INDIANA LAW JOURNAL

Volume 31 WINTER 1956 Number 2

The Indiana Law Journal is published quarterly by
THE INDIANA UNIVERSITY SCHOOL OF LAW

Editorial and Publication Office: Indiana University School of Law
BLOOMINGTON, INDIANA

NOTES

INTERIM HEARINGS UNDER IMMUNITY ACT— CONGRESSIONAL POWER VS. INDIVIDUAL RIGHTS

Congressional investigating committees have in the recent past, when confronted with a valid plea against self-incrimination,[1] been checked in their endeavors to exact information.[2] A statutory provision to remedy this impasse[3] by granting a quantum of immunity from prosecution was enacted by the Eighty-third Congress.[4] Because of this expedient's imminent potency to foster encroachments upon individual rights and law en-

1. U.S. CONST. amend. V. The privilege is validly claimed if the circumstances evidence that an answer, or explanation would incriminate, or tend to incriminate the witness. Emspak v. United States, 75 Sup. Ct. 687 (1955); Hoffman v. United States, 341 U.S. 479 (1950); United States v. Burr, (*In re* Willie) 25 Fed. Cas. 38, No. 1469e (C. C. Va. 1807). The privilege is applicable to any proceeding wherein testimony is forced. Counselman v. Hitchcock, 142 U.S. 547 (1896). It does not cover past crimes which cannot be prosecuted, nor disgrace, nor the possibility of prosecution in another sovereignty. Brown v. Walker, 161 U.S. 591 (1896). It protects only the claimant, United States ex rel. Vajtauer v. Immigration Comm'n. 273 U.S. 103 (1927), and therefore may not be invoked on behalf of a corporation, Essgee of China Co. v. United States, 262 U.S. 151 (1922), nor as to records held in a representative capacity, Wilson v. United States, 221 U.S. 361 (1911), nor as to records required by law, Shapiro v. United States, 335 U.S. 1 (1948). See Note, 47 COLUM. L. REV. 838 (1947). Although the privilege may be waived, Rodgers v. United States, 340 U.S. 367 (1951), Blau v. United States, 340 U.S. 159 (1950), every presumption will be exercised against this waiver, Emspak v. United States, *supra,* and the privilege will be liberally construed, Quinn v. United States, 75 Sup. Ct. 668 (1955). For a historical analysis see Morgan, *The Privilege Against Self Incrimination,* 34 MINN. L. REV. 1 (1949); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America,* 21 VA. L. REV. 763 (1935). For a discussion of current problems see GRISWOLD, THE FIFTH AMENDMENT TODAY (1955); TAYLOR, THE GRAND INQUEST (1955); Williams, *Problems of the Fifth Amendment,* 24 FORDHAM L. REV. 19 (1955).

2. Senate and House committee reports abound with instances. For a particularly interesting example, see *Hearings Before the Permanent Subcommittee on Investigation of the Senate Committee on Government Operations,* 83d Cong., 1st Sess., Pt. 2 at 115 (1953). During the year 1954, 266 witnesses before congressional committees invoked the fifth amendment. 101 CONG. REC. 11316 (daily ed. Aug. 3, 1955).

3. AN ACT TO PERMIT THE COMPELLING OF TESTIMONY UNDER CERTAIN CONDITIONS AND GRANT IMMUNITY FROM PROSECUTION IN CONNECTION THEREWITH, 68 Stat. 745 (1954), 18 U.S.C.A. § 3486 (Supp. 1954). Representative Keating, House sponsor of the Act, stated, "It is certainly in our national interest to give our investigating committees and our prosecutors a means of loosening the tongues of important witnesses who resist all inquiries into their activities by taking refuge behind the fifth amendment." 100 Cong. Rec. 13323 (1954).

4. The scope of immunity necessary to equate the constitutional privilege is complete immunity against prosecution by the government compelling the witness to answer. Counselman v. Hitchcock, 142 U.S. 547 (1892). Brown v. Walker, 161 U.S. 591 (1896), held that the fifth amendment does not protect against remote possibilities, such as state prosecutions. *Accord* United States v. Murdock, 284 U.S. 141 (1931).

forcement,[5] Congress delegated to the district courts responsibility for the ultimate safeguard against abuse.[6] The courts thereby are afforded an opportunity to restrain unwarranted uses of legislative power that otherwise would be insulated from judicial review.

