THE USE OF "LEGISLATIVE PURPOSE" AS A LIMITATION ON THE CONGRESSIONAL POWER OF INVESTIGATION

VICENTE V. MENDOZA *

The issues raised by legislative investigations of the extent of Communist propaganda and activities in the Philippines are far more complex than may seem to be suggested by the current controversy over the revival of the House Committee on Un-Filipino Activities. A determination that the inquiry is for a "legislative purpose" is not the end, but only the beginning, of the complexity. To adapt a figure of Paul A. Freund, the issues are not one-dimensional, all warp and no woof. They call for a pragmatic assessment of consequences in order to find a viable accommodation of the demands of the public order, as these are served by legislative investigations, and those of the rival claims of individual freedom as the indispensable condition of an open society. Unless this is recognized by both the proponents and the opponents the controversy is likely to generate more heat than light.

The idea that Congress has a right to be fully informed in order that it may legislate wisely underlies the exercise of the power to investigate, with coercive power to compel disclosures. At the same time concern for the fact that unless limited to a "legislative purpose" the power to investigate may be used to harass individuals and invade fundamental rights very early led the Supreme Court of the United States to insist on a showing that investigations be "in aid of legislation." There is no congressional power to expose for the sake of exposure. A congressional investigation is not a trial for the punishment of wrongs but a device to enable Congress to know what remedial legislation is needed. Congress is not the grand inquest of the nation. Its powers under the tripartite scheme of government are confined to law making. This has been the conception of the scope of legislative investigation from the beginning. It was the premise of both majority and dissenting Justices in *Arnault v. Nazareno*,[1] the only Philippine case on legislative investigation.

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* *Professorial Lecturer*, University of the Philippines College of Law. *Solicitor*, Office of the Solicitor General of the Philippines. LL.B. U.P. 1957, LL.M. Yale Law School 1971.

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[1] 87 Phil. 29 (1950).

How useful is the requirement of "legislative purpose" as a test of the extent of the congressional power of investigation? While the cases uniformly speak of it as such test, it is obvious that it is used more to state a result than to describe the process of determining the bounds of permissible and impermissible investigations and that reliance on it as a test has, on the whole, left individual rights without adequate protection.

FROM *KILBOURN* TO *GREGORY*: THE RISE AND FALL OF A DOCTRINE

To provide perspective, it is useful to trace the course of the doctrine of legislative purpose. Judicial review of legislative inquiries began in 1880 with the Court's invocation of the principle of separation of powers in support of the proposition that such inquiries can only be justified in terms of the need for legislation. This was the beginning of the idea of "legislative purpose" as a limitation on congressional investigations. On this ground the Court reversed the conviction of a recalcitrant witness for contempt of Congress in *Kilbourn v. Thompson*.[2] In *Kilbourn* the House of Representatives, following the bankruptcy of Jay Cooke & Co., a depository of federal funds, created a committee to look into the financial relation between Jay Cooke & Co. and a real estate pool. The authorizing resolution stated that Jay Cooke & Co., who were debtors of the United States, were creditors of the real estate pool and had dealt with it to the disadvantage of the Government. Kilbourn was the general manager of the pool. For refusing to answer questions put to him by the committee and to produce certain books and papers, he was ordered jailed for forty-five days. He brought an action for false imprisonment, and the Supreme Court upheld him. In what may be regarded as the initial formulation of the doctrine of legislative purpose, Mr. Justice Miller said:

> In the present case the jurisdiction of the Senate, thru the Special Committee created by it, to investigate the Buenavista and Tambobong estates deal is not challenged by the petitioner; and we entertain no doubt as to the Senate's authority to do so and as to the validity of Resolution No. 8 hereinabove quoted. The transaction involved a questionable and allegedly unnecessary and irregular expenditure of no less than ₱5,000,000 of public funds, of which Congress is the constitutional guardian. It also involved government agencies created by Congress and officers whose positions it is within the power of Congress to regulate or even abolish. . . . At 46.
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> The inquiry, to be within the jurisdiction of the legislative body to make, must be material or necessary to the exercise of a power in it vested by the Constitution, such as to legislate, or to expel a Member; and every question which the investigator is empowered to coerce a witness to answer must be material or pertinent to the subject of the inquiry or investigation. . . . At 48.

