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# Congressional Investigations:

## A Plan for Legislative Review

by Frank E. Horack, Jr. • Professor of Law at Indiana University School of Law

■ As Lloyd K. Garrison pointed out in an article in last month's *Journal*, congressional investigations have served the country well and we could not do without them, while at the same time some of them occasionally develop excesses which cause their friends both in and out of Congress much concern. Mr. Garrison's article offered some suggestions for getting off the horns of the dilemma; Professor Horack offers here his own suggestion for solving the problem: a Committee in each house of Congress to review witnesses' claims of exemption from giving testimony.

■ Although the great majority of congressional hearings and investigations are conducted with fairness and decorum, a few committees have placed in jeopardy the reputations, dignity and constitutional rights of many persons who have been summoned as witnesses. As a consequence, there has been an insistent demand for limiting the jurisdiction of committee investigations and reviewing the fairness of committee procedure. Some critics have looked to the courts for a revitalization of *Kilbourn v. Thompson*<sup>1</sup> and others have proposed enactment of uniform rules for congressional committee procedure.<sup>2</sup> Neither approach offers a complete solution.

Two propositions are self-evident: witnesses should be protected from "fishing expeditions", inquiry into purely private affairs and from enforced testimony which might incriminate; the Government should have the full knowledge, testimony and opinion of all its citizens concerning matters of great national import.<sup>3</sup> Only with the aid of the citi-

zens may Congress discharge what Woodrow Wilson described as the duty "to look diligently into every affair of government and to talk much about what it sees".<sup>4</sup> And if Congress is intended to be the watchdog for the people and "the informing function of Congress should be preferred even to its legislative function",<sup>5</sup> then Congress, not the courts, should determine the limits of its jurisdiction when constitutional guarantees are not involved.

Until recently, the judiciary has respected and reflected Wilson's view and has been reluctant to interfere with the investigating process, for, as Judge Holtzoff observed, "While the power of Congress to carry on investigations is not without limit, nevertheless the Congress has broad discretion in determining the subject matter of the study and the scope and extent of the inquiry. If the subject under scrutiny may have any possible relevance and materiality, no matter how remote, to some possible legislation, it is within the power of the Congress to investigate the matter.

Moreover, the relevance and materiality of the subject matter must be presumed. . . . It would be intolerable if the judiciary were to intrude into the legislative branch of the Government and virtually stop the process of investigation."<sup>6</sup>

The Supreme Court, however, undertook judicial review of congressional committee procedure in *Christoffel v. United States*<sup>7</sup> even though it soon chose to abandon the experiment in *United States v. Bryan*.<sup>8</sup> But late in the last term, in *United States v. Rumely*,<sup>9</sup> the Court more boldly restrained committee inquiry even though the decision rested upon the shifting sands of inconclusive statutory construction.<sup>10</sup> Nevertheless, the recent decisions stand as an unmasked warning to congressional committees and will invite further

1. 103 U.S. 168 (1880).

2. Most of the proposals have been collected in Glassie and Cooley, "Congressional Investigations—Salvation in Self-Regulation", 38 *Geo. L. J.* 343 (1950); see also, "Symposium—Congressional Investigations", 18 *U. of Chi. L. Rev.* 421-686 (1951); Wyzanski, "Standards of Congressional Investigations", 3 *Record* 93 (1947).

3. Landis, "Constitutional Limitations on the Congressional Power of Investigation", 40 *Harv. L. Rev.* 153 (1926).

4. Wilson, *Congressional Government* 303.

5. *Ibid.*

6. *United States v. Bryan*, 72 *F. Supp.* 58 (1947).

7. 338 U.S. 84 (1949).

8. 339 U.S. 323 (1950).

9. 73 S. Ct. 543 (1953).

10. The resolution authorized the committee to investigate "lobbying activities". A subpoena issued to procure information concerning "indirect lobbying" was held beyond the jurisdiction of the committee because dictionary definitions of lobbying were restricted to "direct lobbying".

challenges to committee power. Whether the challenges are meritorious or not, the congressional ability to discharge its informing function has been seriously encumbered.

