> another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. For we are here not dealing with the broad terms of the Constitution 'as a continuing instrument of government' but with part of a legislative code 'subject to continuous revision with the changing course of events'." *Addison* v. *Holly Hill Co.,* 322 U.S. 607, 617.

Lastly, in the *Peters* case, the application of the ratification principle would have brought the Court to the determination of crucial constitutional issues; that same difficult duty would devolve upon the Court here. "Indeed, adjudication here, if it were necessary, would affect not an evanescent policy of Congress, but its power to inform itself, which underlies its policy-making function. Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits." *United States* v. *Rumely,* 345 U. S. at 46.

It would appear difficult to say on the evidence here that the House has, by any ratification, "unequivocally" authorized exposure activities of the Committee in areas far removed from propaganda and propaganda activities. Although the preponderant position in the debates was undoubtedly an approval of the Committee's asserted broad powers, we have seen that there was a clearly-expressed minority view even among proponents of the Committee. While there can be little question that the House knew of the Committee's interpretation of its resolution, mere knowledge cannot be deemed ap-

proval in the face of this vigorous dissent. Moreover, it is one thing to regard renewal of authority or appropriation of funds with knowledge of the interpretation put upon that authority by a committee as a ratification of that interpretation if such interpretation could reasonably under all the circumstances be derived from the words used in the grant of authority. But it would be dangerous to imply any ratification of authority which could not reasonably be read into the language used by the House. In the instant case the words of authority cannot without distortion be construed to authorize the exposure and branding of individuals as public enemies for the sake of exposure and retribution (p. 80, *supra*). When these considerations are weighed together with the Court's policy to avoid constitutional questions wherever possible, the argument for ratification does not appear to lead irresistibly to a conclusion that there was an effective broadening of the Committee's authority beyond the fair intendment of the language. This Court has even suggested that a strained construction of language may be proper to eliminate difficult constitutional questions and to avoid ascribing to the Congress an intent to authorize an inquiry of dubious limits or procedures susceptible of grave abuse. *United States* v. *Rumely,* 345 U.S. at 47. It can certainly be questioned whether there would be any substantial strain in a rejection of congressional ratification on the facts presented here.

In view of the doubts cast upon the application of the doctrine of ratification to the facts at bar, this Court may deem it appropriate to avoid the constitutional issues already presented by finding against ratification and holding the questions petitioner refused to answer outside the scope of the Committee's authorization.

IV

The Compelled Disclosures Sought by the Committee Abridge Rights Protected by the First Amendment

We believe that preceding sections of this brief (Points II A, B, C, D) fully support the proposition that the questioning of petitioner by the Committee was an exercise of its asserted purpose of exposure. If, however, this Court were to reject petitioner's argument that the Committee's purpose was exposure rather than investigation in aid of a valid legislative purpose, it does not follow that the Committee could constitutionally require petitioner to reveal the past political affiliations of his one-time associates.[81] The absence of a legislative *purpose* clearly invalidates Committee action (Points I, II, III); its presence cannot validate governmental infringement on constitutional liberties. There still remains the question whether there was a Congressional *need* for the information sought and, if so,

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[81] The affiliations in question were no less political because they were with the Communist Party. Counsel for petitioner recognize that many leaders of the Party have been convicted of conspiracy under the Smith Act and that the Congress has declared the Party an agency of a hostile foreign power (see Communist Control Act of 1954, § 2, 68 Stat. 775). But these aspects of the Party do not preclude legitimate political association for the avowed purposes of the Party. Certainly, during the years from 1942 to 1947, the Party was a legal political party whose candidates appeared on the ballot in local and national elections. As this Court said in *Communications Assn.* v. *Douds,* 339 U.S. 382, 392:

> "Communists, we may assume, carry on legitimate political activities . . . By exerting pressures on unions to deny office to Communists and others identified therein, § 9(h) . . . has the further necessary effect of discouraging the exercise of political rights protected by the First Amendment."

Furthermore, there is not presented here any refusal to testify concerning seditious or criminal activity or advocacy. Petitioner only refused to identify persons as former members of the Party; the Committee evinced no interest in anything beyond the names of former Party members. Under these circumstances, nothing is involved here other than presumably "legitimate political activities".

whether the need was sufficiently urgent and exigent to justify the infringement upon the First Amendment rights involved. We turn, therefore, to an examination of the question whether the Committee's compelled disclosures infringed upon First Amendment rights and if so, whether there was such a pervasive, overriding Congressional need for the information sought from petitioner as to remove the enforced disclosures from the protection of the First Amendment.

A. *First Amendment Protections Apply to Testimonial Disclosures Sought by Congressional Committees*

Even before this Court's decision in *United States* v. *Rumely,* 345 U.S. 41, it was manifest that congressionally-compelled testimonial disclosures are subject to First Amendment prohibitions. For congressional inquiry, like congressional legislative action, can have the effect of abridging the individual's freedom to espouse and express political views and to associate with others for political purposes—political rights which lie at the very foundation of the guarantees of the First Amendment.[82] This Court's historic decisions have given freedom of political belief, expression and association effective, paramount constitutional significance.[83] Nor does the Amendment merely preclude prohibition of the exercise of these rights; it likewise precludes "indirect discouragements"[84] flowing from

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[82] See, e.g., *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152, n. 4; *Stromberg* v. *California,* 283 U.S. 359, 369. And see concurring opinion of Mr. Justice Brandeis in *Whitney* v. *California,* 274 U.S. 357, 374-78.

[83] See, e.g., *Wieman* v. *Updegraff,* 344 U.S. 183; *Thomas* v. *Collins,* 323 U.S. 516; *De Jonge* v. *Oregon,* 299 U.S. 353; *United States* v. *C.I.O.,* 335 U.S. 106, 129 (concurring opinion). *Cf. Communications Assn.* v. *Douds,* 339 U.S. 382, 393.

[84] *See Communications Assn.* v. *Douds,* 339 U.S. 382, 402.

restrictive governmental action of various kinds,[85] including those derived from governmentally-compelled public disclosures.[86] Thus, the decisions before *Rumely* clearly foreshadowed this Court's view that congressionally-compelled testimonial disclosures could present weighty First Amendment issues.

Any doubt as to the applicability of the First Amendment to congressional inquiries was resolved by this Court's declaration in *United States* v. *Rumely,* 345 U. S. 41, that compelled disclosure before congressional investigating committees of political activities and associations of individual citizens is subject to the prohibitions of the First Amendment.[87] There a congressional committee sought to compel identification of persons who made "bulk purchases" of books from an organization known as the "Committee for Constitutional Government". In deference to its "duty to avoid a constitutional issue" (p. 45) and since such compelled identification raised "doubts of constitutionality in view of the prohibitions of the First Amendment" (p. 46), a majority of this Court construed the Com-

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[85] E.g.: *Taxation: Murdock* v. *Pennsylvania,* 319 U.S. 105; *Grosjean* v. *American Press Co.,* 297 U.S. 233. *Licensing: Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495; *Kunz* v. *New York,* 340 U.S. 290. *Denial of "privileges": Wieman* v. *Updegraff,* 344 U.S. 183; see Willcox, *Invasions of the First Amendment Through Conditioned Public Spending,* 41 Cornell L. Q. 12.

[86] *Thomas* v. *Collins,* 323 U.S. 516, 538-40. *Cf. United States* v. *Harriss,* 347 U.S. 612.