On the other hand, the dissent of Mr. Justice Tuason stressed the fact "that the query has nothing to do with any matter within the cognizance of the Congress. There is, on the contrary, positive suggestion that the question has no relation to the contemplated legislation." At 69.

[2] 103 U.S. 168, 26 L. Ed. 377 (1880).

> The resolution adopted . . . contains no hint of any intention of final action by Congress on the subject. In all the argument of the case no suggestion has been made of what the House of Representatives or the Congress could have done in the way of remedying the wrong or securing the creditors of Jay Cooke & Co., or even the United States. Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country. By "fruitless" we mean that it could result in no valid legislation on the subject to which the inquiry referred.[3]

After *Kilbourn* the question did not come up again before the Court until forty years later when in 1927 the Teapot Dome Scandal broke out. The Senate Committee investigation of alleged misfeasance and malfeasance in the Department of Justice was stymied as a brother of the attorney general refused to obey a subpoena issued to him by the committe. Taken into custody in order to be brought before the bar of the Senate, he sued for a writ of habeas corpus and won in the district court. The case was appealed to the Supreme Court. It was clear that if the case was decided on the authority of *Kilbourn* the decision of the district court would have to be affirmed. But the scandal had attracted national attention, and the Senate investigation had to be upheld.

As a first step in that direction, the Court in *McGrain v. Daugherty*[4] had to distinguish its *Kilbourn* ruling: "[The] resolution [in *Kilbourn*] contained no suggestion of contemplated legislation. . . . the matter was one in respect to which no valid legislation could be had; [the matters] were still pending in the bankruptcy court; and . . . the United States and other creditors were free to press their claims in the proceeding." But neither did the authorizing resolution in *McGrain* contain any statement of legislative purpose, as indeed the Senate had no "legislative purpose." The probe was solely for the purpose of exposing corruption. Its purpose was mainly exposure for the sake of exposure.

And so the Court had to take the second step which all but denuded the doctrine of legislative purpose of vitality: infer the purpose from the subject of the investigation. "An express avowal of the object would have been better," said Mr. Justice Van Devanter, "but in view of the particular subject matter was not indispensable." Just why the "particular subject matter" of investigation in *McGrain* indicated a legislative purpose while that in *Kilbourn* did not is not altogether clear. In both cases the subject of the investigation was a scandal in the government.[5]

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[3] *Id.* at 194-95.

[4] 273 U.S. 135, 71 L.Ed. 580, 47 S.Ct. 319, 50 A.L.R. 1 (1927).

[5] In Arnault v. Nazareno, 87 Phil. 29 (1950) the Philippine Supreme Court even went so far as to hold that a question to a witness need not be relevant to any intended legislation. "The Court cannot determine, any more than it can direct Congress, what legislation to approve or not to approve; that would be an invasion of the legislative prerogative. The Court, therefore, may not say that the information sought

Nor could it have made any difference that in *Kilbourn* the subject of investigation had already been taken cognizance of by the court. *First*, the *Kilbourn* Court, in calling the legislative inquiry a "fruitless investigation" with no conceivable legislative purpose in view, was not saying that because of the pendency of the action in court, the legislative investigation would be fruitless. Presumably, a legislative investigation would serve a different purpose. Indeed, and this is the *second* reason why the two cases could not be treated differently, as the later case of *Sinclair v. United States* [6] made it clear, either chamber of Congress could conduct its own inquiry independently of any pending suit in court.

Sinclair concerned a Senate investigation of another aspect of the widespread Teapot Dome Scandal, this time involving oil and gas land leases. In upholding the power of the committee to investigate despite the fact that suits were pending against the witness and his company, Mr. Justice Butler said for the unanimous court:

> . . . It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits . . . . It is plain that investigation of the matters involved in suits brought or to be commenced under [the Senate resolution directing the institution of suits for the cancellation of the leases] might directly aid in respect of legislative action.[7]

Thus, determined to make legislative purpose the measure of the congressional power to investigate and yet unwilling to enforce it as a requirement, lest even inquiries which it approved of because of the national interest in the subject (*e.g.*, the Teapot Dome Scandal) be doomed, the Court was forced to indulge in a presumption: Where no legislative purpose is stated, presume that it exists. Where it is stated, take it at face value. This technique reached its watermark in *United States v. Josephson* [8] where a declaration of legislative purpose was held conclusive on the courts: "Whatever may be said of the Committee on Un-American Activities, its authorizing resolution recites it is in aid of remedial legislation and that fact is established for courts." [9] About the only departure from this trend was *United States v. Icardi* [10] where a lower court required proof of legislative purpose as it considered more weighty the presumption of innocence due a defendant.