The protection of civil rights, of admitted concern throughout these litigations and certainly of the highest value in our constitutional system, does not require judicial review of internal congressional procedure nor jurisdictional limitation on committee inquiry. Judicial review will not only result in a reduction in the power of Congress but also in a decline in congressional responsibility. And the courts' inquiry cannot be easily confined to the cases of "legislative" investigations: no logical boundary separates investigation of the administration of the Government, investigation under the treaty power, impeachments, confirmations of appointments, and even member-discipline and the review of elections. Judicial review of all these diverse subjects would present many embarrassing political questions and a gradual withdrawal of judicial review similar to that which followed *Kilbourne v. Thompson*<sup>11</sup> might be predicted.

### Uniform Rules Have Three Weaknesses

Thus, the great majority of writers have opposed an expansion of judicial review and argue that Congress should assume full responsibility for supervising committee action by enacting uniform rules of procedure binding upon all standing and select committees. The adoption of uniform rules may contribute to an improvement in committee procedure, but basically they suffer from three weaknesses: (1) Different committees have widely differing responsibilities and thus a sensible rule for one may be utter folly for another. (2) The enactment of uniform rules is no guarantee that the committees will comply. Good committees can make good rules, but good rules cannot make good committees. And (3) they provide no sanctions for their enforcement.

The real need is for a system of

legislative review to enforce uniform rules and insure fairness and responsibility of investigations. Theoretically, this is possible now by any member of the House moving to rescind the committee's authority or to confine it by restrictive amendment, but politically it is impossible. The only way the issue reaches the floor of the House is for a witness to refuse to testify and for the committee to seek a resolution from the House for his prosecution either before the bar of the House or in the federal courts.

When the issue is raised in this manner it does not present the question of whether the committee has exceeded its authority or whether the questions have been relevant and material, but whether the chairman of the committee is entitled to a vote of confidence from his party and from the House. The witness is unrepresented and his cause is soon forgotten. Congressmen who privately condemn the actions of the committee feel compelled to vote in support of the committee because the party leadership insists that a vote of confidence is essential to maintain the party position, and individual members, regardless of the merits of the particular controversy, feel that a negative vote would jeopardize their own positions as committee chairmen. Uniform rules will not repeal congressional courtesy.

The philosophy of *McGrain v. Daugherty*<sup>12</sup> can be maintained and judicial review avoided if the Houses establish a system of legislative review. The proposal would permit a witness to challenge the authority of an investigating committee by an appeal to a review committee appointed by the House. The committee should be bipartisan in character, composed of three members from each major political party. The members should be selected from the lawyer members and should have extensive legislative experience and be held in high personal and professional respect by both sides of the House. In addition to the six members there should be a panel of alternates from which members can be

selected in case an appeal is taken from a committee which includes a review committee member.<sup>13</sup>

A committee witness should not be permitted to challenge the sufficiency of the subpoena before the review committee prior to his appearance before the investigating committee, for the presumption should be in favor of the propriety of the inquiry and the witness' obligation to provide information to the Government. After appearance, however, the witness should be able to challenge the propriety of specific questions on the ground that (1) the inquiry is beyond the jurisdiction conferred by the House resolution or the terms of the subpoena, (2) the question is not material or relevant to the inquiry,<sup>14</sup> or (3) the question invades the witness' constitutional rights. Challenge of committee authority would be raised as it is now by the witness' refusing to answer. In addition, the witness would be required to indicate his intent to appeal to the review committee. Thereafter, the investigating committee could not seek a resolution authorizing prosecution for contempt until after the review committee handed down its decision.

The witness would be obligated to notify the review committee of an appeal by the second day following the day on which the question was asked.<sup>15</sup> The appeal would be on the record, that is, a verified copy of the resolution authorizing the inquiry, the subpoena, if one had been used, and the verbatim transcript of the pertinent questions asked by the committee. In order to prevent delay and discursive dilatory tactics, the committee should have the right to ask all questions which it considered pertinent to its inquiry and the wit-

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

12. 273 U.S. 135 (1926).