The statute provides that, precedent to judicial determination, a plea of the privilege against self-incrimination must be asserted in reply to a question asked before a court, grand jury, or congressional committee.[7] Upon confirmance of the expediency of the action, and notification of the Attorney General, application by the United States Attorney or committee representative for an "order" or "approval" of the immunity grant is made to the district court.[8]

---

5. The first immunity statute gave full protection ". . . for any fact or act touching which he [the witness] shall be required to testify. . . ." 11 STAT. 155 (1857). It was felt at the time that the extent of the immunity would entice the most guilty to testify against their less culpable compatriots. Senator Pugh, CONG. GLOBE, 34th Cong., 3d Sess. 433 (1857). The Indian trust bond swindle that resulted was so flagrant that it was asserted against the desirability of the present act. 100 CONG. REC. 13326 (1954). The clause resulted in an amendment 12 STAT. 333 (1862) REV. STAT. § 859 (1875), 18 U.S.C. § 3486 (1952). This remained law until H.R. 6899 was approved Aug. 20, 1954. In 1868, 15 STAT. 37 (1868) was passed providing the same type of immunity for judicial proceedings. Counselman v. Hitchcock, 142 U.S. 547 (1892), held the statute valid as far as it went; but the privilege could still be claimed. Thereafter, Congress enacted 27 STAT. 443 (1893), 49 U.S.C. § 46 (1952) which supplied a broader immunity including not only testimony and papers, but ". . . any transaction, matter or thing, concerning which he may testify, or produce evidence, . . ." This was applicable only to the Interstate Commerce Commission. Brown v. Walker, 161 U.S. 591 (1896), held this statute broad enough to supplant the privilege. This type of statute was later extensively enacted for agency use. A listing of these subsequent Acts appears in 8 WIGMORE, EVIDENCE § 2281 n. 11 (3d ed. 1940).

6. The Senate bill, as originally introduced, contained no provision for approval of the immunity grant by the Attorney General. S16, 83d Cong. 1st Sess. (1954). The House substitute, H.R. 6899, was applicable to court and grand jury proceedings but left the ultimate decision in the Attorney General. See H.R. REP. No. 2606, 83d Cong., 2d Sess. 1-3 (1954). This procedure was favored by the Attorney General. Brownell, *Immunity from Prosecution v. Privilege Against Self Incrimination,* 28 TUL. L. REV. 1 (1953). The House Committee on the Judiciary narrowed the area of the statute's operation to investigations concerning national defense and security, and the requirement of the district court procedure was added. H.R. REP. No. 2606, 83d Cong., 2d Sess. 2 (1954). See note 16 *infra.*

7. 68 STAT. 745 (1954), 18 U.S.C.A. § 3486 (a) (Supp. 1954). This provision was inserted to clarify whether or not a plea of privilege was necessary to initiate the immunity. Under some previous immunity statutes it was held that mere testimony under subpoena initiated the immunity. Adams v. Maryland, 347 U.S. 179 (1954); United States v. Monia, 317 U.S. 424 (1943). Under others a claim of privilege was a condition precedent to the grant. Heike v. United States, 227 U.S. 131 (1914). For analysis see Dixon, *The Fifth Amendment and Federal Immunity Statutes,* 22 GEO. WASH. L. REV. 447, 554-81 (1954).

8. Witness can only be immunized

(a) ". . . when the record shows that—

(1) in the case of proceedings before one of the Houses of Congress, that a majority of the members present of that House; or

(2) in the case of proceedings before a committee, that two-thirds of the members of the full committee shall by affirmative vote have authorized such witness to be granted immunity under this section . . . after having

The first test of the act, *In re Ullman,*[9] originated in a grand jury investigation of espionage. The case holding analogized the court's function under this enactment to the task of the court in conducting an administrative subpoena hearing.[10] The scope of judicial inquiry in an administrative subpoena hearing[11] could be applied with positive benefit to congressional immunity applications. A court could through this procedure resolve questions vital to the preservation of individual rights in a hearing withdrawn from the intense atmosphere of emergency surrounding investigations in the area of defense and security.[12] The judicial

---

claimed his privilege against self-incrimination . . . and that an order of the United States district court for the district wherein the inquiry is being carried on has been entered into the record requiring said person to testify or produce evidence. Such an order may be issued . . . upon application by a duly authorized representative of Congress or of the committee concerned. . . .

(b) Neither House nor any committee . . . shall grant immunity . . . without first having notified the Attorney General of the United States of such action and thereafter having secured the approval of the United States district court. . . .

(c) Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence . . . in any case or proceedings before any grand jury or court of the United States . . . is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court . . . and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence. . . ." 18 U.S.C.A. § 3486 (Supp. 1954).

9. 128 F.Supp. 617 (S.D.N.Y. 1955), *aff'd sub nom.,* United States v. Ullman, 221 F.2d 760 (2d Cir. 1955), *cert. granted,* 75 Sup. Ct. 882 (1955). For background of United States v. Ullman, *supra,* see Dixon, *Immunity and Separation of Powers,* 23 GEO. WASH. L. REV. 627, 641-42 (1955).