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from the witness which is material to the subject of the inquiry is immaterial to any proposed or possible legislation." At 50.

[6] 279 U.S. 749, 49 S.Ct. 471, 73 L.Ed. 938, 63 A.L.R. 1258 (1929).

[7] *Id.* at 295.

[8] 165 F. 2d 82 (2d Cir. 1947), *cert. denied*, 333 U.S. 838, 68 S.Ct. 609. 92 L.Ed. 1122; *accord*, Barsky v. United States, App. D.C. 167 F. 2d 241 (1948) *cert. denied*, 333 U.S. 858, 68 S.Ct. 731, 92 L.Ed. 1138 (1938).

[9] *Id.* at 89.

[10] 140 F. Supp. 383 (D.D.C. 1956).

Otherwise, courts were unable to enforce the requirement of legislative purpose in any meaningful sense and in some cases were forced to presume its existence in sustaining congressional investigations. Thus, as Professor Kalven observed, investigating committees moved from an initial position of doubtful and limited power to one of virtual omnipotence.[11]

The Court worried again about the problem of placing effective limits on the power of investigations as the 1950's witnessed the use of congressional investigations to expose Communists and those suspected of being Communists. This was the McCarthy era in the United States, the period of the great witch hunt.

In this setting, *Watkins v. United States*[12] was decided by the Supreme Court in 1957. The petitioner, a labor union official, appeared before the Subcommittee of the House Committee on Un-American Activities. He testified freely about his political activities and admitted that he had cooperated with the Communist Party, although he denied being a member. When asked whether he knew certain individuals to be members of the Communist Party, he refused to answer on the ground that the questions were outside the scope of authority of the subcommittee. The charter of the committee authorized it to investigate "(i) the extent, character, and objects of Un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, . . . and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." Petitioner was convicted of "contempt of Congress" under 2 U.S.C. § 192, which makes it a misdeamenor to refuse to answer questions "pertinent to the question under inquiry." The Supreme Court reversed, 6 to 1, with Justice Clark dissenting.

The Chief Justice's opinion focused on the need for defining with "sufficient particularity" the jurisdiction and purpose of investigating committees, (1) as a way of insuring the responsible exercise of delegated power, and (2) as a basis for determining the relevance of the questions asked. Investigating committees are the agents of the parent assembly in collecting information for a legislative purpose. Congress has a responsibility to insure that the compulsory process is used only in furtherance of that purpose. "That requires that the instructions to an investigating committee spell out that group's jurisdiction and purpose with sufficient particularity." "An excessively broad charter, like that of the House Un-American Activities Committee, places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary govern-

[11] Kalven, *Mr. Alexander Meiklejohn and the Barenblatt Opinion*, 27 U. CHI. L. REV. 315, 318 (1960).

[12] 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed. 2d. 1273 (1957).

mental interference. It is impossible in such a situation to ascertain whether any legislative purpose justified the disclosures sought and, if so, the importance of that information to Congress in furtherance of its legislative function." By requiring that authorizing resolutions explicitly set forth the powers of investigating committees, the Court hoped that congressional investigations could be confined to "legislative purposes."

The Court found additional reason for enforcing its requirement of precise and limited authority, and thereby the requirement that investigations must be justified by the need for legislation, in the statutory requirement of pertinency. The scope of the committee's powers must be delineated in order to enable the witness to determine whether the subject of investigation is proper (because it is for the purpose of legislation), and ultimately whether the questions asked are pertinent to the subject of the inquiry. "It is obvious that a person compelled to make this choice [of whether or not to answer] is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense." The Court added, however, that as far as the requirement of pertinency was concerned, "There are several sources that can outline the 'question under inquiry' in such a way that the rules against vagueness are satisfied. The authorizing resolution, the remarks of the chairman or members of the Committee, or even the nature of the proceedings themselves might sometimes make the topic clear."

