NOTES

CONGRESSIONAL INVESTIGATIONS AND FIRST AMENDMENT RESTRICTIONS ON THE COMPULSION OF TESTIMONY

Recent appraisals of Congressional investigations have expressed both commendation of the results obtained and, in many instances, criticism of the methods used.[1] Although the problem of determining the proper limits of the Congressional power of inquiry is not new,[2] these restrictions have not been precisely delineated because of a paucity of opportunities for judicial review.[3] The gravamen of the problem is the determination of the rights and privileges of a witness before Congressional committees.

Refusal by a witness to testify on grounds of First Amendment freedoms and the "right" of privacy is a recent manifestation of this enigma.[4] Such recalcitrance is based upon either a lack of power to com-

1. Mr. Justice Frankfurter has stated: ". . . [W]e would have to be that 'blind' Court, against which Mr. Chief Justice Taft admonished . . . that does not see what '[a]ll 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." United States v. Rumley, 345 U.S. 41, 44 (1953). See also Galloway, *Congressional Investigations: Proposed Reforms,* 18 U. OF CHI. L. REV. 478, 480 (1951).

2. "A legislative committee of inquiry vested with power to summon witnesses and compel the production of records and papers is an institution rivalling most legislative institutions in antiquity of its origin." Landis, *Constitutional Limitations on the Congressional Power of Investigation,* 40 HARV. L. REV. 153, 170 (1926). The first investigating committee of the Congress of the United States was created on March 27, 1792, by a resolution in the House instituting an inquiry into the cause of the disaster to General St. Clair and his army in the Northwest. *Id.* at 159.

3. On the barrenness of judicial precedents contrasted with the liberal use of investigating committees, see Landis, *supra* note 2, at 212-213. However, the lack of cases may be contrasted with the profusion of scholarly comment on the problem.

Boudin, *Congressional and Agency Investigations: Their Uses and Abuses,* 35 VA. L. REV. 143 (1949); Cousens, *The Purpose and Scope of Investigations under Legislative Authority,* 26 GEO. L.J. 905 (1938); Fulbright, *Congressional Investigations: Significance for the Legislative Process,* 18 U. OF CHI. L. REV. 440 (1951); Galloway, *supra* note 1; Gose, *The Limits of Congressional Investigating Power,* 10 WASH. L. REV. 61, 138 (1935); Herwitz and Mulligan, *The Legislative Investigating Committee,* 33 COL. L. REV. 1 (1933); Landis, *supra* note 2; Liacos, *Rights of Witnesses Before Congressional Committees,* 33 B. U. L. REV. 337 (1953); McGeary, *Congressional Investigations: Historical Development,* 18 U. OF CHI. L. REV. 425 (1951); MORGAN, *Congressional Investigations and Judicial Review: Kilbourn v. Thompson Revisited,* 37 CALIF. L. REV. 556 (1949); Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusion in Political Affairs,* 47 MICH. L. REV. 181 (1948).

4. It would seem that in many instances witnesses have failed to distinguish between rights which they may have under the First Amendment and those which may be the result of a common-law right of privacy as to governmental invasion. The two

pel testimony or a right of the witness precluding exercise of this power.[5]

Although the power of Congress to investigate is not unlimited,[6] the extent of the power of investigation still renders any limitations of slight practical value to the witness. Since the authority of Congress to investigate is not expressly granted by the Constitution, it has been implied by the Supreme Court as being necessary and appropriate to the effective exercise of the express powers.[7] However, Congress may only require testimony in response to questions which are pertinent to the matter under investigation[8] and may not inquire into the private affairs of a citizen.[9]

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concepts are not identical, and possibly much confusion has resulted from this lack of differentiation. *See* Lawson v. United States, 176 F.2d 49, 51 (D.C. Cir. 1949); Liacos, *supra* note 3, at 364; N.Y. Times, Sept. 25, 1953, p. 20, Col. 2; St. Louis Post-Dispatch, Sept. 29, 1953, § 2, p. 2, col. 3.