10. *In re* Ullman, 128 F.Supp. 617 627 n. 22 (S.D.N.Y. 1955). The witness contended that the court must perform a non-judicial, discretionary function and that thereby the hearing was unconstitutional. This is a view that is shared by several writers. Dixon, *supra* note 9, at 511-14; Comment, 22 U. CHI. L. REV. 657, 671 (1955); Note, 55 COLUM. L. REV. 630, 657 (1955). The court held that under the court and grand jury provisions of the Immunity Act no discretion was vested in the court, 18 U.S.C.A. § 3486 (c) (Supp. 1954), but recognized that the words "may order" and "approval of the court" referring to congressional grants, *Id.* at § 3486 (a) (2), (b), may vest discretion in the court. *In re* Ullman, *supra* at 624. Citing Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894), the court concluded that the hearing was a judicial function. *In re* Ullman, *supra* at 627 n. 22.

11. "The holding in the Brimson case that a proceeding for judicial enforcement of a subpena is a 'case' or 'controversy' indicates that the judicial function in such a proceeding involves more than automatic issuance of an order. A court may always consider such questions as unreasonable searches and seizures, self-incrimination, undue breadth of the subpena, improper inclusion of irrelevant information, administrative authority to make the particular investigation, power to make the particular investigation, power to require disclosures concerning activities outside the agency's regulatory authority, the rule of the concept of business 'affected with a public interest,' and proper issuance of the particular subpena." DAVIS, ADMINISTRATIVE LAW § 37, 123-24 (1951).

12. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on

considerations proposed by Judge Weinfeld in the *Ullman* case would encompass the authorization of the investigation,[13] the procedural validation of the request,[14] and other legal objections.[15] The latter category would seem to include claims of interference with constitutional rights of witnesses.[16]

All these assertions occur in statutory contempt of Congress trials[17] as well as administrative subpoena hearings.[18] Both the hearing and the trial are the result of a contention by an individual that the proposed inquiry is outside the field of authorized investigation[19] or that the constitutional power of the interrogator to compel compliance is disputed;[20] but because of the traditional contempt power of Congress,[21] not shared

---

the outcome of no elections." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

13. *In re* Ullman, 128 F.Supp. 617, 625 (1955) (that the proceedings are within the statutorily authorized area). This would seem to allow consideration of the committee resolution.

14. *In re* Ullman, *supra* note 13. The court determines that the United States Attorney has certified his belief that the grant of immunity would best serve the public interest and that the Attorney General approves of this decision. If this procedure were transferred to congressional grants, the court would determine that the record vote was of the required majority to signify congressional certification of the public interest and that the Attorney General concurred.

15. "No other legal objection exists." *In re* Ullman, *supra* note 14. When an order is sought to force a witness to testify in exchange for immunity against prosecution authorized by statute, he is entitled to advance before the court any other ground, legal or constitutional, for continued refusal to answer.

16. For objections which the court may always consider in an administrative subpoena hearing, see note 11 *supra.*

17. Quinn v. United States, 75 Sup. Ct. 668 (1955) (manner of claim of privilege). Bart v. United States, 75 Sup. Ct. 712 (1955) (necessity of ruling on the objection); United States v. Rumely, 345 U.S. 41 (1953) (question in relation to the authorizing resolution); United States v. Bryan, 339 U.S. 323 (1950) (proof of the quorum); Sinclar v. United States, 279 U.S. 263 (1929) (intentional refusal of information); McGrain v. Daugherty, 273 U.S. 135 (1927) (power of Congress to compel appearance); Aiuppa v. United States, 201 F.2d 287 (6th Cir. 1952) (power of Congress to investigate area).

18. DAVIS, *op. cit. supra* note 11, at § 37.

19. United States v. Rumely, 345 U.S. 41 (1953) (congressional investigation); Jones v. S.E.C., 298 U.S. 1 (1936) (administrative investigation).

20. McGrain v. Daugherty, 273 U.S. 135 (1927) (congressional power); Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894) (administrative power).