[87] This principle has been accepted by the court below since its decision in *Barsky* v. *United States,* 167 F. 2d 241 *cert. den.* 334 U.S. 843. See *Rumely* v. *United States,* 197 F. 2d 166, 174. The compelling reasons for the applicability of the First Amendment are examined in some detail by Mr. Justice Black and Mr. Justice Douglas, concurring, in *United States* v. *Rumely,* 345 U.S. 41, 48, Judge Clark, dissenting, in *United States* v. *Josephson,* 165 F. 2d 82, 93 (C.A. 2, 1947) *cert. den.* 333 U.S. 838, and Judge Edgerton, dissenting, in the *Barsky* case. See Comment, *Legislative Inquiry into Political Activity,* 65 Yale L. J. 1159.

mittee's authorization not to include power to compel such identification. The Court stressed, in words applicable here, that the First Amendment required "accommodation of these contending principles—the one underlying the power of Congress to investigate, the other at the basis of the limitation imposed by the First Amendment . . . " (p. 44).

Although the *Rumely* case thus makes clear that congressionally-compelled testimonial disclosures are subject to First Amendment prohibitions, this Court has not yet elaborated guiding criteria for the "accommodation of these contending principles"—the principles of the First Amendment and of the congressional power to require information as a basis of legislation.[88] Although not directly applicable in the present context, the "clear and present danger" test and a more recent formula approved by this Court (see *Dennis* v. *United States,* 341 U.S. 494, 510), may afford some guides and analogues outside the area for which they were devised. In measuring the constitutionality of congressional interrogation, they at least serve as a reminder of the preferred position of First Amendment rights.

Whatever formula may ultimately be devised for accommodating the power of congressional inquiry with First Amendment principles, there will always have to be a weigh-

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[88] The conflict in policies here is not, as it is sometimes denominated, merely a conflict between Congressional rights and "private rights." Congressionally-enforced disclosures may discourage that free political activity and association which safeguards the democratic system itself. Beyond the protection of "private rights", this Court has always been sensitive to the vital public interests secured by the free exercise of First Amendment freedoms. It has protected those interests even where the party asserting them could show little or no injury to his own constitutional rights. See, e.g., *Murdock* v. *Pennsylvania,* 319 U.S. 105; *Thornhill* v. *Alabama,* 310 U.S. 88; *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495; *Winters* v. *New York,* 333 U.S. 507.

ing of the respective interests in the particular case.[89] Thus, while future close cases may require this Court to establish more particular criteria for the weighing of these interests, no such precise criteria are necessary here, for petitioner's First Amendment claims must be honored under any fair balance of the respective principles involved in the instant case. The interests involved must be judicially weighed and the substantiality of the need for the disclosure established. *It is just this balancing of conflicting principles that the court below refused to undertake.*

We turn now to a consideration of these conflicting interests and submit to the Court that on this record there was no showing of legislative need for the information petitioner refused to give the Committee, whereas, on the other hand, requiring petitioner to identify his former associates as past members of the Communist Party constituted a far-reaching infringement upon vital First Amendment rights.

B. *The Infringement on First Amendment Rights*

Petitioner and the persons whom he was required to identify as former Communist Party members enjoy the constitutional right to engage in political activities and undertake political affiliations, free from unwarranted enforced public revelation. Apart from any more general right of privacy which this Court has indicated may enjoy constitutional protection,[90] it is clear that the First

[89] This, of course, is the import of the *Rumely* decision and the reference therein to Mr. Justice Holmes' statement in *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349, 355. *Cf. Communications Assn.* v. *Douds,* 339 U.S. 382, 400.

[90] *Quinn* v. *United States,* 349 U.S. 155, 161; *Kilbourn* v. *Thompson,* 103 U.S. 168, 190; *McGrain* v. *Daugherty,* 273 U.S. 135, 173-174; *United States* v. *Sinclair,* 279 U.S. 263, 292-94, and cases cited; *Jones* v. *Securities Commission,* 298 U.S. 1, 25-28. See dissenting opinion of Mr. Justice Brandeis in *Olmstead* v. *United States,* 277 U.S. 438, 478: "The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

Amendment affirmatively guarantees some degree of privacy of individual political activity and affiliation. See *United States* v. *Rumely,* 345 U.S. 41; *United States* v. *Harriss,* 347 U.S. 612. The secrecy of the individual's ballot and the privacy of his political beliefs are not merely personal privileges—they are indispensable political necessities. In this vein, it has been well said:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion *or force citizens to confess by word or act their faith therein." Board of Education* v. *Barnette,* 319 U.S. 624, 642. (Emphasis supplied.)

Requiring petitioner to disclose the past political affiliations of his associates abridges his right of political privacy as well as theirs. Compelled public disclosure of past political associations invades the privacy under which such associations were undertaken. It is, in effect, a penalty on political association which serves as a restraint on political activity. The right of political association, if it is to be meaningful, must include the right not to be subjected to public humiliation for such association.

Most serious is the *prior* restraint implicit in such compelled public disclosure. The First Amendment infringement cannot be evaluated without considering the effect of the Committee's questions as a tangible and far-reaching prior restraint upon the freedom of political association and activity of petitioner, of the persons whom he was required to identify, and of the American public itself. Indeed, there has been a noticeable dampening of voluntary group association and discussion on political matters in this country since the Committee has asserted broad and virtually unlimited inquisitorial powers in this field.

The First Amendment allows of no distinction between compelled disclosure of one's own political activities and those of one's friends and associates. To some the fear of being identified may be paramount, while others would be equally restrained by the prospect of being compelled to inform in public on their political associates. Indeed, compelled identification of the political affiliations of others may more severely abridge First Amendment rights than compulsion to identify one's own political acts and associations. "Informing" on friends and associates is for some persons, such as petitioner, far more onerous than being called to explain one's personal political activities. In the circles in which petitioner moves, his commendable refusal to take refuge for his own activities in the protection of the Fifth Amendment and thus avoid the identification of others, would be but slight mitigation had he put himself in the position of informing on former associates in the labor movement. Likewise, a person undeterred by the threat of subsequent governmental interrogation, wherein he may admit or deny, explain or justify his conduct, may indeed hesitate at the prospect of subsequent identification by third parties unwilling or unable to reveal anything but the single fact of some political association. Because of the inapplicability in congressional hearings of the hearsay rule, the rule against opinion evidence and even the basic right to present a defense, "identification" by third parties may deter many from political activities they would undertake without hesitation if they merely faced the possibility of being called to explain their own conduct.

The presently pertinent restraint on free association is thus derived both from the Committee's exercise of the power to obtain the identification of former members of a political party and its power to make petitioner an "informer" on the political affiliations of his former associ-

ates.[91] The potential restraint is all persuasive. As Mr. Justice Douglas and Mr. Justice Black warned in the *Rumely* case, "if the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom . . ." So, too, if a union man from Rock Island can be subpoenaed in 1954 to disclose the 1944 political memberships of his then associates, fear will take the place of freedom of political expression and association. Indeed, the House Un-American Activities Committee's use of the subpoena power for identification purposes has already significantly impaired those freedoms. ". . . there exists today a very general reluctance to join organizations or, indeed, to have anything to do with either persons or organizations within a very broad zone of controversiality . . . The House committee must assume part of the responsibility for this changing attitude toward organizations." [92]

It is this censoring effect, the discouragement of free

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[91] In opposing the grant of certiorari, the Government argued that petitioner has waived the protections of the First Amendment. *Brief in Opposition,* p. 22. Initially, it may be questioned how far the doctrine of waiver, applicable in cases of "personal" constitutional rights (see, e.g., *Rogers* v. *United States,* 340 U.S. 367), applies to the public guarantees of the First Amendment. In any case, the Court will find no waiver in the record.