5. This discussion will not consider any rights or privileges which the witness may have by virtue of the Fifth Amendment. In the event that the proposed federal "immunity statute" is enacted, enabling committees to compel incriminating testimony by granting immunity from federal prosecution, it would appear that the Fifth Amendment will be of much less importance to the witness.

Moreover, the rights under the First Amendment are of much more vital national concern than those under the Fifth Amendment. The latter amendment actually affects only those persons who are called as witnesses, whereas, should the freedoms of the First Amendment be abridged, the effect may well extend to all persons, whether or not they appear as witnesses.

6. The Supreme Court has often intimated that the power to investigate is not unlimited. See Sinclair v. United States, 279 U.S. 263, 292 (1929); Barry v. United States, 279 U.S. 597, 614 (1929); McGrain v. Daugherty, 273 U.S. 135, 173-174 (1927); Interstate Commerce Comm'n v. Brimson, 154 U.S. 447, 478 (1894); Kilbourn v. Thompson, 103 U.S. 168 (1880).

7. ". . . [T]he two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective. . . . We are of the opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . ." McGrain v. Daugherty, 273 U.S. 135, 173-174 (1927). See also Sinclair v. United States, 279 U.S. 263 (1929); Barry v. United States, 279 U.S. 597 (1929); *In re* Chapman, 166 U.S. 661 (1896); Fields v. United States, 164 F.2d 97 (D.C. Cir. 1947), and authorities there cited.

Congress also has the power to imprison a recusant witness for contempt until he may submit to its demands to answer propounded questions or produce required papers; Sinclair v. United States, 279 U.S. 263 (1929); McGrain v. Daugherty, 273 U.S. 135 (1927). The witness may also be prosecuted in the courts under 52 STAT. 942 (1938), 2 U.S.C. § 192 (1946), which provides for punishment as a misdemeanor contumacy before a Congressional committee. *In re* Chapman, 166 U.S. 661 (1896). See Gose, *supra* note 3.

8. ". . . [I]t is a necessary deduction from the decisions in *Kilbourn v. Thompson* and *In re Chapman* that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry." McGrain v. Daugherty, 273 U.S. 135, 176 (1927). Moreover, the question of pertinency is a matter of law. Sinclair v. United States, 279 U.S. 263, 298 (1929). *See* also United States v. Orman, 207 F.2d 148, 152-156 (3d Cir. 1953).

9. This rule was declared by the Court in Kilbourn v. Thompson, 103 U.S. 168, 190 (1880); ". . . neither of these bodies [Houses of Congress] possesses the general power of making inquiry into the private affairs of the citizen." The Court, in *McGrain*

While a refusal by a witness to testify in response to questions actually not pertinent to the inquiry cannot be punished, there seems to be no way in which this can be satisfactorily established at the hearing. Consequently, the witness must hazard prosecution for contempt each time he refuses to answer on this ground. Furthermore, it is often impossible, even in judicial proceedings, for him to rebut the committee's claim of pertinency.[10]

Similarly, the limitation that neither House has the power to inquire into the private affairs of a citizen seems now to be ineffective. This restriction, imposed by the Court in *Kilbourn v. Thompson,* was based on the holding that the power to compel testimony relating to private affairs was a judicial power which could not properly be exercised by the legislature.[11] However, the subsequent decision in the *Sinclair* case negated the efficacy of this limitation by declaring that if a propounded question is pertinent to an authorized Congressional investigation, private affairs may be invaded and the answer compelled.[12] Thus, this limitation also involves the previous problem of determining pertinency.

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v. Daugherty, after examining the cases to that date affirmed the *Kilbourn* decision, stating that the following proposition could be considered as settled law: ". . . [N]either House is invested with 'general power' to inquiry into private affairs and compel disclosures. . . ." 273 U.S. 135, 173 (1927). Such limitations are grounded on the doctrine that there is a fundamental ". . . right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of . . . personal and private affairs." Sinclair v. United States, 279 U.S. 263, 292 (1929).