On the same day *Watkins* was decided the Court reiterated in *Sweezy v. New Hampshire*[13] the requirement that the authority of investigating committees must be clearly defined. Through the Chief Justice, it reversed a conviction for contempt of a one-man state legislative investigating committee on the ground that the committee was given such "sweeping and uncertain mandate" that it could not be authoritatively determined whether the legislature authorized the investigation.

It was not clear, however, whether *Watkins* had invalidated the charter of the House Un-American Activities Committee.[14] But if that was not the result of the litigation, the Chief Justice's *Watkins* opinion at least left no doubt that the Court wanted Congress to authorize only limited and precise inquiries. The essay on the danger which broad grants of authority posed to civil liberties was meant as a warning that unless Congress stopped giving *cartes blanches* to its investigating committees the Court would

[13] 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d. 1311 (1957).

[14] In Barenblatt v. United States, 252 F. 2d 129 (D.C. Cir. 1958) the Court of Appeals rejected the appellant's claim that the Supreme Court had invalidated the committee's charter. Two judges, Edgerton and Bazelon, dissented on precisely this ground.

find it hard to stay its hand in the future. Congress ignored the warning, and the House Committee on Un-American Activities continued its investigations as before.[15]

Did the *Watkins* Court, in its effort to curb congressional incursions into constitutionally-protected freedoms by insisting on precise mandates, invalidate the House Un-American Activities Committee's charter? In 1959, *Barenblatt v. United States*[16] came up for review and tested the Court's determination to enforce the doctrine of legislative purpose. The case raised squarely the validity of the charter of the House Committee on Un-American Activities. The Court was not prepared to risk confrontation with Congress. Its decisions in *Watkins* and *Sweezy* had provoked considerable criticism and had led to demands in Congress for the curtailment of the Court's jurisdiction over cases involving the validity of the acts of investigating committees and of state statutes and regulations dealing with subversive activities.[17]

And so the Court retreated from its original position. While in *Watkins* it used the pertinency requirement actually as a means of compelling Congress to spell out the powers of investigating committees, and thereby confine investigations to "legislative purposes," the Court in *Barenblatt* had to content itself with pertinency as an end in itself, as a means of informing witnesses. A question may be pertinent even if the scope of authority of the investigator is nebulous. The reasoning ran thus: *Watkins* itself said that the pertinency of a question may be judged by reference to other matters, such as the statement of the chairman or members of the committee regarding the subject matter of the inquiry, or the nature of the proceedings. It may be restrictively held to mean no more than that, as a matter of due process, the questions asked of a witness must be pertinent. Indeed, Justice Frankfurter's concurring opinion in *Watkins* gave this reading of the majority opinion of the Chief Justice. Since in *Barenblatt* the chairman of the committee had stated at the outset what the subject of the investigation was (Communist infiltration in the field of education) and indeed the witness came prepared with a memorandum objecting to the committee's jurisdiction, thus showing that he was fully apprised of the subject, the requirements of due process had been satisfied.

Perhaps the Court's long discussion in *Watkins* on the need for carefully drawn and precisely defined jurisdiction of investigating committees was intended as a message to Congress to revise the charter of the Un-American Activities Committee so as to spell out its authority instead of giving it a roving commission, and that the addition of the statement on the manner by

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[15] *See* 1 T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 371 (1967); Kalven, *supra*, note 11 at 323.

[16] 360 U.S. 109, 79 S. Ct. 1081, 3 L. Ed. 2d. 1115 (1959).

[17] *See* Jenner Bill (S. 2646), 85th CONG., 1ST SESS. (1957).

which the pertinency of a question may be determined other than by reference to a precisely drawn mandate was actually an escape route the Court devised for itself in the event that in a showdown with Congress the Court would not be able to enforce its requirement of specific authorizing resolutions.

But the question of broad grant of power to the Committee on Un-American Activities could not easily be disposed of, considering what the Court had said in *Watkins.* The *Watkins* Court saw in the broad grant of investigatory powers a threat to civil liberties. Hence, the subtle threat of invalidation, if not actual invalidation, of the charter of the committee. *Barenblatt* involved the same Subcommittee of the House Un-American Activities Committee, investigating Communist infiltration in the field of education under the same charter which in *Watkins* was found to be "excessively broad." And yet the result reached was different.