13. Admittedly, personnel of this caliber will be already overburdened with responsibility, but with staff-aides of Supreme Court clerk ability, they should be able to discharge these additional obligations.

14. On legislative review, the issue of materiality and relevance should be much broader than in judicial review. See, *infra* page 194.

15. When the investigating committee is holding hearings outside of Washington, the time for notifying would, of course, have to be lengthened.

ness should be obligated to raise all his objections at one time so that the entire matter might be disposed of on one appeal.<sup>16</sup>

In support of the appeal, the witness and the committee should be permitted to file written briefs. Inasmuch as the matter in controversy usually will be known to the witness and the committee in advance of the hearing, a ten-day briefing period should be sufficient. In cases of unusual difficulty the review committee, in the same manner as a court, should have the power to extend the time for filing. Reply briefs and oral argument should be discouraged but not prohibited. The psychological advantage of assuring the witness that his case has actually been heard by the review committee should outweigh the burdens which oral arguments impose on the review committee and the delays to the conduct of the investigation.

Within as short a period as possible after the conclusion of arguments the review committee should be obligated to render its decision, in order that the investigation may proceed if the decision is favorable to the committee, and that the witness' position may be speedily confirmed if the decision is against the committee. The decision of the review committee should be accompanied by a written opinion. Copies of the opinion should be available immediately to the witness and to the committee, and in order that a body of precedents may be developed the opinions should ultimately be printed and published.

#### **It Is To Be Hoped That Few Witnesses Would Remain Recusant**

If the decision of the review committee sustains the investigating committee, the witness could be recalled under the original subpoena merely by informing the witness of a new date set for the hearing. If the witness continued recusant, the committee could then move for a house resolution authorizing prosecution for contempt. Although the vote on this motion would in effect amount to a reconsideration by the whole

House of the review committee's decision, unless there had been a vigorous dissent by a review committee member the adoption of the resolution would be in most instances automatic. It is to be hoped, of course, that in these circumstances few witnesses would remain recusant. If the review committee proceeds in an impartial and judicial manner, courts should give great weight to its determinations particularly where they relate to matters of jurisdiction or internal committee procedure. Witnesses should, therefore, be less successful in their judicial appeals and should conclude that the expenditure of time and money will gain them little.<sup>17</sup>

Conversely, if the decision is against the investigating committee, the witness should not only feel vindicated but should also be protected against further harassment. Congress in the enabling legislation could grant complete finality to the decision, *i.e.*, make a subsequent resolution based on the matter at issue out of order, place the members of the committee in contempt if they proceeded with the questions, or make a continuation of the inquiry grounds for the withdrawal of the committee's authority. The severity of these sanctions and the fact that enforcement would raise a political question for the entire membership to decide argues against complete finality to the review committee's decision. Furthermore, formal abdication of the authority of the house is not in keeping with legislative practice.

A second possibility would be to give finality to the decision unless it was appealed by the investigating committee for reconsideration by the whole house. This appears to be a needless step and tends to reintroduce political considerations which the review procedure seeks to eliminate. A better procedure would permit the decision to be attacked collaterally.

Under this third proposal, if, after an adverse decision, the investigating committee recalls the witness and the witness again refuses to answer, the committee may seek a resolution



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authorizing a prosecution for contempt. In effect this action challenges the decision of the review committee not in an abstract way, as in the second situation, but within the framework of an actual litigation. Presumptively, the decision of the review committee, because it is rendered by an impartial tribunal not concerned with the inquiry, should prevail. The house will be aware that a court would more likely, in deciding a contempt prosecution, follow the decision of the independent committee than of the prosecuting committee; therefore, the house, when it must choose between the decisions of the two committees, is likely to accept the review committee's verdict.

Perhaps the greatest merit to the procedure is that it keeps the issues narrow and balances political pressures. The issue will not be: Should we support our appointed committee against the attack of a nonmember?

16. This does not imply, however, that after a notice to the review committee has been issued, the hearing committee cannot withdraw the question or the witness indicate his willingness to answer thereby making the appeal moot.