10. Pertinency for purposes of a Congressional inquiry has been defined as meaning ". . . pertinent to a subject matter properly under inquiry, not generally pertinent to the person under interrogation." Rumley v. United States, 197 F.2d 166, 177 (D.C. Cir. 1951), *aff'd,* 345 U.S. 41 (1953). The range of matters subject to Congressional power, however, is such that an inquiry may now be conducted into almost any matter of national interest. Gose, *supra* note 3, at 150-151. Moreover, Congress need not specify in advance the purposes for which the inquiry is conducted, and it need not legislate or attempt to legislate upon the precise facts developed. The subject matter need only be so related to a matter upon which Congress is authorized to legislate as to make possession of information in this area valuable in considering legislation. *In re* Chapman, 166 U.S. 661 (1896); McGrain v. Daugherty, 273 U.S. 135 (1927). "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 matter. Moreover, the relevancy and the materiality of the subject matter must be presumed." United States v. Bryan, 72 F.Supp. 58, 61 (D.D.C. 1947). *See* also Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir. 1938). Also a witness is bound to judge correctly as to the element of pertinency since his honest mistake of law is no defense. Sinclair v. United States, 279 U.S. 263, 299 (1929). See also Nutting, *supra* note 3, at 215 . For a general discussion of the problem of determining pertinency, see Morgan, *supra* note 3, at 571; McGeary, *supra* note 3, at 436.

11. ". . . [W]e are of opinion that the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because the power was in its nature clearly judicial." Kilbourn v. Thompson, 103 U.S. 168, 192 (1880).

12. Sinclair v. United States, 279 U.S. 263 (1929); United States v. Orman, 207 F.2d 148 (3d Cir. 1953).

Since any limitations on the power of Congressional committees to compel testimony actually afford the witness only slight protection, he must rely to a greater extent on any affirmative rights which he may have. The decision of *Kilbourn v. Thompson,* apparently created a "right" of privacy. But the subsequent decision in the *Sinclair* case abrogated this protection when the propounded questions were pertinent to the subject under investigation.[13] Moreover, it is now questionable whether or not the requirement of pertinency need be met.[14]

The contention that the witness' right of privacy is invaded by the compulsion of testimony has often been intermixed with a similar argument that First Amendment freedoms are also abridged.[15] Recently the Supreme Court had an opportunity to determine the validity of this position.[16] The Court, however, declined to consider this issue and held instead that the witness could not be compelled to answer since the question exceeded the bounds of the committee's authority under the Congressional resolution directing the investigation.[17] Nevertheless, the concurring opinion of Justices Black and Douglas concluded, contrary to the reasoning but not the result of the majority, that the committee did have the authority to compel the testimony but could not because of the rights of the witness under the First Amendment.[18]

Previous cases have presented the issue to lower federal courts and have resulted in determinations unfavorable to the existence of such a

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13. See Morgan, *supra* note 3, at 569.

Moreover, this resulting limited protection offered by the right of privacy has been further criticized by one authority who contends that no right of privacy should exist at all in the Congressional investigating situation. Landis, *supra* note 2. Mr. Landis submits that in a Congressional inquiry as in a judicial proceeding, any interests in privacy are completely overbalanced by the interests in efficient government, and the fact that testimony may relate to private affairs should present no bar to its compulsion. *Id.* at 219.

14. Recently the court in United States v. Josephson, 165 F.2d 82 (2d Cir. 1947), when presented with the contention that certain questions invaded the right of privacy of the witness and therefore should not be compelled, stated that whether or not an investigation may be invalid because private affairs may be made public ". . . is open to question," citing *Kilbourn v. Thompson* and the article by Landis. *Id.* at 88. The court then authorizes the compulsion, holding the questions pertinent. *Id.* at 89. However, the opinion raises an issue as to whether or not questions invading the right of privacy could be compelled even though not pertinent.