The petitioner in *Barenblatt,* after testifying that he had been a graduate student and teaching fellow at the University of Michigan from 1947 to 1950 and a psychology instructor at Vassar College from 1950 until shortly before his appearance before the committee, refused to answer questions whether he was a member of the Communist Party or of student organizations suspected of being Communist fronts. He was convicted of contempt of Congress. On appeal the Supreme Court reversed. According to the Court the *Watkins* decision rested "solely on that ground [pertinency to the question under inquiry], holding that Watkins had not been adequately apprised of the subject matter of the Sub-Committee's investigation or the pertinency thereto of the questions he refused to answer." "The Court, in other words, was not dealing with Rule XI at large, and indeed in effect stated no such issue was before it, *id.,* at 209. That the vagueness of Rule XI was not alone determinative is also shown by the Court's further statement that aside from the Rule 'the remarks of the chairman or members of the committee, or even the nature of the proceedings themselves, might sometimes make the topic [under inquiry] clear' *Ibid.* In short, while Watkins was critical of Rule XI, it did not involve the broad and inflexible holding petitioner now attributes to it."

But independently of what was said in *Watkins,* was not the charter of the Un-American Activities Committee so vague that it authorized even investigations with no legislative purpose in view? The Court in *Barenblatt* said the committee's charter should not be considered "in isolation from its long history in the House of Representatives . . . The Rule comes to us with a 'persuasive gloss of legislative history,' . . . which shows beyond doubt that in pursuance of its legislative concerns in the domain of 'national security' the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in the country."

At this point, it is clear that the Court was begging the very question raised in *Watkins,* namely, whether given the apparent acquiescene of the parent assembly in what the committee had for a long time been doing, such a broad grant of power could, consistently with the rights of the citizens, he tolerated. Indeed, in *Watkins* the Court said that because of the vagueness of the committee's charter,

> . . . [t]he Committee is allowed in essence, to define its own authority, to choose the direction and focus of its activities. In deciding what to do with the power that has been conferred upon them, members of the Committee may act pursuant to motives that seem to them to be the highest. Their decisions, nevertheless, can lead to ruthless exposure of private lives in order to gather data that is neither desired by the Congress nor useful to it. Yet it is impossible in this circumstance, with constitutional freedoms in jeopardy, to declare that the Committee has ranged beyond the area committed to it by its parent assembly because the boundaries are so nebulous.
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> More important and more fundamental than that, however, it insulates the House that has authorized the investigation from the witnesses who are subjected to the sanctions of compulsory process . . . Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a legislative need."[18]

The fact is that in the showdown with Congress over the issue of specific mandate, the Court in *Barenblatt* backed down.

And so the Court, frustrated in its attempt to make Congress justify its inquiry in terms of a stated need for legislation, had to resort again to inference. "The first question," said the Court, "is whether this investigation was related to a valid legislative purpose . . ." It found that the power of Congress to legislate in the field of Communist activities rested on the right of self-preservation, "the ultimate value of any society." Weighing the claim of the petitioner under the First Amendment[19] against the interest of Congress in obtaining information, the Court struck the balance in favor of the power of Congress.

Justice Black, with whom the Chief Justice and Justice Douglas concurred, filed a strong dissent, contending that the First Amendment is not subject to any judicial balancing. Even on a balancing of interests, he thought the majority put the wrong weights on the scale. It was not the right of Barenblatt, as an individual, to silence but the interest of the people as a whole to join organizations, advocate causes and make political

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[18] 354 U.S. 178, 205, 77 S. Ct. 1173, 1 L. Ed. 2d. 1257 (1957).

[19] As in Watkins, the Court observed, the witness in Barenblatt did not claim the privilege against self-incrimination, obviously aware of adverse community reaction to the invocation of the privilege. This is significant because "the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist the inquiry in all circumstances." Barenblatt v. United States, 360 U.S. 109, 126, 79 S. Ct. 1081, 3 L. Ed. 2d. 1115 (1959).

