: "Government without investigation might easily turn out to be democratic government no longer." Ehrmann, *The Duty of Disclosure,* U. OF CHI. L. REV. 117 (1944).

The field of inquiry into which Congress may roam is practically unlimited. Mr. Justice Ozaeta admitted the difficulty of defining "any limits by which the subject matter of its inquiry may be bounded." [5] He deemed it sufficient to say that "it must be coextensive with the range of legislative power." [6] This is putting it mildly, for in reality, "the field of permissible investigation is broader than the field of legislation since information on which Congress can not act directly may aid it in enacting valid laws." [7] Thus, Congress may ask a witness any question as long as it is "material or pertinent to the subject of the inquiry or investigation." [8] The question need not be relevant to any proposed or possible legislation. The materiality of the question is determined by its "direct relation to the subject of the inquiry and not by its indirect relation to any proposed or possible legislation." [9] Furthermore, it is not necessary that the resolution directing the investigation must avow explicitly that its objective is to aid legislation. The presumption can be indulged in that the object is to aid the legislative function.[10]

This makes Congress a roving commission with powers to determine the scope of its investigatory function. Since the field of legislation is wide, practically any question propounded to a witness may be deemed *material* or *pertinent*. The ingenious legislator can almost always spell out some relationship, no matter how tenuous, to some imagined legislative purpose.[11]

An indication of the almost limitless bounds of relevancy is emphasized in *United States v. Bryan*,[12] where Judge Holtzoff said:

> "If the subject under scrutiny may have any possible relevancy and materiality, *no matter how remote*, to some possible legislation, it is within the power of the Congress to investigate the mtater. Moreover, the relevancy and the materiality of the subject matter must be presumed. The burden is on one who maintains the contrary to establish his contention."[13]

INQUISITORIAL PRACTICES

It is thus easy to recognize dangers of abuse in a sweeping congressional investigation. Too readily, the civil rights of individuals may be, and indeed have been, sacrificed.[14] Judge Wigmore, referring to a particular congressional probe, stated:

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[5] Arnault v. Nazareno, 46 O.G. 3100, 3112 (1950).

[6] *Ibid.*

[7] Driver, *Constitutional Limitations on the Power of Congress to Punish Contempts of Its Investigating Committees*, 38 VA. L. REV. 887 (1950).

[8] See note 5 *supra*, at 3114.

[9] *Ibid.*

[10] See note 3 *supra*, at 162.

[11] Maslow, *Fair Procedure in Congressional Investigations*, 54 COL. L. REV. 9 (1954).

[12] 72 F. Supp. 58 (1947).

[13] *Id.*, at 61. (Underscoring supplied).

[14] Notes, *Constitutional Limitations on the Un-American Activities Committee*, 47 COL. L. REV. 416 (1947).

"The senatorial debauch of investigations—poking into political garbage cans and dragging the sewers of political intrigue—filled the winter of 1923-24 with a stench which has not yet passe daway. Instead of employing the constitutional manly, fair procedure of impeachement, the Senate flung self-respect to the winds." [15]

The investigations which have elicited the sharpest criticism in the United States were those conducted by the House Committee on Un-American activities and the McCarthy and the Jenner sub-committees in the Senate.[16] This criticism had become so widespread that in 1953, Mr. Justice Frankfurter alluded to the "wide concern both in and out of Congress, over some aspects of the exercise of the Congressional power of investigation." [17] The aspects generally considered objectionable are summarized by a writer thus:

"(1) Committees are not collecting information for purposes of legislation but are assuming an "information function" not granted to Congress by the Constitution.

"(2) Committees are functioning primarily as legislative courts to punish individuals by "exposing" them to public scorn.

"(3) Committees have compiled dossiers of about a million Americans based on unevaluated reports of Communist connections, which are circulated indiscriminately.

"(4) Under one pretext or another, private citizens having no connections with government functions have been compelled to make public avowal of their beliefs and associations.

"(5) Individuals and organizations have been condemned on the basis of unsupported accusations and casual associations and contacts.

"(6) Individuals and organizations are being stigmatized without being heard in their own defenses.

"(7) In their insatiable quest for sensation investigating committees have abandoned all sense of fair play and have converted committee hearings into public circuses."

The harassing effect of investigations undertaken in such a manner can easily be understood. If it is made public that the expression of novel political ideas and advocating certain changes in government would only subject individuals to burdensome investigations and disparaging publicity, many persons might be constrained to refrain from such activity. In this way, an unscrupulous use of publicity may operate as a prior restraint on the exercise of civil liberties.

What is perhaps tragic is the fact that American courts have lent a more sympathetic attitude to congressional investigations even in the face of grave perils to individual liberties. For instance,

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[15] 19 ILL. L. REV. 452 (1925).

[16] See note 11 *supra*.

[17] United States v. Rumley, 345 U.S. 41, 44 (1953). In 1947, twenty-two of the twenty-six members of the Yale Law School faculty addressed a public letter to the President of the United States urging the abolition of the Un-American Activities Committee. 34 A.B.A.J. 16 (1948).