15. A recent case in which the First Amendment has been alleged as a ground for refusal to testify is now being considered by the Supreme Court. Emspak v. United States, 203 F.2d 54 (D.C. Cir. 1953), *cert. granted,* 74 S. Ct. 23 (1953).

16. United States v. Rumley, 345 U.S. 41 (1953).

17. *Id.* at 44.

18. "The Court is repudiating what the House emphatically affirmed, when it now says that the Select Committee lacked the authority to compel respondent to answer the questions propounded." United States v. Rumley, 345 U.S. 41, 56 (1953). "Since Congress could not by law require of respondent what the House demanded, it may not take the first step in an inquiry ending in fine or imprisonment." *Id.* at 58.

right.[19] *Barsky v. United States* is the major case in point.[20] The court considered, as must always be done in these cases, whether or not First Amendment freedoms are abridged by compulsory testimony and, if so, under what circumstances this is valid. The court stated that they "would assume, without deciding," that compelling a witness to answer would "impinge upon speech and not merely invade privacy;"[21] nevertheless, it decided that in this instance such a restriction was justified.[22] However, the rationale of the opinion is not clear. Although the court may have assumed that inquiry does affect speech, it never precisely delineated the manner or extent of the abridgement.[23] This suggests a failure to perceive the actualities concerning free speech in this situation which would, of course, preclude rational analysis of the validity of this restriction.

The court might have interpreted the contention—First Amendment freedoms are infringed when a witness is compelled to testify—as dependent upon the validity of this reasoning: The First Amendment guarantees freedom of speech; this right to speak also implies the right not to speak; therefore, to compel a person to speak is equivalent to preventing him from speaking and violates the First Amendment. However, any argument for an equivalent freedom of silence is precluded by an analysis on the basis for the First Amendment's provision relating to speech: promotion of free and open discussion of all issues.[24]

19. Lawson v. United States, 176 F.2d 49 (D.C. Cir. 1949); Marshall v. United States, 176 F.2d 473 (D.C. Cir. 1949); Barsky v. United States, 167 F.2d 241 (D.C. Cir. 1947); United States v. Josephson, 165 F.2d 82 (2d Cir. 1947).

20. 167 F.2d 241 (D.C. Cir. 1947).

21. *Id.* at 250.

22. *Id.* at 249.

23. It would seem that in many instances the issues concerning the First Amendment have not been clearly presented to the courts nor have the courts themselves clearly stated the problem:

"Despite all this, it is argued in behalf of this appellant that the First Amendment forbids the gathering of information by a duly authorized Congressional committee. . . . The theory seems to be that 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 supplied) United States v. Josephson, 165 F.2d 82, 90 (2d Cir. 1947).

24. ". . . [T]heir purpose [First Amendment freedoms] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by just criticism upon their conduct in the exercise of the authority which the people have conferred upon them." COOLEY, CONSTITUTIONAL LIMITATIONS 885 (8th ed. 1927).

Mr. Justice Brandeis has quite succintly summarized the purposes of speech: "Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that the greatest menace to freedom is an inert people; that public dis-

Freedom of speech serves this purpose; freedom of silence, *per se,* obviously does not. The *Barsky* court apparently discerned the invalidity of this reasoning and,[25] failing to recognize any other manner by which the First Amendment could be abridged, perhaps concluded it was not actually restricted.

Another method of analysis reveals that compulsion of testimony by Congressional inquiry does abridge the freedoms of speech and press. Possibly this reasoning may have been one of the considerations motivating the concurring opinion in the *Rumley* case. This analysis admits that a freedom of silence does not exist. However, this does not preclude the existence of a limited privilege to remain silent when that is necessary to prevent an abridgment of the freedoms of the First Amendment. To determine how this may occur, it is necessary to examine the practical results of compelling certain testimony before a Congressional committee.

Although an individual may readily expound an unpopular view before individuals or groups of his own choosing, it is doubtful, in most instances, whether he would desire to broadcast these same opinions to the nation through the medium of a Congressional committee. To force disclosure of unpopular speech may affect the witness by resulting in loss of prestige, employment or friends.[26] Knowing this, a person may refrain from expressing any opinion which might be termed controversial through fear of subsequently being called before a Congressional committee and being forced publicly to divulge or affirm his previous statements.