"mistakes" without later being subjected to governmental penalties for having dared to think for themselves that should be balanced against the interest in national security. On the other hand, he said that the chief aim of the investigation as disclosed by the reports of the committee was to try witnesses and punish them because they were or had been Communists. This latter point was also the theme of Justice Brennan's dissent.

The question of specific authorization, evidenced by a precisely drawn resolution, was mentioned only in passing in *Uphaus v. Wyman,*[20] which was decided (5-4) the same day *Barenblatt* was decided. Instead of making "legislative purpose" the measure of the validity of congressional inquiries, the Court, as in *Barenblatt,* used it as counterweight to individual rights in a balancing of the State's right to security and the right of expression of the individual. No longer was it enough to show a "legislative purpose," for which an allegation or an inference sufficed; the government must also show that the substantiality of its interest outweighed the right of the individual.

This theme was developed in *Gibson v. Florida Legislative Investigation Committee.*[21] Petitioner was adjudged in contempt of the state legislature for refusing to produce the membership list of the National Association for the Advancement of Colored People, Miami branch, of which he was the custodian. The committee wanted to find out whether persons previously identified as Communists were members of the association. The Supreme Court, 5 to 4, reversed the conviction.

> . . . The respondent Committee has laid no adequate foundation for its direct demands upon the officers and records of a wholly legitimate organization for the disclosure of its membership; the Committee has neither demonstrated nor pointed out any threat to the State by virtue of the existence of the N.A.A.C.P. or the pursuit of its activities or the minimal associational ties of the 14 asserted Communists. The strong associational interest in maintaining the privacy of membership list of groups engaged in the constitutionally protected free trade in ideas and beliefs may not be substantially infringed upon such a slender showing as here made by the respondent.[22]

Justices Black and Douglas concurred in separate opinions.

Justice Harlan, joined by Justices Clark, Stewart and White, dissented. He could not understand why, if the subject of Communist subversion was considered a sufficient state interest which justified compelling disclosures, it should make any difference whether the organizations under investigation was a Communist organization or whether it was merely infiltrated by Communists. He said: "[U]ntil today, I had never supposed that any of our de-

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[20] 360 U.S. 72, 79 S. Ct. 1040, 3 L. Ed. 2d. 1090 (1959); Braden v. United States, 365 U.S. 431, 81 S. Ct. 584, 5 L. Ed. 2d. 653 (1961); *see also* Wilkinson v. United States, 365 U.S. 399, 81 S. Ct. 567, 5 L. Ed. 2d. 633 (1963).

[21] 372 U.S. 539, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963).

[22] *Id.* at 555-56.

cisions relating to state or federal power to investigate in the field of Communist subversion could possibly be taken as suggesting any difference in the degree of governmental investigatory interest as between communist infiltration of organizations and Communist activity by organizations."

The fact is that by 1963 the Court had dropped the use of the presumption doctrine and was now more and more inquiring into the real nature of congressional activities. Instead of requiring that the charters of investigating committees spell out the group's jurisdiction and purpose as evidence and assurance of the "legislative purpose" of the investigation, the Court had been forced to take congressional inquiries for what they are and to weigh them against the rights of individuals.

The trend is evident in the 1966 case of *De Gregory v. Attorney General of New Hampshire*[23] where the Court apparently drew a distinction between a witness who was a present member of the Communist Party and another one who was a past member of the Party. It reversed a contempt conviction arising from appellant's refusal to answer questions regarding part-time membership in the Communist Party. Through Justice Douglas, it found "no showing whatsoever of present danger of sedition against the State itself, the only area to which the authority of the State extends. There is thus absent that 'nexus' between petitioner and subversive activities in New Hampshire . . ." Justice Harlan, with Justices Stewart and White, dissented: "New Hampshire in my view should be free to investigate the existence or nonexistence of Communist Party subversion, or any other legitimate subject of concern to the State, without first being asked to produce evidence of the very type to be sought in the course of the inquiry. . . . . I cannot say as a constitutional matter that inquiry into the current operations of the local Communist Party could not be advanced by knowledge of its operations a decade ago."