21. Congress has express contempt power to punish its members. U.S. CONST. art. I, § 5, cl. 2. It is also judicially recognized that it has power to punish an impairment of the integrity of Congress Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821) (bribery attempt); but the imprisonment for the contempt could last only the length of the session. *Id.* at 231. In seeking to overcome this short term punishment legislation was enacted as part of the immunity bill. 11 STAT. 155 (1857). See note 5 *supra.* It provided that, after being summoned, a refusal to appear or to answer pertinent questions, or to produce papers before an investigating committee, was a misdemeanor with a sanction of a fine and imprisonment. This was sustained as constitutional by *In re* Chapman, 166 U.S. 661 (1897). It had been held however that as the powers of Congress are dependent upon the Constitution the investigation must be within the power of Congress. Kilbourn v. Thompson, 103 U.S. 168 (1880) (investigation held outside the power of Congress). This decision was attacked on its historical analysis of the origins of the

by administrative bodies,[22] the dissentient committee witness must risk imprisonment to obtain the adjudication available in a court hearing on an administrative subpoena. Inasmuch as the immunity statute enables Congress to compel testimony beyond limits previously recognized, the individual fairly deserves the impartial interim hearing in the district court to determine, without a congressional contempt citation as the outcome of his judgment, the existence of a duty to testify.[23]

The constitutionality of this hearing has been questioned.[24] One contention is that the court would be required to make a strictly political decision, violative of the separation of powers, if the Attorney General, upon notice of the intended grant, disagreed with the vote of the investigating body as to whether a grant of immunity in a particular case would serve the public interest.[25] It is submitted that this constitutional question could be averted. Faced with this disagreement the court conceivably could maintain that, since the variance existed, the grant of immunity was not a matter of verified public necessity and on that ground refuse to issue the "order" or "approval" necessary to the immunization.[26] This practice would vest in the Attorney General the power to halt legislative invasions of law enforcement,[27] and allow the court to avoid the strictly

congressional contempt power. Landis, *Constitutional Limitations on the Congressional Power of Investigation,* 40 HARV. L. REV. 153 (1926); Potts, *Power of Legislative Bodies to Punish for Contempt,* 74 U. PA. L. REV. 691 (1926). The power of contempt may be extended to investigations that have as their object fact gathering for a legislative purpose. McGrain v. Daugherty, 273 U.S. 135 (1927). The legislative purpose must be presumed when the general subject is one concerning which Congress can legislate, United States v. Orman, 207 F.2d 148, 157 (3d Cir. 1953); but where the questions and documents sought are not pertinent on their faces to the authorized investigation, the United States in a contempt proceeding must prove by other evidence the relation of the questions, documents and the particular witness to the investigaion. *Id.* at 155. See Hitz, *Criminal Prosecution for Contempt of Congress,* 14 FED. B.J. 139 (1954).

22. An agency ". . . could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment." Interstate Commerce Comm'n v. Brimson, 154 U.S. 447, 485 (1894); but judicial contempt power can be used to compel obedience in a hearing that is a constitutional case or controversy, *id.* at 489.

23. Taylor, *Judicial Review of Legislative Investigations,* 29 NOTRE DAME LAW. 242, 279-82 (1954); Keating, *Protection for Witnesses in Congressional Investigations,* 29 NOTRE DAME LAW. 212, 223-24 (1954).

24. Dixon, *Immunity and the Separation of Powers,* 23 GEO. WASH. L. REV. 501, 627 (1955); Comment, 53 MICH. L. REV. 858, 864-71 (1955); Comment, 22 U. CHI. L. REV. 657 (1955); Note, 55 COLUM. L. REV. 632, 654-58 (1955).

25. Comment, 22 U. CHI. L. REV. 657, 670-71 (1955).

26. "It [H.R. 6899] requires, in the case of congressional investigations, virtual agreement between all three branches of Government—legislative, executive, and judicial—before an effective grant of immunity is conferred." Representative Keating, 100 CONG. REC. 13324 (1954).

27. This was the type of power sought by the Department of Justice, and incorporated in H.R. 6899 before change by the House Committee on the Judiciary. See note 6 *supra* and accompanying text.

political decision of which branch's estimation of the public necessity should prevail.[28]

Presented with consistent compliance by the Department of Justice with congressional requests for the immunity grant, there is a real danger that the hearing would become a perfunctory judicial acquiescence to the extension of legislative inquiry power[29] unless the nature and scope of the traditional burden of the courts under the separation of powers is recognized and assumed.[30] The tripartite system of government was instituted as a method of preserving individual freedom by limiting governmental power,[31] and not merely as an expedient division of labor.[32]

Under this structure the people have traditionally looked to the courts for the enforcement of their individual rights.[33] Early in our constitutional history Hamilton realized that the courts, in their powers of review,

28. If the public necessity for the immunization of an individual is not perfectly clear, then a refusal to entertain the hearing until the congressional body and the Attorney General were in accord would be, in actuality, a judicial determination that in the absence of a clear need for the information to satisfy the public necessity in this manner, the right will not be invaded. See Barsky v. United States, 167 F.2d 241, 249 (D.C. Cir. 1947), *cert. denied,* 334 U.S. 843 (1948) (public necessity was clear).