[18] See note 11 *supra*, at 841-842.

instead of applying the same test to investigations as is required of legislation, that a "clear and present" danger to the government must be shown, the courts have preferred to allow much greater latitude to investigations. All that is required for the investigation of public opinion is that such opinion constitutes a "potential threat" to the welfare of the country.[19]

It is important to note the above trend in the American judicial scene in view of the understandable tendency on the part of our Supreme Court to apply American authroties whenever a question arises involving the power of Congress to investigate. The case of *Arnault v. Nazareno*[20] aptly illustrates this point. And what is of even greater significance is the existence in the Philippines of a Committee on Anti-Filipino Activities, patterned closely after its American counterpart. What is to prevent the members of CAFA —should occasions a rise—from following the devious paths of their American original? What can stop them from straying from their task of truth-seeking into the shadowy domains of truth-twisting in the interest of party and politics? It has been done in the United States where public opinion is strong; it can be done here.

What has been said of the CAFA applies with equal force to the other investigating committees. What can possibly restrain Congress from appointing investigating committees for every matter appealing to the majority as of political importance? As intimated earlier, a crafty legislator can, with great facility, prove the relevancy of the most searching questions to a possible legislation.

Necessity of More Precise Criteria

It would seem therefore that more control is desirable, at least in so far as legislative investigations may conflict with civil liberties.

Mr. Justice Tuason gives this eloquent warning:

> ". . . Powers so dangerous to the liberty of a citizen cannot be allowed except where the pertinency is clear. A judge who abuses such power may be impeached and he acts at all times under the sense of this accountability and responsibility. His victims may be reached by the pardoning power. But if the Congress be allowed this unbounded jurisdiction of discretion, there is no redress. The Congress may despoil of a citizen's life, liberty, or property, and there is no power on earth to stop its hand."[21]

This is not mere extravagant language, because ordinary legal sanctions—criminal punishment or civil suit for injunction or damages—are not available on account of the Constitutional immunity

[19] Barsky v. United States, 334 U.S. 843, 847 (1948). See also note 7 *supra*.

[20] See note 5 *supra*. It must be stated in this connection that the weight of persuasion would seem to lean in favor of the majority's finding that the constitutional right against self-incrimination depended upon by Arnault to support his petition for *habeas corpus* was not transgressed. This is true because of the particular circumstances of this case.

[21] Dissenting opinion in Arnault v. Nazareno, *supra* note 5, at 3128.

of congressmen.[22] Thus, in *Tenney v. Brandhove*,[23] the action for damages brought against the chairman of a legislative investigating committee was dismissed, on the ground that acts committed in the course of an investigation came within the scope of the constitutional privilege.

The problem that confronts us, therefore, is how we could best curb the inquisitorial tendencies and practices of legislative investigating committees. Any attempt to solve this difficulty must however give due regard to the consideration that a restrictive interpretation of the investigatory power may hamper the legislature in its attempts to cope effectively with serious national and political problems.

Several remedies have been advanced. One school of thought [24] advocates the adoption of a procedural code to govern investigating committees. This has however been strongly criticized by Wyzanski [25] and Meader[26] on the ground that any set of procedural rules would render inflexible legislative committee operations.

Another proposal [27] contemplates the creation of a special review committee in each House to pass upon the objections of witnesses as to the pertinency of questions and other matters.

These resolutions are defective in one common respect: their observance or non-observance, in a word, their efficacy, ultimately depends upon the will of the legislators themselves. Partisan considerations can easily render them ineffective.

A more puissant redress lies in the courts. But this cannot be done so long as they will persist in resorting to such vague criteria as "material," "relevant," and "co-extensive with the range of legislative power." At least, in so far as constitutional liberties of individuals are concerned, like that of free speech, the courts should be more precise, and should wield a firmer hand in striking down any attempt at encroachment. As Circuit Judge Clark stated:

> "The right of congressional investigation has been so important, so productive of good in so many instances in our history, that no one would wish to hamper it improperly. And it is true, as many urge, that the force of public opinion and the expression of the electorate at the polls must remain its main source of control. *But in the narrow, though important, field of constitutional liberties, more control is desirable.* For the extreme power thus wielded carries the seeds of its own ruin if it is not constitutionally exercised . . ." [28] (Underscoring ours).

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[22] Art. VI, § 15 provides: ". . . and for any speech or debate therein, they shall not be questioned in any other place."

[23] 341 U.S. 367 (1951).

[24] See note 11 *supra*.

[25] See note 11 *supra*, at 844.

[26] Meader, *Limitations on Congressional Investigations*, 47 MICH. L. REV. 775 (1949).

[27] Horack, *Legislative Review of Congressional Investigations*, 40 A.B.A.J. 191 (1954).

[28] United States v. Josephson, 165 F.2d 82, 93 (1948). (Dissenting opinion).

Ultimately, there is, of course, the force of public opinion which can either bring glory or cast obloquy on any public official who follows the wrongful path. To quote Senator Claro M. Recto:

> "The representatives of an emancipated people, like our own, may solemnly commit to writing the immemorial ideals of the race to be a covenant against tyranny and despotism. And this solemn covenant, which we call the Constitution, may be signed; it may be ratified; it may be preserved for public veneration in a holy of holies. Judges may paraphrase and interpret it with eloquence and learning; presidents may swear to defend it. But if the people do not take it to their hearts . . . , if the people are indifferent to the rights which it guarantees, . . . and tolerant, indulgent and forbearing of its infringements, if those who are charged with enforcing it conspire to escape or defeat it, then it is no more of a Constitution than the glittering facade of empty pronouncements and harmless injunctions that conceal the iron curtain of autocracy and dictatorship." [29]

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[29] From his speech delivered on the occasion of the Constitution Day, reprinted at 15 LAWYERS' JOURNAL 51 (1950).