On the contrary, petitioner specifically asserted his right to refuse to answer questions about the former political affiliation of his associates and friends. Having explicitly refused to become an informer on the political affiliations of his associates, he waived neither his own First Amendment rights nor those of others which he could legitimately assert. See *Barrows* v. *Jackson,* 346 U.S. 249. Under these circumstances petitioner's offer to tell all about himself as long as he did not have to inform on others cannot be construed as a waiver. Such a doctrine would tend to prevent the cooperation of witnesses such as petitioner, who sought as far as possible to provide the Committee with information, short of the betrayal of past political associations. Petitioner did not surrender his right to object to all questions abridging First Amendment rights merely because he consented to answer some.

[92] Carr, *op. cit. supra,* p. 357.

political activity, inherent in the Committee's assertion and exercise of a power to compel identification of members of organizations the Committee finds suspect, which has resulted in impairment of political freedoms in the United States. The power which the Committee has always asserted, as it asserts it here, to require wholesale identification and re-identification of the membership of political groups, no matter how negligible or non-existent be the legislative informational need, is the Committee's chief means of prior restraint.[93] The resulting fear of inquisition, discouraging free political expression and affiliation, is today a tragic reality of American political life.

Moreover, the restraint on the exercise of First Amendment rights arising from the Committee's use of the power of "membership identification" is compounded by the circumstances, the manner and the consequences of identification before the Committee. It is these realities of the Committee's operations that today cause many to hesitate before undertaking political activities and associations.

Collective Guilt: What organizational affiliation will result in "identification" cannot be foreseen. No organization is immune from the Committee's censure.[94] Before

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[93] One commentator has suggested that "the House should force the Committee to cease altogether its efforts to demonstrate the 'guilt' of particular individuals. The depersonalization of the work of the Un-American Activities Committee is the single most important change that is necessary if the threat offered by the committee to the American way of life is to be overcome." Carr, *op. cit. supra,* p. 462.

[94] The American Civil Liberties Union, for instance, was subjected to gratuitous attack in a Committee report on an unrelated organization for having "gone so far in its preoccupation with civil liberties as to defend both Communists and Fascists, sometimes with an almost complete disregard for considerations of national security involved." Report on Civil Rights Congress, H. Rep. No. 1115, 80th Cong., 1st Sess. (1947), p. 9. Among recent identifications required by the Committee was its demand for a list of all persons employed by or receiving any money from the

the Committee's undiscriminating standards[95] even anti-communist organizations become "subversive".[96] The Committee judges organizations by entirely accidental or incidental connections.[97] Even an organization's espousal of "democracy" as distinguished from a "republican form of government" has evoked a Committee demand for identification of members.[98]

Guilt by Association: Guilt by *past* association and by *mere* association is the basis of the Committee's identification method. In addition to the impossibility of predicting what organization will fall within the Committee's unique standards of guilt, it is impossible for the individual today to anticipate the political facts or organizational connections which, with the benefit of hindsight, the Committee may find damning tomorrow. Indeed, petitioner and those

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Fund for the Republic. As long ago as 1947 the Committee had investigated:

> "the American Civil Liberties Union, the C.I.O., the National Catholic Welfare Conference, the Farmer-Labor party, the Federal Theatre Project, consumers' organizations, various publications from the magazine 'Time' to the 'Daily Worker'." *United States* v. *Josephson*, 165 F. 2d 82, 95 (C.A. 2, 1947), *cert. den.* 333 U.S. 838.

[95] See illustrations in Judge Edgerton's dissenting opinion, *Barsky* v. *United States*, 167 F. 2d 241, 257, *cert. den.* 334 U.S. 843.

[96] On July 10th, 1956, in the Committee's hearings on a Fund for the Republic study *(Report on Blacklisting)*, Mr. John Cogley, its principal author, after having been questioned at length on the organizational affiliations of his staff members, said (Tr. pp. 115-116):

> ". . . Mr. Harrington, you referred to as a Socialist. I don't think you can refer to it as a Communist front because the group that you refer to is vigorously anti-Communist.
>
> Mr. Arens: You of course are aware of the fact that Lenin, the key philosopher of communism, has said socialism is only one transition toward communism.
>
> Mr. Cogley: Yes, sir.
>
> Mr. Arens: And Socialists are only people who are conducting the transition from democracy to communism."

[97] See Carr, *op. cit. supra*, pp. 337-363.

[98] See the letter from the Chief Counsel of the Committee reproduced at 92 Cong. Rec. A508 (1946).

he was required to identify may well have been unable to foresee in the period from 1942 to 1947, the years about which the Committee was inquiring, the advent of the cold war or the subversive purposes of the Communist Party which became clearly manifest in later years.

An individual's espousal of a cause or membership in a group, no matter how meritorious, can be occasion for "identification" if the group includes, or the cause is also espoused by, Communists.[99] The individual's association with the offending organization may be two or three times removed but the Committee still finds the association tainted.[100] Under these circumstances the unpredictability of the acts and associations which may in future years cause one to be identified or to become an identifier before the Committee, cannot but effect a severe restraint upon political activities and associations.

Interrogation: The Committee may give "identified" persons an "opportunity" to testify. But the opportunity is often unwelcome. The hearing will be designed for maximum publicity, not judicious fact-finding. Identifications may be "leaked" piecemeal in distorted form to an eager press. The rights of witnesses before the Committee to make statements of their own,[101] to present their "defense evi-

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[99] See, e.g., Carr, *op. cit. supra,* p. 341. The same inference is drawn from public opposition to the Committee itself. *Ibid.*

[100] ". . . its method has been to take the names of persons active in a non-Communist organization, which may be called A, to show that they have also been identified with organization B which is alleged to be Communist-controlled, and to conclude that they have necessarily acquired a Communist taint from B, that they have necessarily transmitted this taint to A, and that the taint has ultimately touched all members of A, even those who have had no association with B. These latter members of A are then ready to be used in new box scores to show that organization C with which they are identified has acquired the taint." Carr, *op. cit. supra,* p. 344.

[101] See Carr, *op. cit. supra,* p. 306-312.

dence''[102] and to have effective assistance of counsel[103] are severely curtailed. As a former Chairman of this Committee told a witness: ''The rights you have are the rights given you by this committee.''[104] The process has all the appearance of a trial without the procedural safeguards provided by our system of criminal justice.[105] An appearance before the Committee is indeed not for the timid or faint of heart.

Consequences of Identification: Added to these discouraging realities of ''identification'' before the Committee are the consequences which regularly follow. Identifications are endlessly re-publicized by the Committee itself, in millions of distributed copies of reports which generally include merely the damning fact of identification (see pp. 52-54, *supra*). As we have already seen, identification before the Committee is often the end of a career or profession, if not of any employment whatever,[106] for the Committee encourages the social and economic ostracism of those identified (see pp. 55-57, *supra*).

