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CITATIONS

MISCELLANEOUS

IN THE

Supreme Court of the United States

October Term, 1956

JOHN T. WATKINS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

No. 261

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR ROBERT M. METCALF, *AMICUS CURIAE*

Interest of *Amicus Curiae*

Robert M. Metcalf, appearing as *amicus curiae* herein with the consent of both petitioner and respondent, is the defendant in *United States* v. *Metcalf,* Case No. 3184 in the United States District Court for the Southern District of Ohio, Western Division. In that proceeding, Metcalf has been indicted under legal and factual circumstances comparable to those involved in the instant case. Accordingly, Metcalf has a direct and substantial interest in this Court's review and disposition of the questions presented by the petition for a writ of certiorari in the instant case, and joins in petitioner's prayer that it be granted.

Statement

Metcalf is an artist in stained glass and a professor of art at Antioch College, Yellow Springs, Ohio. On September 15, 1954, he appeared as a witness, under subpoena, before a subcommittee of the Committee on Un-American Activities of the House of Representatives.[1] As the indictment recites, Metcalf "testified that in the latter part of 1945 or the early part of 1946 when he was a professor at Antioch College, he became involved in a Marxist discussion group and admitted that there were members of the faculty of Antioch College in this group".[2] Metcalf was then asked to tell the subcommittee the names of the Antioch faculty members and students, and of other individuals, who had belonged to the "Marxist discussion group." He declined to give the names, stating his grounds of refusal in a letter which was made part of the record of the hearing[3], and which concluded as follows:

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[1]His testimony is printed in *Investigation of Communist Activities in the Dayton, Ohio Area—Part 3,* Hearing before the Committee on Un-American Activities (83rd Cong., 2d Sess.), September 15, 1954, pp. 6978-83.

[2]Metcalf's description of the group was as follows (*Investigation of Communist Activities, supra,* at p. 6979):

> "In the latter part of 1945, or the early part of 1946, I became involved with a small group. As I understood, it would be a Marxist discussion group and not an organized part of the Communist Party. Some time later, and this information didn't come through to me personally, but there was an effort to make or to suggest that this group affiliate with the student group. I did not approve of this at all. I never do approve of indoctrination of any kind. I would have nothing to do with it.
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> "I said that I would then immediately withdraw from any activity in such a thing, and there was one Marxist meeting held at which the whole business was disbanded, largely because, I think, all of the people felt that we were not involved with what we had started with at all. These people I never heard make any subversive remarks, and as far as I know personally those people got out of that organization at the same time that I did."

[3]*Investigation of Communist Activities, supra,* pp. 6980-81.

> "The basis and scope, if any, of your committee's authority to investigate educational institutions, and individuals connected therewith, presents a fundamental and far-reaching legal question. I have no desire to restrict my testimony before your committee for the purpose of precipitating a judicial test. Believing as I do, however, that the inquiry is beyond the powers of your committee, and, in any event, restricted by the Bill of Rights, I shall be constrained to decline to reply to unauthorized questions, in case answering might cause other individuals unnecessary harm or embarrassment, or would otherwise cause me to lose self-respect."

On February 24, 1955 Metcalf was indicted in the Federal District Court at Dayton, Ohio, under the statute (2 U. S. C. 192) making it a misdemeanor for a witness before a duly empowered Congressional committee to refuse to answer pertinent questions. On October 3rd, 1955, the District Court (Cecil, D. J.), on motion, dismissed the indictment as "insufficient by reason of the fact that it does not allege all of the essential elements of the crime."[4] On July 10, 1956 Metcalf was again charged, under the revised indictment which is presently pending in the same court.

In the instant case, petitioner has been convicted under the same statute under which Metcalf is indicted, the charge is based in both cases on appearances before subcommittees of the same Congressional investigating committee acting under the same authority, and the questions which petitioner and Metcalf refused to answer are comparable, though not identical. All but one[5] of the issues presented in the petition

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[4] *United States* v. *Metcalf,* unreported, Crim. No. 3052, S. D. Ohio W. D. *Cf. United States* v. *Lamont,* 18 F. R. D. 27 (S. D. N. Y. 1955); *United States* v. *Deutsch,* decided July 26, 1956 (D. C. Cir.).

[5] The fifth question stated in the petition, relating to the presence of government employees on the Grand Jury, will probably not arise in Metcalf's case.

are also raised by the proceeding against Metcalf, and its outcome may therefore be governed or affected by this Court's disposition of any of these questions, should it determine to review the judgment below in the instant case.

