INDEX

CITATIONS

STATUTES AND RESOLUTIONS

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 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 in this case.

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 beceme 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:

> "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 commit-

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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.

> tee 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 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.

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[4] *United States* v. *Metcalf,* unreported (Crim. No. 3052, S. D. Ohio W. D.). Compare *United States* v. *Lamont,* 236 F. 2d 312, 313-15 (C. A. 2d 1956) and below 18 F. R. D. 27 (S. D. N. Y. 1955); *United States* v. *Deutch,* 235 F. 2d 853 (C. A. D. C. 1956).

[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.

QUESTIONS PRESENTED HEREIN

1. Whether the questions put to petitioner were within the scope of authority delegated to the Committee by Congress, and pertinent to the inquiry which the Committee was authorized to conduct.

2. Whether the questions put to petitioner were beyond the constitutional limits of Congressional investigative power, under the provisions prescribing separation of executive, legislative and judicial powers and guaranteeing the rights of free speech and assembly.

3. Whether the statute and resolutions establishing the Committee are so vague and indefinite as to furnish no ascertainable standard of guilt, and thereby deprived the petitioner of his constitutional right to due process of law.

SUMMARY OF ARGUMENT

I. *The Questions Put to Petitioner were Beyond the Scope of Authority Delegated to the Committee by Congress, and were not Pertinent to the Inquiry which the Committee was Authorized to Conduct.* The Committee is authorized by Congress to investigate "the extent, character, and objects of un-American propaganda activities in the United States" and "the diffusion within the United States of subversive and un-American propaganda . . ." . On their face the questions put to petitioner, looking to the identification of certain individuals as members of the Communist Party, bear no relation to "propaganda" of any kind or to the channels of its "diffusion". Nor did the Committee lay any foundation to establish that the questions, though not *prima facie,* were in fact pertinent to the authorized inquiry. *United States* v. *Lamont,* 236 F. 2d 312 (C. A. 2d 1956). The legislative history of the

statute and resolutions establishing the Committee contains nothing to warrant expanding the scope of the language beyond its normal meaning, and clearly shows that the Congressional purpose, in harmony with the wording, was to look into the origin, contents, and channels of distribution of propaganda. Nothing in the legislative history supports the extraordinarily broad construction, adopted by the court below, that Congress has authorized the Committee to identify and "expose" every present and former member of the Communist Party. A resolution (H. Res. 88, 75th Cong. 1st sess.) the language of which might have been susceptible to such interpretation was debated and rejected by the House of Representatives in 1937 shortly before Representative Martin Dies introduced the much narrower resolution (H. Res. 282, 75th Cong. 1st sess.) adopted by the House in 1938, the language of which is identical with that of the statute under which the Committee presently operates. To overcome the wording and its legislative history, the Government may argue that in practice the Committee has purported to exercise a virtually unlimited power of inquiry into the Communist affiliations, past and present, of private individuals, and that the Committee practice has been "ratified" by Congress or the House of Representatives, in that the authorizing language has been left unaltered and appropriations have been voted to continue the Committee's work. But whatever weight might under other circumstances be given to such "committee construction" of its delegated powers, it can have none here, for the construction given a statute by those who execute its provisions will never be given an effect which would raise question of the statute's constitutional validity. *United States* v. *Standard Brewery,* 251 U. S. 210 (1920). In the present case, a construction of the authorizing statute so broad as to render pertinent the questions put to petitioner for the purpose of identifying past and present Communist Party members, would raise

very serious constitutional issues, as set forth below. Unless Congress in the plainest language has undertaken to authorize so sweeping and radical an inquiry, the language of authorization must be construed so as to avoid constitutional issues. *United States* v. *Rumely,* 345 U. S. 41 (1953); *cf. Peters* v. *Hobby,* 349 U. S. 331 (1955). The indictment must therefore be dismissed on the ground that the questions put to petitioner were not pertinent to the inquiry that Congress authorized the Committee to conduct.

II. *The Questions put to Petitioner were Beyond the Constitutional Limits of Congressional Investigative Power, under the Provisions Prescribing Separation of Legislative, Executive, and Judicial Power, and Guaranteeing the Rights of Free Speech and Assembly.* The investigative power of Congress is part of its legislative power, and is subject to the constitutional division of powers among the three branches of the government, and to all other constitutional limitations on the power of Congress, including those embodied in the First Amendment. See *Quinn* v. *United States,* 349 U. S. 155, 160-61 (1955).

A. *Separation of Powers.* The Committee's reports to Congress, as well as the other material referred to in the Petition for Certiorari (pp. 19-29), leave no doubt that the questions put to the petitioner were part of the Committee's avowed program of identifying and "exposing" past and present members of the Communist Party. The court below upheld the Committee's power to carry out such a program (233 F. 2d at 684 and 686-87), and the Solicitor General supports the decision below on that basis (Brief in Opposition to Certiorari, pp. 17-18). But such a program cannot possibly be justified as a proper exercise of legislative power. The identification, prosecution, and punishment if guilty of members of the Communist Party whose activities, actual or suspected, are