Thus, the intimidating consequences of identification before the Committee are neither incidental nor hypothet-

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[102] See Carr, *The Un-American Activities Committee,* 18 University of Chicago L. R. 598.

[103] See Carr, *op. cit. supra,* pp. 295-306.

[104] In a verbal exchange with an attorney, who had been ordered in the middle of the questioning of his client to take the oath and to testify but who had refused to do so without benefit of counsel, Chairman Thomas said:

> "The rights you have are the rights given you by this committee. We will determine what rights you have and what rights you have not got before the committee. I insist you be sworn at the present time." Hearings regarding Communist Espionage in the United States Government (1948), p. 1310.

[105] Professor Wigmore has emphasized the need for limiting the legislative power of inquiry in view of the non-applicability of "evidential rules that in judicial trials protect parties and witnesses and check abuses of the power." VIII Wigmore, *Evidence* (3rd Ed.) § 2195, p. 80.

[106] See Cogley, *Report on Blacklisting* (1956).

ical. In the light of the Committee's self-confessed intention to expose, punish and even censor, the possibility of identification becomes a probability for those whose associations arouse the Committee's suspicion or the political hostility of some of its members. One who writes books, movies or television scripts, for instance, is not merely faced with the possibility of a legislative inquiry incidentally touching on his personal affairs; he can anticipate intentional identification by the Committee.[107] And even preparing and publishing a study on the effects of the Committee's activities in this area is enough to bring the author before the Committee for hostile interrogation.[108]

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[107] For instance, the 1951 Annual Report of the Committee states:

> "It was the hope of this committee, after having conducted the 1947 hearings, that the motion-picture industry would accept the initiative and take positive and determined steps to check communism within the industry . . . The committee pursued its established policy that whenever it is obvious that a responsible group, whether in industry, labor, or independent organization, does not perform its duty in guarding itself against Communist influence, then the committee must expose this defect. So it was with the motion-picture industry . . . If Communism in Hollywood is now mythical, it is only because this committee conducted three investigations to bring it about. The industry itself certainly did not accomplish this." H. Rep. No. 2431, 82nd Cong., 2d Sess., pp. 2, 8.

[108] On July 10, 1956, the Committee undertook a lengthy interrogation of Mr. John Cogley, as to his *Report on Blacklisting*. The Committee eschewed any implication that Mr. Cogley himself was not a loyal American but proceeded to question Mr. Cogley's study. The interrogation took the form principally of asking Mr. Cogley why he had not put this or that reference to this or that fact into his book. Mr. Cogley was asked questions about his assistants, such as whether he knew that Dr. Jahoda "had issued reports or studies herself critical of the loyalty programs of this Government" or knew "about her connection with the Socialist Democratic Party in Austria." (Tr. pp. 13-14).

At the conclusion of the hearing Mr. Cogley said (Tr. p. 112):

> "I would like to know, if I may, why I was called.
>
> The Chairman: Because we have been very much interested in this particular question and when your report was filed we were disappointed, at least I was, that you didn't discuss the failure of people who cooperated with congressional committees to obtain employment."

Thus, considered as a prior restraint on political freedoms, the Committee's use of the power of wholesale membership identification cannot be divorced from the realities of its self-asserted function of deliberate exposure. The restraint on political freedoms is immeasurably multiplied by the fact that it is purposeful.[109] This is the very basis of the distinction in the *Douds* case, 339 U. S. 382, 402-404, where this Court upheld the non-Communist oath provisions of the Taft-Hartley Act, stating:

> "But we have here no statute which is either frankly aimed at the suppression of dangerous ideas nor one which [may] . . . be made the instrument of arbitrary suppression of free expression of views . . . Congress did not restrict the activities of the Communist Party as a political organization; nor did it attempt to stifle beliefs."

In contrast, in the instant case the Committee's identification is "frankly aimed at the suppression of dangerous ideas"; has been "made the instrument of arbitrary suppression of free expression of views"; does restrict mere political activity and is in fact an "attempt to stifle beliefs". The present abridgment is a deliberate discouragement of the exercise of political rights.

But whether purposeful or incidental, it cannot be doubted that the Committee's exercise of its power of identification has seriously endangered and restrained fundamental political freedoms. These restraints on expression and asso-

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[109] The distinction between purposeful and merely incidental abridgment of First Amendment rights has been recognized by this Court since its decision in *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250, where the Court viewed the tax in question as "a deliberate and calculated device in the guise of a tax to limit the circulation of informaton." See also, *Niemotko* v. *Maryland*, 340 U.S. 268; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 505.

ciation were imposed upon petitioner, the persons on whom he was required to "inform", and the public at large, by the Committee's requirement that petitioner identify former associates as past members of the Communist Party. It is unnecessary to speculate on just what pervasive congressional need for information could justify these infringements on political liberties; certainly no such congressional need is presented here.

C. *The Committee's "Need" for the Information Sought*

Having shown how grave and far-reaching is the infringement of First Amendment freedoms in this case, we turn now to an examination of the Congressional "need" asserted as its justification. In so doing we note that this Court has required the need which justifies abridgment of First Amendment rights to be not merely some need but a substantial need;[110] has accorded First Amendment rights a preferred position;[111] and has determined that congressional authority, especially where it impinges upon constitutional liberties, must be exercised with "the least possible power adequate to the end proposed."[112]

Of course, these principles do not preclude legitimate congressional inquiry. Indeed we do not doubt that legislative

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[110] Among the purposes this Court has found too insubstantial are ones such as prevention of street littering *(Schneider* v. *State,* 308 U.S. 147), prevention of fraud and crime by door-to-door peddlers *(Cantwell* v. *Connecticut,* 310 U.S. 296), protecting a householder's quiet and privacy *(Martin* v. *Struthers,* 319 U.S. 141), governmental loyalty *(Board of Education* v. *Barnette,* 319 U.S. 624) and private property rights *(Marsh* v. *Alabama,* 326 U.S. 501).

[111] See *Saia* v. *New York,* 334 U.S. 558, 561, and cases cited.

[112] *Marshall* v. *Gordon,* 243 U.S. 521, 541, quoting from *Anderson* v. *Dunn,* 6 Wheat. 204, 231. This Court has repeatedly struck down legislation abridging First Amendment rights where the governmental objective asserted could be accomplished by a narrower restriction. See, e.g., *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 504-506; *Cantwell* v. *Connecticut,* 310 U.S. 296; *Schneider* v. *State,* 308 U.S. 147; Comment, *Legislative Inquiry into Political Activity,* 65 Yale L. J. 1159, 1173 n. 78.

requirements for information may support congressional inquiry into membership in the Communist Party under certain circumstances; the world-wide and domestic Communist menace is certainly an appropriate subject of congressional concern. But a legislative need for membership information in a particular situation at a particular time may be conceded without affirming the necessity of membership identification in all situations and at all times.

What the Committee demanded from petitioner in 1954 was identification of former associates as members of the Communist Party between 1942 and 1947. At the time of the hearings in question, the program and activities, and the character and membership, of the Communist Party during these years had been exhaustively examined by the Committee itself.[113] In 1954 these matters were no longer subject to any appreciable amplification by the mere further accumulation of the names of Party members before 1947. The Committee's files at the time of these hearings already included the names of thousands of Party members [114] and millions of individuals on whom the Committee had information.[115]

The questions asked petitioner related to membership in the Communist Party many years before the hearing. In the interim, in 1947, Congress had enacted special legislation to deal with Communists in the labor movement. The need for information in 1954, if any there was, would have been in connection with the efficacy of that legislation between 1947 and 1954 rather than the names of Communist Party members between 1942 and 1947. Membership in the

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[113] See Ogden, *The Dies Committee* (1945); Carr, *The House Committee on Un-American Activities, 1945-1950* (1952).