Reasons for Granting the Writ

The cases of Watkins and Metcalf are two of many presently pending in the courts, in which witnesses before legislative investigating committees have declined to answer questions, not under claim of privilege, but on the ground that the committees lacked authority to require that the questions be answered. Most of these cases involve committees which are active in the general field of government security and individual loyalty, and witnesses who have declined to answer questions about the political associations, activities, or opinions of themselves or other persons.

Some years past, this Court denied *certiorari* in three cases in which witnesses before the Committee on Un-American Activities had been convicted for refusal to answer questions or produce documents.[6] More recently the Court granted *certiorari* in a case arising from a witness' challenge to the power of a House committee investigating lobbying, and reversed the conviction on the ground that the questions were unauthorized. *United States* v. *Rumely,* 345 U. S. 41 (1953).

During these years, two Senate subcommittees have entered the loyalty-security field and conducted extensive hearings,[7] and state investigative agencies, both legislative

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[6] *United States* v. *Josephson,* 165 F. 2d 82 (C. A. 2, 1948), *cert. denied* 333 U. S. 838; *Barsky* v. *United States* (D. C. Cir. 1948), *cert. denied* 334 U. S. 843; *Lawson* v. *United States,* 176 F. 2d 49 (D. C. Cir. 1949), *cert. denied* 339 U. S. 934.

[7] The Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, and the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Senate Committee on the Judiciary.

and executive, have concerned themselves with the same general subject matter.[8] The combined activities of the several federal and state investigative committees have resulted in numerous episodes in which individuals called as witnesses have contested the committees' authority to question them on political or "loyalty" matters, and have consequently been proceeded against criminally or in contempt. Most of these cases are presently pending in the lower federal courts under the statute involved in the present case.[9]

There can be no question of the importance of the constitutional and other legal issues raised in cases of this type, as this Court has made abundantly clear in two recent decisions. See *United States* v. *Rumely,* 345 U. S. 41, 44; *Quinn* v. *United States,* 349 U. S. 155, 160-61. Nor, in view of the far-flung activities of legislative committees and the numerous cases they are precipitating, can there be any doubt of the current and sharp pressure of these issues on the legal and political fabric of the nation. The instant case appears to present these issues fairly and squarely, and plainly to warrant review by this Court.

By no means is it suggested that the instant case necessarily calls for disposition of the constitutional issues

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[8]See Gellhorn, *The States and Subversion* (1952); Barrett, *The Tenney Committee* (1951); Chamberlain, *Loyalty and Legislative Action: A Survey of Activity in the New York Legislature, 1919-1949* (1951).

[9]*E.g., United States* v. *Deutsch,* decided July 26, 1956 (D. C. Cir.); *United States* v. *Gojack,* pending in the Court of Appeals for the District of Columbia, No. 13464; *United States* v. *O'Connor,* 135 F. Supp. 590 (D. D. C. 1955), pending in the Court of Appeals, No. 13049; *United States* v. *Lamont,* No. C 145-216 (S. D. N. Y.) and companion cases *Unger* (C 145-217) and *Shadowitz* (C 145-218). There are numerous comparable cases in the federal courts, and one from a state court is now pending here on appeal. *Sweezy* v. *New Hampshire,* No. 175 October Term, 1955. There have been recent press reports of Congressional citations for contempt which will presumably lead to additional indictments on like grounds in the near future. See *The New York Times* for July 26, 1956 (a well-known playwright, a professor who is the executor of Albert Einstein's estate, three actors, and three residents of St. Louis) and for May 1, 1956 (three editorial employees of *The New York Times,* a reporter, a radio station director, and a librarian).

stressed in the petition. Indeed, as is suggested below,[10] it may well be that the Un-American Activities Committee here exceeded the authority delegated to it by Congress, and that the constitutional questions may not be reached.

This possibility, however, in no way diminishes the legal significance or practical importance of this controversy. Questions of pertinence and of the scope of committee authority inhere in most if not all of the other cases pending in the lower federal courts,[11] and their proper disposition may contribute, quite as significantly as the resolution of constitutional issues, to the integrity of the legislative process and the preservation of individual rights.

Certainly neither a decision in this nor in any other single case is likely to lay at rest the numerous and diverse issues projected by the current proliferation and expansion of the investigative process. The legitimate breadth of the legislative power of inquiry must be respected and enforced together with the rights and liberties of the individuals upon whom that power is brought to bear. But it can hardly be disputed that cases such as the instant one[12] present legal issues of balance and adjustment which urgently call for this Court's review, so that what Justice

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[10]*Infra,* pp. 7-10.