As pointed out by the Court in *American Communications Ass'n v. Douds,*[27] governmental encroachments of individual freedoms of speech and press are no longer confined to direct and candid abridgment.[28]

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cussion is a political duty; and that this should be a fundamental principle of the American government." Whitney v. California, 274 U.S. 357, 375 (1927).

25. The *Barsky* court also pointed out and recognized the basis for free speech: "The public policy which supports freedom of speech is that the safety of democratic government lies in open discussion—discussion of grievances, remedies, of 'noxious doctrine' as well as of popular preferences." 167 F.2d 241, 249-250 (D.C. Cir. 1947).

26. Judge Edgerton, dissenting in the *Barsky* case, states: "That the Committee's [House Committee on Un-American Activities] investigation does in fact restrict speech is too clear for dispute. The prosecution does not deny it and the court concedes it. The effect is not limited to the people whom the Committee stigmatizes or calls before it, but it extends to others who hold similar views and to still others who might be disposed to adopt them. It is not prudent to hold views or to join groups that the Committee has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to speak." *Id.* at 255. The point had also been made by Judge Clark in his dissent in United States v. Josephson, 165 F.2d 82, 100 (2d Cir. 1947).

27. 339 U.S. 382 (1950).

28. *Id.* at 399. "'It is not often in this country that we now meet with direct and

Modern methods are much more subtle and are, therefore, correspondingly more dangerous since they may escape casual appraisal. If compelling testimony causes individuals to refrain from expressing controversial opinions or discussing issues subject to possible Congressional inquiry, the purposes of free speech have been severely restricted. Because ". . . even the most timid and sensitive cannot be unconstitutionally restrained in the freedom of his thought . . . ,"[29] the fact that certain intrepid individuals might not be deterred from expressing such views, even though they might be subsequently compelled to affirm them publicly, does not justify abridgment of any individual's freedom of speech.

The other basic freedom of the First Amendment—that concerning freedom of the press—may also be restricted by the compulsion of testimony. This was illustrated in the concurring opinion of the *Rumley* case. In this instance the witness was asked to testify concerning certain financial records, which would also reveal the subscribers and purchasers of the witness' publications. Justices Douglas and Black contended that if this inquiry were permitted, the press would be subjected ". . . to harrassment that in practical effect might be as serious as censorship . . ." and would result in the government holding ". . . a club over speech and over the press."[30]

Since the compulsion of testimony concerning exercises of First Amendment freedoms would do more than merely "impinge upon speech" but would, rather, abridge them, a limited privilege of silence may be necessary. If the court in the *Barsky* case was influenced by an assumption that compulsion of testimony only slightly restricts the First Amendment, then its conclusion may be subject to re-evaluation in the light of the *Rumley* case and this method of analysis.

However, the *Barsky* court may have determined that testimony may be compelled in the inquiry situation because of other considerations. By assuming that compelling testimony does ". . . impinge upon speech and not merely invade privacy . . . ,"[31] they may have inarticulately accepted the rationale implicit in the *Rumley* case and developed in the foregoing analysis. The court was then confronted with the problem of determining whether or not the First Amendment could be validly abridged in this instance. In resolving this issue, the court considered the existing national situation and the relative necessities for inquiry 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.'" The court was quoting Mr. Justice Jackson, concurring in Thomas v. Collins, 323 U.S. 516, 547 (1945).

29. Barsky v. United States, 167 F.2d 241, 249 (D.C. Cir. 1947).

30. 345 U.S. 41, 48, 58 (1953) (concurring opinion).

31. 167 F.2d 241, 250 (D.C. Cir. 1947).

legislation.[32] While the validity of this reasoning may be questionable, it illustrates an attempt to resolve the most perplexing problem facing the courts in the inquiry situation.