29. "[W]here there are competing demands of the interests of government and of liberty under the Constitution, and where the performance of governmental functions is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essentials of both . . . it is the function of the courts to determine whether such accommodation is really possible." Minersville District v. Gobitis, 310 U.S. 586, 603 (1940) (dissent by Mr. Justice Stone). "The framers were not unaware that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection." *Id.* at 604-5.

30. "In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation." Schneider v. State, 308 U.S. 147, 161 (1939). "And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." *Ibid.*

31. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (judicial review). "Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties." Minersville District v. Gobitis, 310 U.S. 586, 600 (1939). See TAYLOR, *op. cit. supra* note 1 at 30-57.

32. Myers v. United States, 272 U.S. 52, 293 (1926) (dissent).

33. Toth v. Quarles, 24 U.S.L. WEEK 4005 (U.S. Nov. 8, 1955) (right to trial by civil authority); McCollum v. Board of Education, 333 U.S. 203 (1948) (freedom of religion); DeJonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); Near v. Minnesota, 283 U.S. 697 (1931) (freedom of the press) Agnello v. United States, 269 U.S. 20 (1925) (searches and seizures); Schenck v. United States, 249 U.S. 47 (1919) (freedom of speech); Brown v. Walker, 161 U.S. 591 (1896) (self-incrimination); Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866) (habeas corpus); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (ex post facto).

protect the rights of the people from legislative encroachment.[34] Mr. Chief Justice Warren recently reiterated this position by noting that the power of Congress to investigate, while co-extensive with the power to legislate, is not unlimited.[35] Constitutionally forbidden areas of legislation, the specific guarantees of the Bill of Rights, and the necessity to relate the investigation to a valid legislative purpose restrict the extent of the legislative power.[36] Moreover, this power is not to be confused with that of law enforcement assigned to the executive and judiciary.[37] As these limits of congressional investigative power are successfully enforceable only through judicial power,[38] justification for such an extension of this investigative power as the immunity grant involves should be determined in the courts. A balance of interests may there be struck, by use of judicial standards, between the individual right and the public demand for information.[39]

The climate of opinion which engendered the Immunity Act, a concern for the protection of our democratic government through the use of internal security measures,[40] has as its correlate a tendency to minimize the interests of individuals when they become an impediment to the gratification of the many.[41] This propensity, obfuscating the fact that individual freedom is as much a tenet of our society as majority rule, is manifest in the standards which are used to determine whether a particular investigation or proposed question is a justified use of congres-

34. "It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." THE FEDERALIST No. 78 at 398 (Beloff ed. 1948) (Hamilton). "Indeed there is a sense in which it may be said that the whole efficacy and reality of constitutional government resides in its courts." WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 18 (7th ed. 1907).

35. Quinn v. United States, 75 Sup. Ct. 668, 672 (1955).

36. *Ibid.*

37. *Ibid.*

38. Another opportunity for the courts to enforce the limitations of congressional inquiry power was provided in H.R. 780 sponsored by Representative Keating and passed by the House, 101 CONG. REC. 2473 (daily ed. Mar. 15, 1955). This bill incorporates the court hearing procedure used by administrative agencies. Congressional committees would, under this bill, be able to seek judicial enforcement of their subpoenas. This bill will avert the necessity for the cumberous, contempt proceeding, complement the immunity statute and provide a "prompt day in court" for "any witness who really feels he is being treated unfairly." *Ibid.* See WILSON, *op. cit. supra* at 142-172.

39. Representative Keating, 100 CONG. REC. 13323-24 (1954).

40. See GRISWOLD, *op. cit. supra* note 1, at 70-73.

41. Aiuppa v. United States, 201 F.2d 287 (6th Cir. 1952); United States v. Kleinman, 107 F.Supp. 407 (D.C.D.C. 1952). Voorhis, *Congressional Investigations: Inner Workings,* 18 U. CHI. L. REV. 455 (1951).

sional power.[42]

The area of individual freedom sought to be invaded dictates the specific standard of justification to be applied. If the question merely tends to embarrass, degrade, or harass the witness, a tenuous connection with a legislative purpose is all that need be shown.[43] If the interrogation seeks to probe the political beliefs of the witness, some version of the "clear and present danger" standard is applied to measure the propriety of the intrusion.[44] Congress may, through use of its inherent contempt power, infringe upon rights of privacy protected by the fourth amend-