[11]See, *e.g. United States* v. *Kamin,* 136 F. Supp. 791 (D. Mass. 1956).

[12]In the *Josephson* case, *supra* note 6, the witness refused even to take the oath, so that the scope of the Committee's legitimate authority was not squarely raised. In the *Barsky* case, *supra* note 6, the comments of the Court of Appeals on the Committee's power to ask questions such as are involved in the instant case appear to have been unnecessary to a disposition of that case, which involved a subpoena for the financial records of an organization engaged in foreign propaganda. In the *Lawson* case, *supra* note 6, the petitioners took the flat position that Congress has no power whatever, under any circumstances, to inquire into political beliefs or associations. Whether or not it was factors such as these that led this Court to deny *certiorari* in those cases, in the instant case there are no such flaws in the picture presented for review.

Holmes called "the neighborhood of principles of policy"[13] may regain a measure of equanimity and harmony.

This brief *amicus* on petition for *certiorari* is not, of course, an appropriate vehicle for full analysis of the far-reaching questions which are common to the instant case and the *Metcalf* case. The petition for *certiorari* (p. 16 footnote 13) mentions most of the constitutional issues, while laying the main burden of argument on the doctrine of separation of powers and the problem of valid legislative purpose.

However, a few additional comments on the merits appear to be warranted. For, with all respect to distinguished counsel for the petitioner, it is believed that the petition's statement of the constitutional issues is confined to the factual question of "exposure", at the expense of other facets of at least equal significance. And, perhaps more important, the petition deals only sketchily with the issue which must be resolved before the constitutional questions are approached: whether or not questions such as those put to the petitioner are pertinent to the inquiry which the House of Representatives has authorized the Un-American Activities Committee to conduct.

1. *Scope of Authority Delegated to the Committee by the House, and Pertinence of the Questions Put to Petitioner.* The Legislative Reorganization Act of 1946 and House Resolution 5 (83rd Congress), in identical language, authorize the Un-American Activities Committee to investigate "the extent, character, and objects of un-American propaganda activities in the United States".[14] On the face of the matter, it is clear that the questions put to the petitioner and to Metcalf are exceedingly remote from the pre-

[13]See *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355 (1908).

[14]The full text of the authorization is given in the petition at p. 4.

scribed subject matter of the investigation. As the dissenting judges below put it (Pet. 64):

> "The questions do not relate in any clear or direct way to the extent, the character, the objects, or the diffusion, of any propaganda, subversive and un-American or otherwise. The government has not shown that in asking these questions the Committee was seeking, even directly, information about the extent or character or objects or diffusion of propaganda. It has not shown that Watkins, or his union, or the persons about whom the Committee inquired, engaged in propaganda, or that the Committee sought to learn whether they did."

The petition nevertheless implies (p. 34) that the House has in fact authorized the Committee to require answers to questions of this type,[15] on the basis that the Committee "has interpreted its resolution as giving it authority to investigate un-American and subversive activities unrelated to legislation" and that Congress "has every year ratified this interpretation."[16] But of course Congress is powerless to ratify a committee's assertion of authority to conduct inquiries unrelated to legislation. The question is rather what scope of inquiry is reasonably related to the legislative purpose specified by Congress in the authorizing resolution. And it is not to be lightly assumed that the House has enlarged the specified purpose beyond its fair intendment,

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[15]Below, petitioner did not contend that the Committee lacked authority from the parent body; indeed his brief in the Court of Appeals (pp. 57-58) expressly disavows such challenge. Presumably, this is why the petition (pp. 32-34) relies only reluctantly on the position taken by the dissenting judges below, and which prevailed in the majority opinion of the panel prior to the rehearing *en banc*.

[16]By reference to petitioner's brief in the Court of Appeals (pp. 57-58), it appears to be his suggestion that the House has "ratified" the Committee's conduct in that "the House has permitted the Committee to continue to operate under the same charter and thus ratified the broader construction."

merely because the House has continued the investigative authorization and appropriated funds to its support, after the Committee has asserted a wider authority than is covered by the authorizing resolution.[17]

The House has authorized this particular Committee to look into "un-American propaganda activities", and it is plain that in this case the Committee was doing nothing of the sort. It strains the strands of reasonableness past the breaking point to infer that the House meant its Committee to poke about in fields so disparate in time and subject matter from the declared object of the inquiry. The questions put to Watkins and Metcalf are much farther removed from any possible pertinency than those that were held not pertinent in *Bowers* v. *United States,* 202 F. 2d 447 (C. A. D. C. 1953) and *United States* v. *Kamin,* 136 F. Supp. 791 (D. Mass. 1956). See also *United States* v. *DiCarlo,* 102 F. Supp. 597 (N. D. Ohio 1952); *In re Battelle,* 207 Cal. 227, 277 Pac. 725 (1929); *People* v. *Foster,* 236 N. Y. 610, 142 N. E. 304 (1923).