Recognizing that First Amendment freedoms are not absolute,[33] the courts have developed various tests to determine when they may be validly abridged by legislation. The question immediately arises as to whether or not these tests may be used to evaluate abridgment by inquiry. Justices Black and Douglas seem to imply vaguely that this may be proper, stating that: "Since Congress could not by law require of respondent what the House demanded, it may not take the first step in an inquiry ending in fine or imprisonment."[34]

The "clear and present danger" test has existed as a familiar but ofttimes uncertain test to determine when speech may validly be abridged by legislation.[35] The vital issue here concerns its general applicability where inquiry compels speech. Probably legislation most analogous to the inquiry situation is an enactment which purports to compel certain practices which abridge indirectly the First Amendment freedoms.[36]

32. *Id.* at 246-247.

33. Dennis v. United States, 341 U.S. 494, 519-525 (1951); United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 95 (1947); Frohwerk v. United States, 249 U.S. 204, 206 (1919). *See* also Near v. Minnesota, 283 U.S. 697, 715 (1931); Whitney v. California, 274 U.S. 357 (1927).

But see MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948); Meiklejohn, *The First Amendment and Evils That Congress Has a Right to Prevent*, 26 IND. L.J. 477 (1951).

34. 345 U.S. 41, 58 (1953) (concurring opinion). However, it is never explicitly made clear which type of legislative test should be used nor how such test should be applied. Moreover, it is also possible that Justices Black and Douglas were thinking in terms of an absolute restriction on the exereise of Congressional powers in this area and thus did not consider any tests to determine whether or not such abridgment might be valid under certain circumstances.

35. Justice Holmes, in Schenck v. United States, 249 U.S. 47, 52 (1919), first established this test.

The original purpose of this test was to determine at what point certain speech became an incitement or a criminal attempt to violate a constitutional statute. See CHAFEE, FREE SPEECH IN THE UNITED STATES 81-82 (1941), for a discussion of this concept as derived from Schenck v. United States, 249 U.S. 47 (1919).

For a general discussion and analysis of the cases applying the clear and present danger test, see Justice Frankfurter concurring in Dennis v. United States, 341 U.S. 494, 529-561 (1951); CHAFEE, *loc. cit. supra.* See also Boudin, *"Seditious Doctrines" and the "Clear and Present Danger" Rule,* 38 VA. L. REV. 143 (1952); Corwin, *Bowing Out "Clear and Present Danger,"* 27 NOTRE DAME LAW. 325 (1952); Mendelson, *Clear and Present Danger—From Schenk to Dennis,* 52 COL. L. REV. 313 (1952).

36. Such a situation was presented to the Court in American Communications Ass'n v. Douds, 339 U.S. 382 (1950). This case involved the determination of 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 not believe in Communist principles. The Court admitted that the freedoms of the First Amendment were restricted stating that: The provisions of this statute ". . . undoubtedly lessens the threat to interstate commerce, but it bas the further necessary effect of discouraging the exercise of political rights protected by the First

Evaluation of this type of restriction, according to the Supreme Court, must be accomplished by weighing the interests of the government in the particular legislation against the interests of the individual in exercising these freedoms to determine which one prevails under the particular circumstances.[37]

Apparently, the danger test is similarly inapplicable to investigations in which the witness is compelled to testify since analogous problems exist. There are two possible methods by which it could be employed in this situation. The committee may either contend that the actual prior exercise of these freedoms constitutes a clear and present danger or it may argue that the lack of information concerning these exercises constitutes such a danger. The problem is the same in either case. In order to establish the existence of the danger to justify compulsion of the testimony, the testimony must be compelled.[38] This is an illustration of the problems inherent in applying the danger test to evaluate situations for which it was not designed. As pointed out by the Court in the *Douds* case it is not an absolutistic dogma with universal validity.[39] The test was devised to help determine when the actual past exercise of First Amendment freedoms constituted sufficient danger to justify their abridgment. It may not be used with equal applicability to determine when a certain situation, which is inimical to a governmental purpose, may be remedied with First Amendment freedoms indirectly abridged in the process.