42. As most fundamental rights are considered conditional, Barsky v. United States, 167 F.2d 241, 248 (D.C. Cir. 1947), *cert. denied,* 334 U.S. 843 (1948), the courts determine from an analysis of supporting authority whether the public necessity should prevail. *Id.* at 247. In the absence of a showing of sufficient public necessity the fundamental freedoms are held inviolate. Rumely v. United States, 197 F.2d 166 (D.C. Cir. 1952), *aff'd on other grounds,* 345 U.S. 41 (1953). The danger inherent in confirming congressional power to investigate an area, Barsky v. United States *supra* at 247, is that individual rights of all are decided in one case without distinction as to each individual's relation to the problem. See Lawson v. United States, 176 F.2d 49, 52 (D.C. Cir. 1949). Moreover, it is extremely difficult at times to distinguish mere political liberalism from communistic adherence. "I cannot deem it within the rightful authority of Congress to probe into opinions that involve only an argumentative demonstration of some coincidental parallelism of belief with some of the beliefs of those who direct the policy of the Communist Party, though without any allegiance to it. To require oaths as to matters that open up such possibilities invades the inner life of men whose compassionate thought or doctrinaire hopes may be as far removed from any dangerous kinship with the Communist creed as were those of the founders of the present orthodox political parties in this country." American Communications Ass'n v. Douds, 339 U.S. 382, 442 (1950). These difficulties result from the confirmance or non-confirmance of the congressional power rather than a determination of whether one person's individual rights are or are not outweighed on the basis of necessity.

43. The question is a legitimate exercise of congressional power if it is shown to be pertinent to the authorized investigation, United States v. Rumely, 345 U.S. 41 (1953); Sinclair v. United States, 279 U.S. 263 (1929); United States v. Orman, 207 F.2d 148 (3d Cir. 1953); Marshall v. United States, 176 F.2d 473 (D.C. Cir. 1949), *cert. denied,* 339 U.S. 933 (1950); Trumbo v. United States, 176 F.2d 49 (D.C. Cir. 1949); United States v. Keeney, 111 F.Supp. 233 (D.C.D.C. 1953); United States v. Di Carlo, 102 F.Supp. 597 (N.D. Ohio, 1952); and it is shown that the investigation is in the furtherance of a valid legislative purpose, McGrain v. Daugherty, 273 U.S. 135 (1927) *In re* Chapman, 166 U.S. 661 (1897); Kilbourn v. Thompson, 103 U.S. 168 (1880); Marcello v. United States, 196 F.2d 437 (5th Cir. 1952); Lawson v. United States, 176 F.2d 49 (D.C. Cir. 1949); Barsky v. United States, 167 F.2d 241 (D.C. Cir. 1948); United States v. Josephson, 165 F.2d 82 (2d Cir. 1947), *cert. denied,* 333 U.S. 838 (1948); Townsend v. United States, 95 F.2d 352 (D.C. Cir.), *cert. denied,* 303 U.S. 664 (1938); United States v. Kleinman, 107 F.Supp. 407 (D.C.D.C. 1952).

44. One standard was enunciated in Barsky v. United States, 167 F.2d 241, 247 (D.C. Cir. 1947), *cert. denied,* 334 U.S. 843 (1948). "There is a vast difference between the necessities for inquiry and the necessities for action. The latter may be only when the danger is clear and present, but the former is when danger is reasonably represented as potential." *Ibid.* It has been contended that such probing had no purpose other than exposure of the political beliefs and affiliations of the witness. United States v. Josephson, 165 F.2d 82 (2d Cir. 1947), *cert. denied* 333 U.S. 838 (1948). The court discounted this argument by observing that, "[T]he authorizing statute contains the declaration of Congress that the information is for a legislative purpose and that fact is thus established for us." *Id.* at 89.

ment as long as the subpoena seeks information within the authorization of the investigation.[45] However, administrative agencies, which must rely on judicial contempt power, have been required to show probable cause of law violation before a judicial subpoena is granted.[46]

The standard which must be met to invade absolute rights, such as the privilege against self-incrimination, is a complete substitution for intended benefits.[47] Immunization from federal prosecution resulting from the incriminating evidence given was narrowly held to be an adequate substitute for the effect of this privilege.[48] Apart from self-incrimination, the interlacing of the specific and general rights of the people under the Constitution collectively establish a right of individual integrity.[49]

45. REV. STAT. § 102, as amended, 2 U.S.C.A. § 192 (Supp. 1954); United States v. Bryan, 339 U.S. 323 (1950); United States v. White, 322 U.S. 694 (1944); Jurney v. McCracken, 294 U.S. 125 (1935); Hale v. Henkel, 201 U.S. 43 (1906), Fleischman v. United States, 174 F.2d 519 (D.C. Cir 1949), *rev'd. on other grounds,* 339 U.S. 349 (1950); Fields v. United States, 164 F.2d 97 (D.C. Cir. 1947); United States v. Flaxer, 113 F.Supp. 669 (D.C.D.C. 1953); United States v. Kamp, 102 F.Supp. 757 (D.C.D.C. 1952); United States v. Cohen, 101 F.Supp. 906 (N.D. Cal. 1952).