But even if some tenuous showing of pertinence be assumed as theoretically possible, the pressure of the constitutional issues raised thereby requires that the authorizing statute and resolution be not construed so broadly as to bring these questions within its scope. This Court has made it clear that the Houses of Congress must not be assumed to have authorized committees to ask questions that impinge closely on constitutional rights, unless that meaning has been made unmistakably clear. *United States* v. *Rumely,*

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[17] *Cf.* the treatment of the related though not identical question of House "ratification" of the specific questions put to the recalcitrant witness by the vote citing for contempt, in *United States* v. *Rumely,* 345 U. S. 41, 47-48. "Administrative construction" as a guide to statutory interpretation is respected only within the area of reasonable interpretation. See *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, 640. Surely, any analogous doctrine of "committee construction" of its delegated powers should be at least equally limited.

345 U. S. 41 (1953); see also Judge Edgerton's opinion, dissenting in part, in *United States* v. *Lattimore,* 215 F. 2d 847, 863-69 (C. A. D. C. 1954).

The constitutional questions raised by the questions put to Watkins and Metcalf are at least as grave as, and more numerous than, those that dictated the result in the *Rumely* case. But whereas the decision in the *Rumely* case required a narrow and restrictive interpretation of the authorizing resolution which some might regard as strained, in the present case the authorizing acts must be stretched beyond their reasonable meaning to bring the questions within their scope.

The determination of this case, therefore, is governed *a fortiori* by the *Rumely* decision. The questions put to Watkins were beyond the authority delegated to the Committee, and therefore not pertinent to the inquiry that the Committee was authorized to conduct. Accordingly, the judgment below should be reversed.

2. *Constitutional Limitations on the Investigative Power of Congress.* Since the investigative power of Congress is a part of its legislative power, the former is both subject to and supported by all those provisions of the Constitution which shape the latter. This Court has recently described, in a statement both pithy and comprehensive, the several constitutional limits on the investigative power, including those that are pertinent to the instant case. *Quinn* v. *United States,* 349 U. S. 155, 160-61.

The petitioner, we submit, has demonstrated conclusively that the Committee's questions to Watkins were asked for the sole purpose of exposure, and that the Committee had no legitimate legislative purpose in view. Surely, too, it is plain that Congress possesses no such power of exposure as this Committee asserts, and that the attempted exercise of such a power has been authoritatively condemned ever since the time of John Quincy Adams (Pet. 17).

But petitioner's argument covers only a part of what is at issue here. Describing the questions put to Watkins as a "case of exposure for exposure's sake" phrases the test in subjective terms of the Committee's motive and intent. It may be helpful to view the constitutional problem also in the more objective terms of the scope and effect of the questions, in relation to the declared object of the Committee's inquiry.

If the lens is focused from this vantage point, it is easy to see why petitioner's argument, and his evidence of the Committee members' purposes, proved unconvincing to the majority of the court below. For they took the view (Pet. 43, 48) that the authority delegated to the Committee by the House extends so far as to empower the Committee to "identify" *every individual* who is or has been a member of the Communist Party or who "believes" in Communism.[18]

For reasons already given, this is an unwarrantably broad construction of the delegated power to investigate "un-American propaganda activities". For reasons shortly to be stated, it is likewise a conclusion that narrows the doctrine of separation of powers and the guarantees of the Bill of Rights to the vanishing point. However, the court below concluded otherwise on these points, and once having gone so far, it was obviously not interested in petitioner's proof, however clear, that the Committee and its members had revealed that their actual purpose was not legislative, but was directed solely to "exposure for exposure's sake."

The essential vice and fallacy of the position taken by the majority of the lower court (apart from the Procrustean extension of the House resolution) is that it totally subordinates to the legislative power the constitutional provisions that limit that power. To establish an absolute

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[18]The Supreme Court of New Hampshire appears to have taken an essentially similar view in the *Sweezy* case now pending in this Court. See the Jurisdictional Statement, pp. 45-47.

and unlimited investigative power to "identify" every individual who "believes" in Communism or any other doctrine, however noxious, is an unbalanced and indefensible conclusion, the logical implications of which are staggering.