[114] See pp. 50-51, *supra*.

[115] As early as 1943 the Committee reported having a file of "over 1,000,000 cards, each containing information on individuals and organizations engaged in subversive activities." H. Rep. No. 2748, 77th Cong., 2d Sess., p. 2.

Communist Party in these years would in itself have little enlightening significance; the Communist Party before the beginning of the "cold-war" in 1947 had a vastly different appearance than thereafter.

In his dissenting opinion, Judge Edgerton described some of these significant differences, such as this country's relationship with the Soviet Union and its attitude towards communism during the years in question (R. 191-192). Numerous persons, many doubtless idealistic and high-minded in their purpose, joined the Communist Party during this period, became disillusioned and left. It has been estimated that, although the average yearly Communist Party membership was about 40,000, over 700,000 persons have, at one time or another, been members thereof. Ernst and Loth, *Report on the American Communist* (1952) pp. 14, 33. One former member has referred to "those thousands who continually drift into the Communist Party and out again" and pointed to the fact that "the turnover is vast." Chambers, *Witness* (1952) p. 12. John Lautner, formerly a member of the Communist Party, testified in the trial of *United States* v. *Fujimoto,* 102 F. Supp. 890 (D. C. Hawaii, 1952) concerning the disillusionment of members with the Communist Party, as follows:

> "The Party was like a barn door, they were coming in and going out. As soon as new members found what the Party was they left. Year in and year out there was almost a hundred—well, a large percentage of turnover in the Party."

We are a nation of "joiners." Membership is not necessarily indicative of concurrence with the collective purpose, whether that purpose be overt or covert. A chance invitation from a friend or acquaintance at some party or meet-

ing will often result in a donation which turns out years later to have been a membership fee. As this Court recently emphasized in *Wieman* v. *Updegraff*, 344 U.S. 183, 190-191:

> "... membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years, many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged '. . . one of the great weaknesses of all Americans, whether adult or youth, is to join something.' At the time of affiliation, a group itself may be innocent, only later coming under the influence of those who would turn it toward illegitimate ends."
>
> "... yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources."

The Committee required nothing from petitioner other than the names of former Party members. It is difficult to see how such names acquired any informational significance except on the presumption that every former member of the Party necessarily shared in the purposes and activities which have become clear only in later years. In effect, the ordinary legislative inquiry has been reversed—instead of accumulating information on individual activities which reveal collective purposes or methods, a conclusion of collective guilt is employed to justify revealing the mere names of any former members. A valid Congressional

need must be supported by something better than this presumption of guilt by past political association.[116]

But even if it were conceded, arguendo, that the Committee in 1954 actually required identification of those who were Communist Party members between 1942 and 1947, still there was no legislative need for the identifications demanded from petitioner. The conclusive answer to the contention that the Committee had a need for the identification of *these individuals,* is that they all had already been identified before this very Committee, in some cases by more than one witness.[117] No cogent reason can be suggested why the Committee required public re-identification of persons who had already been identified before it, in some cases repeatedly, as former members of the Communist Party.[118] Indeed, the very implausibility of any "need" for such re-identification lends support to our earlier contention that the only realistic explanation of the Committee's actions is in terms of the exercise of its asserted function of exposure.

Congressman Francis E. Walter, the present Chairman

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[116] *Cf. De Jonge* v. *Oregon,* 299 U.S. 353; *Herndon* v. *Lowry,* 301 U.S. 242; *Schneiderman* v. *United States,* 320 U.S. 118.

[117] This Court recently indicated that it will not be receptive to an assertion of governmental need for information where the information has already been obtained. In *Slochower* v. *Board of Education,* 350 U.S. 551, 558, the Court said:

> ". . . the present case differs materially from *Garner,* where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here, the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college function. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information."

[118] As was pointed out by the dissenting judges below, any legislative need for the information demanded from petitioner "might have been served by questioning Watkins in a closed session. But the Committee questioned him at a public hearing" (R. 193).

of the Committee, has himself fully answered the argument of congressional need which the Government now asserts on behalf of his Committee. During the Committee's 1951 Hollywood hearings when a witness, Larry Parks, was unwilling to re-identify former members of the Communist Party, Congressman Walter stated:

> "*How can it be material to the purpose of this inquiry to have the names of people when we already know them?* Aren't we actually, by insisting that this man testify as to names, overlooking the fact that we want to know what the organization did, what it hoped to accomplish, how it actually had or attempted to influence the thinking of the American people through the arts?" (Emphasis supplied.) *Communist Infiltration of Hollywood Motion-Picture Industry*—Part I (82d Cong., 1st Sess.), p. 93.

In sum, it cannot be that mere membership in a political party subsequently found to be dominated by persons with subversive and illegal motivations, subjects members, years after they have discontinued membership, to repeated public identification before the same congressional committee. Nor is there justification for compelling former associates to become the agents of such repeated re-identifications. If the original identification of these thirty persons added anything necessary to the Committee's information about the character or nature of the Communist Party, at the very least the informational need was met once these specific individuals had been identified before the Committee. A contrary rule would serve as justification of a legislative trial and preclude any meaningful accommodation of the congressional power of inquiry to the guarantees of the First Amendment.

D. *The Decision of the Court Below*

Where exercise of the congressional power of inquiry infringes upon First Amendment freedoms, courts must undertake an accommodation and harmonizing of these conflicting principles. The degree of infringement on individual freedom, on the one hand, must be measured against the immediacy or urgency of the informational need on the other. It is precisely this weighing and balancing of the interests of the individual and of the state that the court below refused to undertake.

Nowhere in the opinion below is there any discussion of the abridgment of First Amendment rights set out above. The court summarily disposes of First Amendment issues (R. 182) not only without any weighing of conflicting principles, but without even finding that the Committee had a need, either remote or urgent, for the information it sought from petitioner.[119]

Certainly the statement of the court below that "the questions asked Watkins could be asked for a valid legislative purpose" (R. 178) does not constitute a determination by the court of a legislative need for answers to the questions. A possibility of a legislative purpose is not the equivalent of a legislative purpose (see pp. 70-76, *supra*); and a legislative purpose is not the equivalent of legislative need. What we have, therefore, is a statement two steps removed from the urgent need required to justify far-reaching infringements of First Amendment rights.

Certainly, too, the court's statement that the purpose of the Committee's hearing was related to an amendment to the Internal Security Act (R. 181), cannot be deemed the equivalent of a determination of need. We have already shown that the questions petitioner refused to

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[119]A persuasive disposition of the question of legislative need appears in the dissenting opinion (R. 191-193).

answer actually had no relationship to this amendment (pp. 70-76, *supra*). The statement of the court below can thus be explained only on the assumption that the court was again referring to the hypothetical possibility of a legislative purpose. Again, as indicated in the previous paragraph, such a possibility of a legislative purpose is not the equivalent of a determination of legislative need.