46. Jones v. S.E.C., 298 U.S. 1 (1935); F.T.C. v. American Tobacco Co., 264 U.S. 298 (1924); Hale v. Henkel, 201 U.S. 43 (1906); Boyd v. United States, 116 U.S. 616 (1886); Bowles v. Insel, 148 F.2d 91 (3d Cir. 1945). *But see* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

47. Hale v. Henkel, 201 U.S. 43 (1906). See note 1 *supra.*

48. Brown v. Walker, 161 U.S. 591 (1896) (5-4 decision). Two English cases were cited as precedent for the holding that state prosecution was a remote possibility. King of Two Sicilies v. Willcox, 7 State & N.S. 1049 (Eng. 1851) (prosecution by foreign sovereignty); Reg. v. Boyes, 121 Engl. Rep. 730 (1861) (possibility of parliamentary impeachment after pardon by the Crown). There is a real question as to whether the hazard of prosecution by a state is remote inasmuch as testimony compelled by the Immunity Act is eminently relevant in state sedition prosecutions. See Commonwealth v. Nelson, 377 Pa. 58, 104 A.2d 133 (1954), *cert. granted,* 75 Sup. Ct. 58 (1955). There is evidence of a desire "to close that loophole." Senator McCarran, 99 CONG. REC. 8341 (1953) (discussing S. 16) but there is some doubt as to whether it has been accomplished. See H.R. REP. No. 2606 83d Cong. 2d Sess. (1954), Representative Celler, 100 CONG. REC. 13326 (1954) (discussing H.R. 6899). This point has been put in issue again. "Defendant [Ullman] asks us to modify this doctrine [Brown v. Walker] in the light of new circumstances which have since arisen. [T]he argument must be addressed not to our ears but to eighteen others in Washington, D. C." United States v. Ullman, 221 F.2d 760, 761-62 (2d Cir.), *cert. granted,* 75 Sup. Ct. 882 (1955).

49. Whether the fourth amendment is limited to "material things," Olmstead v. United States, 277 U.S. 438, 464 (1928), or extends to feelings, emotions, sensations, and beliefs becoming "the right to be let alone," *id.* at 478 (dissent), it must be admitted that these latter rights are existent in our society. It has been unsuccessfully argued that these vital rights lie in the first amendment. See note 44 *supra.* But the question of whether these individual rights are sufficiently inviolable as to preclude certain types of congressional questioning has never been answered by the Supreme Court. For the latest avoidance, see Quinn v. United States, 75 Sup. Ct. 668 (1955). The argument has been broached in a concurring opinion. "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." United States v. Rumely, 345 U.S. 41, 58 (1952). See Nutting, *Freedom of Silence* 47 MICH. L. REV. 181, 213-22 (1948); Note, 21 GEO. WASH. L. REV. 602 (1953). For general background see the UNIVERSITY OF CHICAGO LAW SCHOOL CONFERENCE SERIES No. 13, CONFERENCE ON FREEDOM AND THE LAW (1953). These rights may be in the future attached to the ninth amendment. BARTH, GOVERN-

This right, though invaded by a compulsion to testify, is not protected by a grant of immunity. Immunization is incapable of protecting a witness from disgrace and socio-economic sanctions from which, to a variant degree,[50] he would be spared by the silence normally following the claim of the absolute privilege.[51]

If Congress determines that public necessity demands information of so specific a nature that it may be gained only by abrogating the absolute privilege against self-incrimination, it should be shown in the hearing that it is probable that the desired information is held by the pleading witness. This would create a relationship between the individual and the legislative problem which would serve as a foundation for the extension of coercive power to compel testimony.[52] If the committee could not establish this probability through its existent investigatory power, it would be unreasonable to extend the power in the mere hope that the need will be met.

As long as Congress employed only its traditional contempt power to compel testimony, the court was precluded by recognition of the legislative purpose from questioning the general duty of the witness to testify.[53] This situation no longer obtains. The statutory necessity for the court "order" or "approval" whether it involves employing judicial contempt

---

MENT BY INVESTIGATION, 11 (1955); PATTERSON, THE FORGOTTEN NINTH AMENDMENT, (1955).