17. It is conceivable, if the legislative review proved to be a highly reliable process, that witnesses after an adverse decision by the review committee might more frequently receive maximum fines and imprisonment upon their conviction in court.

or, Will an adverse vote injure the political position of the majority party? The issue framed under this proposal will be: Which of two committees has more accurately determined the propriety of a particular question asked of a particular witness under a specific resolution authorizing an inquiry? On such a question, reasonable men admittedly may differ, but the decision of the house is now more easily confined to the merits of the question and the political pressures are now balanced, for the decision of one committee must be sustained and the decision of the other must be reversed.

There are other advantages of legislative review. When the question is decided judicially, concepts of separation of powers and intergovernmental relations must be considered by the court. Is it wise and proper, therefore, for the court to review the internal workings of a legislative committee unless compelled by constitutional direction? If the court interferes will it encourage witnesses, without cause, to delay investigations necessary to the national security and welfare? If the court refuses to interfere, will this be interpreted by congressional committees as *carte blanche* authority to proceed without restraint? These questions need not perturb the legislative review committee. They are a part of the legislative process and may police the committees with a view to maintaining the reliability and insuring the public respect and confidence in the fairness and impartiality of legislative investigations.

When a court decides issues of "relevancy and materiality" it must limit its decisions to jurisdictional constitutional questions. The legislative review committee, however, can consider not only the jurisdictional and constitutional questions but also the import of specific questions on the total conduct of the hearing. If, for example, the house adopts rules

for the governance of committee hearings and investigations similar to those which have been proposed,<sup>18</sup> the review committee could restrain the investigating committee from asking questions concerning personal and private belief, from inquiring into matters adversely affecting reputation without insuring the witness the opportunity of filing a sworn statement in refutation, or from requiring testimony without the presence of counsel. These are but a few of the safeguards suggested in the uniform rules, but practically all of them are susceptible to better enforcement by the legislative review committee than by the courts.

#### Courts Cannot Easily Protect Congressional Witnesses

The courts have no convenient way by which to restrain a committee from establishing "guilt by association", from disparaging and "convicting" unfriendly witnesses or from releasing partial and misleading transcripts of evidence. Legislative review, however, could properly provide this type of supervision. The house, through the review committee, could protect its own record and maintain proper responsibility to its constituents.

Decisions of this character are admittedly difficult to make and for obvious reasons no legislator would make them voluntarily. Thus, a legislative procedure which requires the witness to raise the issue and imposes by statute the duty of deciding on the review committee, not only appeals to the lawyers' respect for review procedure, but also is politically attractive because the review committee is not required to take the initiative and the membership of the house need not vote on broad and inarticulate political issues. Each decision, as at common law, will be made on the narrow facts of the particular case.

This procedure offers advantages

both to the witness and to the government. The witness can get an early determination of his case with a lesser expenditure of time and money. This is not an inconsequential advantage, for the risk of criminal prosecution with all its implications and insinuations has no doubt forced more than one witness to testify when he was in fact privileged.

The advantages to Congress will also be great. The four or five years' delay required by the current method of prosecution for contempt will be eliminated in the majority of cases. The Government, if it is entitled to it, will have the advantage of important testimony when it needs it most. The spectacle of a willful witness stopping the machinery of government should become rare, for if legislative review is impartial and competent, such a witness can foresee slight chance of acquittal if the review committee decides adversely in his case. Conversely, legislative review should insure fairer treatment of all witnesses and to that extent most witnesses should be willing to testify more freely. Finally, the investigating function should be made a responsible process and thereby be relieved of the charges of bias and prejudice.

Admittedly, legislative review will cause an initial increase in the number of cases, but if the procedure is well administered the increase will be temporary. Soon the investigating committees will recognize the limits of their own power, and witnesses will learn that spurious objections will not be sustained. Ultimately, only the meritorious borderline cases where reasonable men differ will be litigated.

Legislative review will fill the hiatus between unenforceable rules of committee procedure and undesirable judicial intervention in the legislative process.

18. See *supra*, note 2.