Probably the main reliance of the court below was upon its statement "that, having power to inquire into the subject of communism and the Communist Party, Congress has the authority [120] to identify individuals who believe in communism and those who belong to the Party, since the nature and scope of the program and activities of the Communist Party depend in large measure on the character and number of its adherents . . . Personnel is part of the subject" [121] (R. 182). But, whatever justification the theory that "personnel is part of the subject" might have provided for the identification of Communists in strategic

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[120] The court below appears to have confused congressional "authority" with congressional need (R. 182). We have demonstrated earlier in this brief (Points I-III) that no such authority exists. But, even if the authority did exist, it would not in and of itself justify the infringement of First Amendment rights. It takes urgent **"need", rather than** legal "authority", to support such infringements.

[121] It has been pointed out how limitless is the incursion on the privacy of ordinary citizens which might be justified on this theory. See Taylor, *Grand Inquest,* pp. 164-165. Indeed, in the instant case the Committee sought to identify persons who were merely past members of the Communist Party—ordinary citizens who were not even members of a labor union. See n. 69, *supra.* The extremes to which identification can be carried for purposes of harassment are well illustrated by current efforts in some of the states to force a disclosure of the names of all members of the National Association for the Advancement of Colored People within their borders. The First Amendment issue raised by this attempted wholesale disclosure of NAACP membership is now being litigated in a number of southern states. See, e.g., *National Association for the Advancement of Colored People* v. *State of Alabama, on the relation of John Patterson, Attorney General,* now pending in the Supreme Court of Alabama.

positions when Congress first initiated investigations into Communist activities, it cannot now support continued identification of those who were Party members long ago. Moreover, it certainly provides no justification for *re-identifications* which can shed no light upon either the former or the present "nature and scope of the program and activities" of the Communist Party. No pervasive need justifying abridgment of First Amendment rights arises from the generalization that "personnel is part of the subject."

In sum, neither the hypothetical relevance of the Committee's questions nor the generalization that personnel is part of the subject can supply an actual need for the identification and re-identification of one-time Communists or "support an exercise of the investigative power that puts every man's past record of association and opinion to the test of either public or secret inquisition under oath." [122]

We do not challenge the contention that the substantiality of congressional need for information may, on occasion, justify the compulsion of disclosures which normally would be protected under the First Amendment. But we do say that unjustifiable abridgment of liberties of association and expression, forbidden to Congress by the First Amendment, may no more be achieved by the legislature's power of inquiry than by its power to legislate. Where the infringment on basic liberties is as patent and far-reaching as it is in the instant case, and the congressional need is as remote and fanciful as the need presently asserted, constitutionally-guaranteed freedoms must prevail. In the *Rumely* case this Court reiterated, in the context of the congressional

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[122] Taylor, *Grand Inquest,* p. 167.

power of inquiry, Justice Holmes' admonition that all rights

> "are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

In petitioner's case, under even the most liberal view of Congressional authority to obtain legislative information, the point has been reached where First Amendment principles "become strong enough to hold their own."

V

2 U.S.C. 192, Read Together With the Authorization of the Committee on Un-American Activities, Is So Vague and Indefinite as to Deprive Petitioner of Due Process of Law

Section 192, under which petitioner was indicted and convicted, punishes refusals to answer questions "pertinent to the question under inquiry" by a Committee of either House of Congress where the question under inquiry is within the power of the Committee to investigate.

There is no independent authority, comparable to a judge when questions are asked by a grand jury, to which a witness can appeal to make the determination whether the announced "question under inquiry" is within the authority of the committee before which he is testifying. The witness in any congressional inquiry must resolve for himself whether a question by the committee is part of an *authorized inquiry* and this he can only do by reference to the statute or resolution purporting to authorize the investigation. Therefore, the contempt statute must be read together with the enactment setting forth the authorization of the particular committee, in order to decide whether the

witness was able to make the determination that the inquiry was authorized with the accuracy required by the due process clause.

This process of combined construction has been used in determining whether a statute was unconstitutionally vague (see e.g., *Kraus & Bros.* v. *United States,* 327 U.S. 614, 620), and is, indeed, the only method of determining the constitutional question here presented. In the *Rumely* case, for example, this Court would not have been able to reach the conclusion that Section 192 was, or might be, unconstitutional, as to Rumely without reading it together with the authorizing resolution involved in that case.

By this combined construction, the criminal provision which must be considered for the application of the void for vagueness doctrine would read in substance about as follows:

> It shall be a crime punishable by a fine of not more than $1,000 and imprisonment for not more than one year for any witness before the Committee on Un-American Activities of the House of Representatives to refuse to answer any question pertinent to any question under inquiry about which the Committee was authorized to inquire under its statutory authority to investigate the extent, character and objects of un-American propaganda activities in the United States, the diffusion within the United States of subversive and un-American propaganda attacking the principle of the form of government as guaranteed by our Constitution, and related questions.

On its face this composite statute provides no reasonably ascertainable standard of guilt and is too vague and indefinite to meet the standards of due process under the Fifth Amendment. *United States* v. *Cohen Grocery Co.,*

255 U.S. 81; *Connally* v. *General Const. Co.*, 269 U.S. 385; *Herndon* v. *Lowry*, 301 U.S. 242. The double basis for the requirement of adequate certainty is the individual's need for notice as to the standards of conduct which he must follow, and the prosecutor's need for an adequate guide in enforcing the law. Neither basis is satisfied here. Under the composite statute quoted above, "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453.

Although it is beyond dispute that the Committee has expanded its investigations far beyond the literal reading of its authorization, it is far from clear what the present limits of the authorization are actually supposed to be and what the courts may fairly construe them to be in determining whether or not there has been contempt of the Committee in failing to respond to questions not within the literal mandate of the Committee. See n. 123, p. 122, *infra*. The emphasis, in practice, has shifted away from propaganda; the phrase rarely appears in any but a formal manner. Instead the Committee tends to describe its area of investigation as "subversive and un-American activities" (R. 125, *Annual Report for 1951*, p. 5). Congressman Doyle, a member of the Committee, spoke of exposing "subversive activities" in reporting to the Congress during the debate on the 1954 appropriation for the Committee (R. 168, 100 Cong. Rec. 2174, daily issue). The Chairman, opening the Chicago hearings of which petitioner's questioning was a part, used the phrase "extent and success of subversive activities directed against these United States . . ." (R. 43.) We submit that a witness deciding whether he may rightfully refuse to answer a particular question cannot possibly determine from such statements the present limits of the Committee's authority with anything like the degree of certainty required for a criminal statute.

The Committee asserts the authority to investigate "subversive" and "un-American" activities.[123] Probably no two words in common usage today have as varying meanings to different people. The Committee, in an obvious effort to cure this vagueness, recently defined "un-American or subversive activity" as follows: "That activity which attacks the principle of the form of government as guaranteed by our Constitution is un-American and subversive by seeking to overthrow it by use of force and violence, in violation of established law."[124] Yet the Committee has never applied and does not now apply this standard in its operations. Indeed, under the heading "Subversive Activities" in the very public relations pamphlet containing the above definition, the Committee went far beyond the overthrow of the government by force and violence and went into "Communist fronts" (p. 21); Fascists or "hate" groups (p. 21); "fellow-travelers" (p. 24); teachers who claim the Fifth Amendment (p. 23); etc.