50. It is recognized that many doors are closed to the witness merely by pleading the privilege against self-incrimination. Byse, *Teachers and the Fifth Amendment,* 102 U. PA. L. REV. 871 (1954); Finklehor, Stockdale, *The Professor and the Fifth Amendment,* 16 U. PITT. L. REV. 344 (1955); Brown, Fasset, *Security Tests for Wartime Workers: Due Process Under the Port-Security Program,* 62 YALE L.J. 1163 (1953); Countryman, *Loyalty Tests for Lawyers,* 13 LAW. GUILD REV. 149 (1953); Note, 35 B.U.L. REV. 185 (1955); Note, 38 MARQ. L. REV. 8 (1954); 4 CATHOLIC U. L. REV. 51 (1954). *Compare* TAYLOR *op. cit. supra* note 1, at 210; Williams, *Problems of the Fifth Amendment,* 24 FORDHAM L. REV. 19, 42 (1955).

51. It would be a hollow grant of immunity if the witness coerced to testify were subjected to existing federal and state sanctions. See FUND FOR THE REPUBLIC, THE DIGEST OF THE RUBLIC RECORD OF COMMUNISM IN THE UNITED STATES (1955). This is one of the issues before the court in United States v. Ullman, 221 F.2d 760 (2d Cir.), *cert. granted,* 75 Sup. Ct. 882 (1955). See the concurring opinion by Circuit Court Judge Clark. *Id.* at 763.

52. Persons have a right to be exempt from all unauthorized, arbitrary, or unreasonable inquiries into their personal and private affairs. Sinclair v. United States, 279 U.S. 263, 292 (1929). Moreover, while it may be that Congress may have committee hearings to inform the public, it has never been held that the committee may use contempt power without a legislative purpose. United States v. Kleinman, 107 F. Supp. 407 (D.C.D.C. 1952). See TAYLOR, *op. cit. supra* note 1, at 209; King, *Immunity for Witnesses,* 40 A.B.A.J. 377 (1954); Nutting, *Freedom of Silence,* 47 MICH. L. REV. 181, 218-22 (1949). There is cause for concern that this Immunity Act would be used merely to expose. In debate over S. 16 Senator Ferguson stated, ". . . it [immunization] would be the greatest legal, constitutional weapon we could have for exposure and prosecution of subversive activities such as communism." 99 CONG. REC. 8341 (1953).

53. See note 43 *supra.*

power or operates merely as a procedural check upon the further use of congressional contempt power,[54] lends itself to judicial perusal of the individual duty to further testify. If the witness, the legislature, and the Attorney General desire the grant of immunity, the court still must consider the proof of probability before an order will be issued.[55] The timely court hearing would lend form and order through a stabilizing procedure allowing individual rights to be synchronized with the demands of representative government.

The hearing on the immunity grant is a feasible practice in which the constitutional basis for government can be made operative. In the hearing the individual's duty to testify may be established upon an individual, *ad hoc* basis. A corresponding power of Congress to coerce incriminatory answers can be extended for one witness and returned to its normal scope. This utilization of the hearing recognizes that the legislative and executive branches have decisions to make that are based on the political expediency and immediacy of the need, and that the judiciary assumes the burden of timely enforcement of rights under a living Constitution.[56] The interaction of interests in an impartial judicial hearing affords assurance that the most information will be gained with the least sacrifice of individual rights.

THE RIGHTS OF ALIENS IN DEPORTATION PROCEEDINGS

Aliens, facing deportation, although ostensibly guaranteed due process of law by the courts,[1] have in the past received strikingly little

54. It would be difficult to convincingly demonstrate that under the Immunity Act, note 3 *supra,* in contrast to H.R. 780, the court was not to use judicial contempt power to enforce orders issuing from both proceedings. It is believed significant that Representative Keating sponsored both the Act and the Bill. See Keating, *supra* note 23 at 223-224.

55. In this manner the court may be best assured that "the immunity power is not frittered away," *In re* Ullman, 128 F.Supp. 617, 625 (S.D.N.Y. 1955), and that the "public necessities" do outweigh the private interests. Barsky v. United States 167 F.2d 241, 249 (D.C. Cir. 1947).

56. See note 34 *supra,* and accompanying text.

1. United States *ex rel.* Vajtauer v. Commissioner of Immigration, 273 U.S. 103 (1927); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923); Japanese Immigrant Case, 189 U.S. 86 (1903). "[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law'. . . ." *Id.* at 100. Sometimes the courts while speaking in terms of due process have actually done little more than rubber-stamp the action of the agency enforcing the deportation laws. "It is true that she [petitioner] pleads a want of knowledge of our language; that she did not understand the nature and import of the questions propounded to her; that the investigation made was a 'pretended' one;