Perhaps the *Barsky* court partially recognized this difficulty when it refused to apply the danger test to evaluate the inquiry situation;[40]

Amendment. Men who hold union office 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." *Id.* at 393. However, the Court concluded that the "clear and present danger" test was not the proper method of determining whether or not such abridgment would be valid, contending that the danger test is not an absolutist test and does not automatically apply as a proper method of evaluating any First Amendment abridgement. *Id.* at 394-396.

37. "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, 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 presented." *Id.* at 399.

38. The information may be vital or it may be of little consequence. It may be contended that in many instances the value of the information sought to be compelled could be determined from the nature of the question. However, this would certainly not be true in the majority of instances in which an answer other than "yes" or "no" was required.

But see a dictum to the contrary in which the court apparently failed to recognize these difficulties. National Maritime Union of America v. Herzog, 78 F. Supp. 146, 165 (D.D.C. 1948), *aff'd*, 334 U.S. 854 (1948).

39. *See* also Dennis v. United States, 341 U.S. 494, 542-544 (1951) (concurring opinion).

40. ". . . [F]or the judicial branch of government to hold the legislative branch

however, it apparently objected because the committee could seldom prove that either the previous exercise of First Amendment freedoms or a lack of information concerning such exercises constitute a clear and present danger. Thus, the committee might be unable to obtain information. The court attempted to resolve the problem by changing the criterion from clear and present danger to danger "reasonably represented as potential."[41] It must be granted that this new standard would eliminate any difficulties of proof but only because "reasonably represented as potential" is actually no test at all. It merely requires a determination of whether or not there was a rational basis for the investigation.

It would appear that the reason for the adoption of this new "test" is a belief that some standard must be used which would embody the principle of the danger test. However, this fails to recognize that the principle itself is inapplicable to the inquiry situation. Probably no test embodying this principle will be adequate. Because the criterion the court adopted provided no standards for evaluation, its judgment ultimately rests upon a determination of ". . . the relative necessity of the public interest as against the private rights."[42] Thus, for practical purposes, it utilizes the balancing of interests process proposed in the *Douds* case.

The balancing of interests test can be validly applied to the inquiry situation. However, it must be recognized that use of that process here may differ in many respects from application to legislation which directly prohibits the exercise of First Amendment freedoms.[43] In the latter instance, the interests to be balanced and weighed are apparent—the individual interest in the exercise of the particular freedom restrained and the public interest protected by restraining the exercise of such freedom. In the inquiry situation, however, the circumstances would be quite dissimilar and subject to other considerations. The First Amendment freedoms are not restrained directly but, rather, as a result of a particular governmental action—compelling testimony. Moreover, the interest opposing that of the individual is not that of restraining the exercise of these freedoms for the public good but is a governmental interest—compelling testimony and seeking information to assure an effective legislative process. The governmental interest may restrict any

to be without power to make such inquiry until the danger is clear and present would be absurd. How except upon inquiry would the Congress know whether the danger is clear and present?" 167 F.2d 241, 246-247 (D.C. Cir. 1947).

41. Inquiry may be necessary ". . . when danger is reasonably represented as potential. There was justification here, within the bounds of the *foregoing restriction* for the exercise of the power of inquiry." (emphasis supplied) *Id.* at 247.

42. *Id.* at 249.

43. Justice Frankfurter proposed this test to evaluate legislation. Dennis v. United States, 341 U.S. 494, 542 (1951) (concurring opinion).

of the First Amendment freedoms; such restraint may not only extend to the particular witness but to anyone disposed to exercise these rights. Therefore, the public interest in the exercise of First Amendment freedoms must be included on the side of the individual interest and balanced against the interest of the government in obtaining the desired information.[44]

It may be contended that the governmental interest in compelling testimony is much greater than that interest involved in a direct abridgment of these rights by legislation since information obtained by committee inquiry is necessary for an effective legislative process. However, this greater governmental interest will not necessarily prevail over the individual interest here because the individual interest is actually the public interest in the First Amendment freedoms. The *Barsky* court recognized that the governmental interest would be greater in an investigation but did not also recognize that the individual interest would be similarly increased.[45] Therefore, if the court sought to balance these interests, the greater governmental interest readily justified the compulsion of testimony.