The Committee's investigations themselves indicate that it treats its authority and the phrase "subversive activities" to mean whatever comes under the personal interdiction of its members in the way of unorthodox opinions and activities. Listing only a few of the Committee's hearings and reports, investigations have included as their focal objects the Office of Price Administration (1945), the

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[123] Of course, for the Court to reach this point, it must have construed the Committee's authorization as going far beyond propaganda activities (see pp. 76-96 *supra*). Any such interpretation would have had to be based on a Congressional ratification of the Committee's broad assertions of power. We assume, therefore, for purposes of this part of the brief, that the Court has accepted the Committee's assertions of power as ratified by the Congress and incorporated in its authorization. This very holding of ratification aggravates the uncertainty posed for one such as petitioner. He cannot rely on statutory language but must examine complex issues of implicit, rather than explicit, ratification to determine what constitutes contempt of this Committee.

[124] This is YOUR House Committee on Un-American Activities, p. 2.

CIO Political Action Committee (1944), labor unions (1947, 1949, 1950, 1953, the movie industry (1947, 1951, 1952), Oliver Edmund Clubb, an employee of the State Department (1951), Dr. E. U. Condon (1952), Bishop Oxnam (1953), The Methodist Federation for Social Action (1952), the theatre (1955), the Fund for the Republic (1956).

The scope of the statute is in no way narrowed, nor is its vagueness in any way cured, by the announced purpose of the particular hearing at which petitioner testified. On April 29, 1954, the date on which petitioner appeared, the Chairman simply announced that "the hearing this morning is a continuation of the hearings which were held in Chicago recently" and counsel started to ask petitioner questions (R. 70). Nor does the announced purpose in Chicago afford any enlightenment even if it had been read to petitioner (R. 43-44). The Chairman referred to "subversive activities" and to the fact that Chicago is not necessarily better or worse than other cities, and stated that "subversive infiltration" was under consideration (R. 44). Petitioner could have found no guidance in this statement in making his determination whether the subject under inquiry was within the broad interpretation of the Committee's authority. When petitioner questioned "the proper scope of . . . [the] committee's activities," (R. 85), no clarification was forthcoming but only a direction to answer (R. 86). Neither the statute nor its interpretation by the Committee was sufficiently definite to enable the petitioner to determine the scope of the Committee's authority.

Petitioner had to decide for himself if the Committee had authority to require him to state publicly whether 29 individuals had been members of the Communist Party 10 years earlier; he had to decide whether the fact of one-time membership of persons who had "long since removed themselves from the Communist movement" (R. 85) was

within the scope of an investigation of "un-American" and "subversive" activities. Petitioner might reasonably have believed that past membership was not an un-American activity both because it had been engaged in by many Americans and because it had been perfectly legal at the time in question. Likewise, petitioner might reasonably have believed that past membership was not subversive both because of its then clear legality and his own failure to observe any disloyalty on the part of these individuals. No questions were asked petitioner about any unlawful or disloyal conduct by him or any of the 29 persons and he may very well have believed that, in the absence of some unlawful or disloyal conduct, the fact of membership in the years 1942 to 1947, before the Cold War, was not within the terms "un-American" or "subversive". Apparently petitioner believed that present membership might well be deemed un-American or subversive as he not only agreed to, but did, name present members. The distinction petitioner apparently drew between present and long past membership can hardly be deemed an unreasonable one. Only by asserting the proposition that any connection with the Communist Party, no matter how long ago and without reference to any illegal or disloyal activities, is un-American and subversive, can one say that these terms have sufficiently clear meaning so that petitioner could have told with reasonable certainty whether he had to answer the questions put to him by the Committee.[125]

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[125] Limiting the applicability and effective use of Section 192 because of its vagueness and indefiniteness in the case of the Committee on Un-American Activities will not deprive Congress of the power to compel pertinent testimony. Congress can, as it has on occasion, authorize its committees to compel pertinent testimony by applying for a court order, which would permit a judicial determination of the pertinence of the testimony sought before the witness is subject to contempt proceedings. This is the standard procedure provided for investigations conducted by administrative agencies (see Taylor, *Grand Inquest* (1955), pp. 260-262)

VI

Petitioner Has Been Deprived of His Right to a Fair and Impartial Grand Jury

We turn now to the grand jury question raised, but left undecided, in *Quinn* v. *United States,* 349 U. S. 155, 170; *Emspak* v. *United States,* 349 U. S. 190, 202; and *Bart* v. *United States,* 349 U. S. 219, 223. As in those cases, the Court here will no doubt desire to consider first whether petitioner's refusal to "inform" on former associates, in the circumstances of this case, constituted a violation of the contempt statute and will only reach this grand jury point if it should reject all of petitioner's previous arguments (Points I-V).

In the trial court, petitioner moved for a dismissal of the indictment on the ground that, by virtue of the fear instilled by the government employees security programs, less than 12 grand jurors were free from bias against him and able to cast their votes impartially, or for a preliminary hearing at which he could prove the essential facts supporting the motion. Petitioner, by an affidavit of counsel attached to his motion for dismissal or preliminary hearing (R. 5, 9-10), made an affirmative showing that the personal bias and fear, which this Court had found wanting in *Dennis* v. *United States,* 339 U. S. 162, actually existed on the part of the grand jurors in this case (R. 10).

The affidavit of counsel attached to petitioner's motion related that "more than 11 members of the grand jury which voted this indictment are biased and prejudiced against the

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and would remove the unfairness in a witness having to make a decision on pertinence at his peril. Certainly, in the absence of some such procedure for court orders, Congress should be required to provide authorizing resolutions sufficiently definite so that a witness can know with reasonable certainty whether the questions put to him are within the committee's authorization.

defendant and unable to exercise an independent judgment, by reason of the fact that they, or close associates, including relatives, were employed by or were seeking employment with the United States or the District of Columbia Government" (R. 5); that 11 of the 23 members of the grand jury, including the foreman and deputy foreman, were employed by the Government of the United States (R. 5); that 2 others were employed by the District of Columbia Government (R. 5); that still others had close associates and relatives who were employed by the United States or the District of Columbia (R. 5); that still others sought employment there (R. 5); and that 7 years of successive loyalty and security programs had instilled in United States and District of Columbia employees and their close associates and relatives a fear of creating the appearance of sympathetic association with left-wing or Communist causes so strong as to prevent them from casting their votes impartially and amounting "to an actual bias against any person accused of some act which might impede the hunt for supposed Communists" (R. 8). Moreover, the affidavit states that, at hearings under the security programs, persons under investigation were asked their opinions of the *Hiss, Remington, Coplon and Rosenberg* cases and their attitude towards the House Committee on Un-American Activities (R. 9). "If," the affidavit continues, "the mere opinions of persons who have not even participated in a case thought to affect the security of the government are treated by the authorities as relevant to a decision on security or loyalty status, the grand jurors would recognize that a vote against an indictment in this case would be harmful to their security status" (R. 9).