If this Committee has the power attributed to it by the majority below to require any individual to assist it in identifying past and present Communist members and "believers," the arguably relevant breadth of questioning is enormous. *Cf. Tenney* v. *Brandlove,* 341 U. S. 367, 380 (1951). Furthermore, the Committee surely has the power to cross-examine witnesses to test the veracity, candor and completeness of their testimony. It is easy to envisage the virtually unbounded scope of arguably relevant questioning about opinions and associations that would be open to the Committee to pursue. Finally, the Committee's power under the statute (2 U. S. C. 192) is not restricted to oral testimony; it may also order the production of books and records. Under the theory of the majority below, the Committee would clearly be empowered to compel any person to produce any letters or other documents in his possession, no matter how personal in character, containing any reference to his attitude or that of anyone else toward Communism or any matter related to Communism.

No doubt the Government may reply that these things are not involved in the instant case. True enough, but it is certainly part of a wise jurisprudence to envisage the necessary consequences of a position or principle before adopting it. Whatever disposition is made of the instant case, the position taken by the lower court in this and earlier cases is insupportable, and leads inevitably to grotesque and intolerable corollaries.

In the present case this Court is confronted, and not for the first time, with a problem of balance and adjustment between on the one hand the Government's right to protect itself against violent overthrow by legislative means

reasonably adapted to that end, and on the other hand the preservation of governmental structure and the protection of individual rights in accordance with the constitutional provisions dedicated to those ends. There are several notable versions of the equation in the law books, of which the two perhaps most often invoked are Justice Holmes' "clear and present danger" test[19] and Judge Learned Hand's formulation,[20] approved by this Court in *Dennis* v. *United States,* 341 U. S. 494, 501. In bringing judgment to bear on such imponderables as freedom and security, even the best-phrased statements are chiefly valuable in evoking an attitude of mind conducive to a dispassionate, informed, and imaginative appraisal.

This is precisely what the majority of the court below failed to render. The gravity of the invasion of free speech wrought by questioning such as is involved in the instant case is apparent, and was clearly recognized by all members of this Court, as well as the court below in the *Rumely* case.[21] Such an invasion is not to be judicially sanctioned merely because the questions refer to Communism.

In the cases of the petitioner and Metcalf, the relation of the questions to the danger of the violent overthrow of government is exceedingly remote. The questions concern events many years past, and persons and situations far removed from the national security. That the House of Representatives needed the information called for by the questions for any legislative purpose is not seriously arguable. The proof that the Committee's real purpose was not legislative but punitive is compelling.[22] There is no reason-

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[19]*Schenck* v. *United States,* 249 U. S. 47, 52.

[20]*United States* v. *Dennis,* 183 F. 2d 201, 212 (C. A. 2).

[21]See *Rumely* v. *United States,* 197 F. 2d 166, 173-74, 176; *United States* v. *Rumely,* 345 U. S. 41, 46, 56-58.

[22]In shifting the core of the analysis from purpose and intent ("exposure") to the objective tests of scope, effect, and relation to the declared purpose of the inquiry, it is by no means intended

able relation between the questions and the inquiry into "un-American propaganda" which the Committee is empowered to conduct. The endless "identification" of individuals who may in the past have had some connection with Communism is no proper legislative function, and undermines the separation of powers. The incursion on the guarantees in the Bill of Rights is deep and dangerous, whether viewed from the right, left, or center of the political spectrum.

Other cases may well present situations in which reasonable men might differ in the course of an analysis such as the foregoing. In the instant case, the lower courts failed to make any analysis whatsoever. They simply did not undertake to search the issue in the general terms that this Court has laid down in related cases.[23] The result is a decision which ignores its own logical consequences, which disregards the facts necessary to a realistic and informed conclusion, and which must surely be reversed.

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to suggest that the evidence of the Committee's true purpose (on which petitioner chiefly relies) is irrelevant to the issue. To the contrary, it may be (as it is here) of the greatest importance in determining the value of the questions for legislative purposes, and the degree of relationship between the questions and the legitimate scope of the inquiry.

[23]In addition to the *Dennis* case, *supra,* see *Marshall* v. *Gordon,* 243 U. S. 521, 541 (1917), wherein Chief Justice White, discussing the legislative power to punish for contempt, observed that it should be exercised in accordance with the principle "the least possible power adequate to the end proposed." The language is taken from *Anderson* v. *Dunn,* 6 Wheat. 204, 230-31 (1821). *Cf. Toth* v. *Quarles,* 350 U. S. 11, 23 (1955).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

August 15, 1956.

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