THE ALTERNATIVE USE OF THE DOCTRINE

Thus, through the years, the doctrine of legislative purpose, first announced in *Kilbourn* (1880), has steadily declined in value as a limitation on the congressional power of investigation, until today it is used only as a counterweight to individual rights. Unable to find any legislative purpose to sustain the congressional probe of the Teapot Dome Scandal, the Court in *McGrain* (1927) and *Sinclair* (1929) had to presume its existence. In *Watkins* and *Sweezy*, both decided in 1957, it tried to enforce the doctrine through the requirement of definite mandate to investigating committees, thus enabling it to check the exercise of power other than legislative, but the Court was frustrated in its efforts as Congress ignored its threat of invalidation and the Court was forced to retreat in the ensuing confrontation two years later (*Barenblatt* and *Uphaus*, 1959).

[23] 383 U.S. 825, 86 S. Ct. 1148, 16 L. Ed. 2d. 292 (1966).

The use of the doctrine of legislative purpose is subject to the following observations:

First. To say that congressional inquiries may only be justified in terms of the need for legislation is to assume two things: (a) that the powers of government can be neatly divided into legislative, judicial and executive, and (b) that the function of Congress is confined to strictly lawmaking. Only a doctrinaire view of the principle of separation of powers can support the first. The second assumption is based on an unreality. "The informing function of Congress should be preferred even to its legislative function," wrote Woodrow Wilson in 1885,[24] but the modern Court tried to deny the validity of this statement [25] and the reality of congressional power. But what was the congressional probe of the Teapot Dome Scandal which the Court approved in *McGrain* and *Sinclair* if not exposure for its own sake? Or take the congressional interrogation of Communists in *Watkins* and *Barenblatt,* with the spotlight of public opinion on the witnesses and the known temper of the times against them. Who can deny that the proceedings before the Subcommittee of the House Un-American Activities Committee were anything but a "trial"? [26]

Second. As the above analysis of the cases shows, the doctrine of legislative purpose is difficult of enforcement. The dissenting justices in *Barenblatt* might be right in denouncing the investigation of Communist infiltration of the schools as nothing but a witch hunt, but what could the Court have done in the face of congressional announcement that the end in view

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[24] W. WILSON, CONGRESSIONAL GOVERNMENT 303 (1885).

[25] It is a measure of the force and validity of Wilson's statement that it had to be denied or at least qualified on several occasions. Thus, Justice Frankfurter, for instance, said in his majority opinion in United States v. Rumely, 345 U.S. 41, 44, 73 S. Ct. 543, 97 L. Ed. 770 (1953): "President Wilson did not write in light of the history of events since he wrote; more particularly he did not write of the investigative power of Congress in the context of the First Amendment. And so, we would have to be that 'blind' Court against which Mr. Chief Justice Taft admonished in a famous passage, Child Labor Tax Case, 259 U.S. 20, 37, that does not see what '[a] 11 others can see and understand' not to know that there is wide concern, both in and out of Congress, over some aspects of the exercise of the congressional power of investigation."

Chief Justice Warren, writing for the Court in Watkins v. United States, 354 U.S. 178, 200, n. 33, 77 S. Ct. 1173, 1 L. Ed. 2d 1273 (1957), wrote: "We are not concerned with the power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government. That was the only kind of activity described by Woodrow Wilson. . . ."

For his part, Justice Douglas said in Russell v. United States, 369 U.S. 749, 778, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1968): "Wilson was speaking not of a congressional inquiry roaming at large, but of one that inquired into and discussed the functions and operations of government."

[26] Compare: "The restriction to legislative matters may have meant something in 1881, although not in *Kilbourn v. Thompson* itself; it does not mean much, today, having regard to what are now the acknowledged concerns of Congress. Moreover, the informing function serves not only Congress but the public, for law with us is effective by consent, and Congress should have the power to generate consent by making known the facts that lead it to legislate." A. BICKEL, THE LEAST DANGEROUS BRANCH 162 (1962).

was legislation? It is said that investigations can only be undertaken in aid of legislation. But how is the Court to prove otherwise if Congress declares that its purpose is legislation? The Court cannot probe into the motives of the members of Congress.[27] And legislative investigation need not result in legislation. More often than not, therefore, the courts are driven to the extreme of taking the statement of legislative purpose at face value and considering it as conclusive upon themselves. The result is to leave constitutionally protected freedoms without protection.