The Government filed no answering affidavit challenging any of these facts. The District Court, however, denied petitioner's motion without opinion (R. 10-11). The Court

of Appeals, although this question had been placed squarely before the court by petitioner (Brief for Appellant, pp. 72-74), omitted any reference to the grand jury question in its decision. The minority had no occasion to refer to this point, since they voted for reversal of the conviction on other grounds.[126]

The refusal of the courts below to dismiss the indictment or grant a preliminary hearing on the ground of grand jury bias and prejudice created by the government employees security programs deprived petitioner of his right to a fair and impartial grand jury (*Cassell* v. *Texas,* 339 U. S. 282), acting as a "responsible tribunal." *Beavers* v. *Henkel,* 194 U. S. 73, 84. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis* v. *United States,* 339 U. S. 162, 171-172; *Morford* v. *United States,* 339 U. S. 258, 259. Whether a defendant's right to a fair and impartial grand jury be based on the Constitution or upon the statute requiring grand jury action for the misdemeanor involved in contempt (see 2 U.S.C. § 194), or because the Government chose that method of proceeding, the right to a fair and impartial grand jury is undeniable. As the Government has stated elsewhere, while "the Fifth Amendment requires indictments only in capital 'or other infamous' crime, . . . where the Government has chosen or been compelled to proceed by indictment, the accused probably has standing to move to dismiss an indictment found by a disqualified body, just as he would have a right to attack an information filed upon the oath of a disqualified prosecuting officer." [127]

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[126] The position of the minority judges favoring reversal on the grand jury point under similar circumstances is set forth in their dissenting opinion in *Quinn* v. *United States,* 203 F. 2d 20, 26.

[127] The Government's statement was made in the court below in *Emspak* v. *United States,* 203 F. 2d 56 and is quoted in *Quinn* v. *United States,* 203 F. 2d 20, 26, n. 2.

(i) In the District Court, the Government, filing no answering affidavit and thus admitting the facts alleged in petitioner's affidavit for purposes of the motion to dismiss, relied upon this Court's decision in *Dennis* v. *United States,* 339 U. S. 162. But the Government's reliance on *Dennis* was misplaced. There Mr. Justice Minton, writing for the majority, stated that "no question of actual bias is before us. The way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact" (p. 168). Clearly petitioner's motion and unanswered affidavit raise the question of bias "to the realm of fact." Mr. Justice Minton went on to state that "as far as it appears, the [trial] court was willing to consider any evidence which would indicate that investigatory agencies of the Government had recognized in the past or would take cognizance in the future of a vote of acquittal, but no such proof was made" (p. 168). Exactly such proof was supplied in the affidavit attached to petitioner's motion for dismissal—namely, that investigatory agencies of the Government would take cognizance of a vote against the Government since they had even taken cognizance of *opinions* concerning cases in which the Government was involved. Furthermore, the majority pointed out in *Dennis* that the loyalty program was then only three months old and "apparently not the subject of anticipatory fear by these jurors" (p. 170). Here, however, as the affidavit filed with petitioner's motion stated, "more than seven years of administrative implementation [of the loyalty and security programs] has created a real and personal fear" (R. 10).

(ii) In the Court of Appeals the Government suggested that the grand jury bias was not prejudicial because the essence of petitioner's defense at the trial was a "legal justification" rather than a factual denial (Brief of Appel-

lee, p. 18), thus making indictment certain. But this argument disregards the rule that where grand jury selection is likely to result in unfairness, "*reversible error does not depend on a showing of prejudice in an individual case*" because

> "The injury is not limited to this defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States,* 329 U.S. 187, 195.

Where the method of selecting grand and petit jurors presents the possibility of bias, this Court has from the first declined to look to the actual effect of the discrimination in the particular case, as long as the defendant was in the class likely to be injured. *Strauder* v. *West Virginia,* 100 U.S. 303; *Ballard* v. *United States, supra; Cassell* v. *Texas, supra; Thiel* v. *Southern Pacific Co.,* 328 U.S. 217.

It is no answer to state that a fair grand jury would also have indicted. *Cf. Tumey* v. *Ohio,* 273 U.S. 510, 535. Procedural due process assures that even a correct result may not be achieved by odious means. As was stated recently in a related context: "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts." *Communist Party* v. *Control Board,* 351 U.S. 115, 124. Unless the guarantee of an unbiased grand jury is now to be limited to persons likely to have avoided indictment before a fair grand jury, the Government's argument merits no consideration.

(iii) In this Court, in its Brief in Opposition to the Petition, the Government, by cross-reference to its Brief in Opposition in *Ben Gold* v. *United States,* No. 137, October

Term, 1956, pp. 39-40, presented what appears to be an additional argument as follows:

> "The absence from normal grand jury processes of the *voir dire* examination, the historic guarantee against bias and partiality on the part of members of the petit jury, indicates the fundamental difference between the two kinds of jury. It attests the conviction, resting on centuries of Anglo-American experience, that the interest in expeditious administration of criminal justice is best served, without any sacrifice of society's equally fundamental interest in assuring fair trials to all accused persons, if the historic procedure for guaranteeing jurors free from bias and partiality is restricted to the selection of those who actually try the accused. This accommodation of interests is in keeping with the traditional concept of the grand jury as a shield between prosecutor and persons accused of crime, free, however, of various guarantees historically associated with the trial itself. Cf. *Costello* v. *United States,* 350 U. S. 359."

It is not entirely clear whether the Government is now contending that petitioner is not entitled to a *voir dire* examination of the grand jurors in order to prove bias, or that petitioner is not entitled to a grand jury in which at least 12 grand jurors concurring in the indictment are free from bias and prejudice against him.

If the Government's argument is limited to the suggestion that petitioner is not entitled to a *voir dire* examination of the grand jurors, it has no application here. Petitioner seeks no such examination. Petitioner, by his counsel's affidavit (R. 5-10), set forth a *prima facie* case of bias and prejudice of a majority of the grand jurors. The Government, relying upon the *Dennis* case, failed to file an

answering affidavit. Thus the facts set forth in the affidavit for petitioner must be taken as true. No one in this case is contending for a *voir dire* examination of the grand jurors. Petitioner moved for a dismissal of the indictment on the ground that there were less than 12 members of the grand jury concurring in the indictment who were free from prejudice or bias against him "by reason of the facts stated in the affidavit" and, in the alternative, if these facts should be challenged, requested a hearing to give further proof in support of the affidavit (R. 4). This is a far cry from a request for a *voir dire* examination of the grand jurors.

If the Government is suggesting the broader proposition that petitioner had no right to a grand jury containing at least 12 jurors free of bias and prejudice against him—and we are loath to assume that the Government is suggesting this point—then it would indeed be making a mockery of the grand jury process. Petitioner's motion and affidavit do not present a mere technical defect in the grand jury process;[128] they present a case of a grand jury rendered irresponsible by bias and prejudice against the defendant. Certainly the wrong done petitioner and the processes of justice is far more serious than that done in the exclusion cases; in those cases there was a mere possibility of bias whereas here the unanswered affidavit of petitioner sets forth facts indicating an actually biased and prejudiced grand jury. Exclusion from the grand jury of persons possibly biased in favor of an accused is far less prejudicial than the inclusion thereon of those actually biased against him. We submit that the fact that the grand jury process

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[128] Of course, even some technical defects invalidate grand jury action. It is interesting to note, for example, that under the Federal Rules of Criminal Procedure, petitioner is entitled to 12 legally qualified grand jurors concurring in the indictment. Rule 6(b)(2). It could hardly be contended that he is not entitled to 12 grand jurors free from bias and prejudice.

is not surrounded by all the "guaranties historically associated with the trial itself" does not mean that it is surrounded by none.

Conclusion

It is respectfully submitted that the decision of the court below should be reversed.

Respectfully submitted,

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