The result in the *Barsky* case may have occurred through a combination of circumstances. To say, however, that the court's decision sanctioning compulsion of testimony was clearly erroneous would neither be accurate nor fair to the court. Assuming that their final determinations involved a virtual attempt to balance the interests, it would appear that their decision might have been otherwise had they considered the increased weight to be given the individual interest. Nevertheless, whenever this process is used as a means of evaluating abridgment of First Amendment freedoms, the resulting decision of the court can never be

44. The individual interest here is a combination of the personal interest of the particular individual being examined and the general public interest in the freedoms of the First Amendment. Too often the social interest in the First Amendment is neglected, and the "individual interest" is considered as only encompassing the personal desires of the particular witness.

"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. . . .

"The great trouble with most judicial construction . . . is that this social interest has been ignored and free speech has been regarded as merely an individual interest, which must readily give way like other personal desires the moment it interferes with the social interest in national safety." CHAFEE, *op. cit supra* note 35, at 33-34.

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, *the more imperative is the need* to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people. . . ." (emphasis supplied) De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

45. 167 F.2d 241, 247, 249 (D.C. Cir. 1947).

clearly erroneous. The very nature of the process involves ascribing to the courts the duty of deciding when these freedoms may be validly abridged. The balancing of interests is merely a means by which the court renders a policy decision without the benefit of any concrete norms.

However, the balancing of interests process could serve as a method of determining the validity of compelling testimony if the courts recognize that: To compel testimony in response to questions which concern the exercise of First Amendment freedoms may abridge these rights; the governmental interest in Congressional investigations may be much greater than that in legislation which directly abridges the First Amendment. However, the individual interest here includes the public interest in the First Amendment and is, thus, also correspondingly increased. With these two working principles before them, the courts might be able to deal adequately with this problem, with a view towards eventually establishing ascertainable limits to the Congressional power of inquiry when compelling testimony.

Of course, the better solution to the entire problem would be for Congress to recognize the results of some of its current practices and by self-restrictive legislation eliminate the problem at its source.[46] Many recommendations have been offered to improve current Congressional procedures in investigations which would at least partially alleviate the danger of abridging First Amendment freedoms.[47]

U. C. C. CONTRIBUTIONS TOWARD THE ADOPTION OF A CONTRACTUAL CONCEPT OF WARRANTIES

The law has never provided a clearly defined theory of liability for breach of warranty.[1] At the time of their inception in the common law, warranties were based on the tort action of deceit.[2] They evolved,

46. Dennis v. United States, 341 U.S. 494, 539-540 (1951).

47. Galloway, *supra* note 1. See also Meader, *Limitations on Congressional Investigation,* 47 MICH. L. REV. 775, 778 (1949); Rogers, *Congressional Investigations: The Problem and Its Solution,* 18 U. OF CHI. L. REV. 464 (1951); Stebbins, *Limitations of the Powers of Congressional Investigating Committees,* 16 A.B.A.J. 425, 428 (1930).

1. This is, in part, a result of a failure to objectively evaluate the purposes of warranties in the beginning. Fuller's comment, in relation to damages, is equally applicable to the law of warranties: "We are still all too willing to embrace the conceit that it is possible to manipulate legal concepts without the orientation which comes from the simple inquiry: toward what end is this activity directed?" Fuller and Perdue, *The Reliance Interest in Contract Damages: I,* 46 YALE L.J. 52 (1936).

2. The warranty action based on deceit actually preceded the assumpsit action. Assumpsit was originally considered a tort action but developed shortly into contract. 1 WILLISTON, SALES § 195 (3d ed. 1948).