Then also, while the Court may try to enforce the legislative purpose doctrine by requiring Congress to state the aims and purposes of authorized investigations, there is nothing it can do if Congress refuses to comply with its demand. On what ground can the Court strike down vague authorizing resolutions? On the principle of separation of powers? The delegation doctrine, which is a corollary of that principle, has been in limbo. Its first, and perhaps last, use to invalidate legislation was in 1935 in *Panama Refining Co. v. Ryan*[28] and *Schechter Poultry Corp. v. United States*,[29] and since then it has never been used again. As has been noted, the steady flow of delegations of power by Congress to administrative agencies continued despite the decision in these cases.[30] As for the requirements of due process, the Court itself has said that the committee questions can be made pertinent by reference to the remarks of the chairman, the subject of the inquiry, and the like, without having to refer to the authorizing resolution of the committee.

Nor can the Court use the legislative purpose doctrine to strike down inquiries it does not like without having to use it as well against investigations it likes. The Court realized this in *Barenblatt* when it said: "Petitioner . . . contends . . . that the vagueness of Rule XI deprived the Subcommittee of the right to compel testimony in this investigation, which in its farthest reach would mean that the House Un-American Activities Committee under its existing authority has no right to compel testimony in any circumstances."

Third. Even given the fact that an investigation is for a legislative purpose, the task of the Court is not at an end. There still remains the problem of accommodating the public interest and that of the individual. The legislative purpose served by the inquiry will still have to be weighed against the right of the witness. Legislative purpose serves best not as a limitation on the power of investigation but rather as a counterweight to the interest in civil liberties. This is by no means an easy task. As the Court said in *Watkins*, "accommodation of the congressional need for a particular information with the individual and personal interest in privacy is an arduous and

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27 Stamler v. Willis, 287 F. Supp. 734 (1968).

28 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935).

29 295 U.S. 495, 55 S.Ct. 837, 79 L. Ed. 1570, 97 A.L.R. 947 (1935).

30 W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 60 (5th ed., 1970); *see also* BICKEL, *supra*, note 26 at 160.

delicate task for any court. . . . The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness."

Fourth. What has been said in the immediately preceding paragraph proceeds on the assumption that the investigation is actually for the purpose of legislation. Where the purpose is otherwise, such as the exposure of Communists in certain sectors of the public life, the congressional purpose must be recognized for what it is and then weighed against the interest of the individual.

To presume that the purpose is lawmaking where the purpose is different is to place an undue weight on one side of the scale. Against the presumption of legislative purpose, individual rights would indeed appear to be mere paper weights. Inevitably the balance must be struck in favor of the security of the state or other justifying national interest.

As Martin Shapiro pointed out, the whole technique of balancing individual freedoms against society's interests in government activities interferring with those freedoms will greatly benefit from the abandonment of the demand for, and presumption of, legislative purpose. By recognizing exposure as a normal purpose of investigations, while at the same time stressing its potential danger to individual rights, the Court can begin to act as a real balancer of interests, striking down those inquiries which needlessly destroy constitutional rights and upholding those in which exposure of some danger or misdeed is essential to society.[31]

For example, as Professor Freund noted in 1961, long before *Gibson v. Florida Legislative Investigation Committee* [32] was decided, there is a difference between these cases where a witness refuses to answer questions about Communist membership simply because he denies the authority of the committee at all, and those where he refuses to answer question about organizational activities because the organizations in question have not been shown by independent evidence to be of a character which it would be permissible to regulate.[33]

Indeed, the use of "legislative purpose" as a short hand term for what Congress might undertake tends to lend a conclusory meaning when what is involved is a process of reaching judgement. By regarding legislative investigations as any other legislative act (*e.g.*, statute) and recognizing them for what they are, courts would be freed from the distorting illusion created by the demand for legislative purpose and would thus be able to measure the tension created by the tug and pull of the competing interest in public order and that in freedom of speech.

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[31] Shapiro, *Judicial Review, Political Reality and Legislative Purpose: The Supreme Court's Supervision of Congressional Investigations,* 15 VAND. L. REV. 535 (1962).

[32] *Supra* note 21.

[33] Freund. *The "Charles Evans Hughes" Lecture,* 19 N.Y. COUNTY BAR BULL. 12, 17 (1961).