within the ambit of the criminal laws is a matter for the executive and judicial branches of the government, not for Congress. *Kilbourn* v. *Thompson,* 103 U. S. 168 (1880); *Greenfield* v. *Russel,* 292 Ill. 392, 127 N. E. 102 (1920). Congress, on the other hand, has the power to identify and "expose" an individual as a past or present member of the Communist Party only if such information is reasonably related to a legislative purpose. The Committee, in questioning petitioner, made no effort to establish any such relationship, and the material in the Petition for Certiorari (pp. 19-29) conclusively establishes that in fact the Committee had no legislative purpose in mind, but was pursuing a program of "exposure for exposure's sake". The circumstance, heavily relied on by the court below (223 F. 2d at 686-87) and by the Solicitor General (Brief in Opposition, pp. 14-16), that the Committee had various bills under consideration at the time petitioner was questioned, is of no significance unless the questions put to petitioner bore some reasonable relationship to the Committee's study of the bills. But there is no color of any such relationship. The questions put to petitioner, accordingly, lay outside the sphere of legislative power conferred on Congress by Article I of the Constitution, and the Committee was powerless to require the petitioner to answer them.

B. *First Amendment.* Even if there were an arguable relation between the questions put to petitioner and an authorized legislative purpose, the First Amendment would deprive Congress of the power to compel petitioner to answer the questions. That Amendment bars legislative acts, even though valid in all other respects, which violate the guarantees that it embodies. *Fiske* v. *Kansas,* 274 U. S. 380 (1927); *cf. American Communications Ass'n* v. *Douds,* 339 U. S. 846 (1950). As this Court has recently re-

affirmed, the First Amendment limits not only legislation, but all other manifestations of legislative power, including investigative action. *United States* v. *Rumely,* 345 U. S. 41 (1953); see *Quinn* v. *United States, loc. cit. supra.* The court below, in other cases, has recognized that questions such as those put to petitioner substantially infringe the First Amendment's guarantees of free speech, press, and assembly. See *Rumely* v. *United States,* 197 F. 2d 166, 173-74 (C. A. D. C. 1952). It has upheld the Committee's power to "expose" individuals "who believe in Communism" only on the theory that Communism is such a serious threat to national security that the infringement of the First Amendment is warranted. See *Barsky* v. *United States,* 167 F. 2d 241, 246; *Rumely* v. *United States, loc. cit. supra.* But neither in this nor earlier cases has the court below applied the standards laid down by this Court, which must be met if restrictions on free speech, press, or assembly are to be held valid. *Dennis* v. *United States,* 341 U. S. 494 (1951). Grave as is the danger of Communism, there is no basis here for finding that the information sought to be elicited by the questions put to petitioner was necessary or even useful for legislation in the field of national security. Lacking any indication of such necessity or usefulness, the First Amendment bars the imposition of penal consequences for petitioner's failure to answer.

C. *Unconstitutionality.* The First Amendment and the principle of separation of powers must be taken in conjunction when considering the constitutionality of the statute under which the Committee operates, if construed as authorizing the questions put to petitioner. Unquestionably, Congress has the authority and responsibility to protect the Government against violent overthrow, by legislative means reasonably adapted to that end. So too, the investigative power should be allowed ample scope in order that Congress may obtain the information it needs for its deliberations.

But infringements of the constitutional guarantees are not to be judicially sanctioned simply because they occur in the course of an investigation of Communism. In upholding the Committee's power to "identify" all past and present Communists, the court below wholly disregarded the constitutional values at stake here, and failed to search the issue in the terms this Court has laid down in related cases. *Dennis* v. *United States, supra; Jones* v. *Securities Commission,* 298 U. S. 1 (1936); see *Board of Education* v. *Barnette,* 319 U. S. 624, 642 (1943). Where individual rights are at stake, the investigative process should be exercised in accordance with the principle: "the least possible power adequate to the end proposed." *Anderson* v. *Dunn,* 6 Wheat. 204, 230-31 (1821). In this case the questions put to petitioner were so remote from any valid legislative purpose, the Committee's purposes were so plainly unwarranted, and the incursion on the constitutional guarantees is so deep, that the petitioner was under no legal obligation to answer, and his conviction must be set aside.

III. *The Statute and Resolutions Establishing the Committee are so Vague and Indefinite as to Furnish no Ascertainable Standard of Guilt, and thereby Deprived Petitioner of his Constitutional Right to Due Process of Law.* The statute under which petitioner was indicted (2 U. S. C. 192) punishes only the failure to answer questions "pertinent" to the inquiry, and witnesses before this Committee are therefore relegated to the authorizing statute in determining whether particular questions are or are not "pertinent." In the authorizing statute, the qualifying adjectives "un-American" and "subversive", even if read in conjunction with the phrase "attacks the principle of the form of government as guaranteed by our Constitution", are far too general to furnish a valid basis for a criminal indictment.

United States v. *Cohen Grocery Co.,* 255 U. S. 81 (1921); *Musser* v. *Utah,* 333 U. S. 95 (1948). This is especially true if the authorizing statute is given the broad construction urged by the government and adopted by the court below. *Cf. Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952). Had the House of Representatives sought to compel the petitioner to answer by exercising its own contempt power, the vague wording of the authorizing statute might be overlooked, for then the petitioner would be on notice and would have had opportunity to avoid contempt by answering at the bar of the House. *Cf. Jurney* v. *MacCracken,* 294 U. S. 125 (1935). But here the House chose to invoke criminal process, and the precision of the statutes under which he is indicted must meet the requirements of due process, just as in any other statutory prosecution. Here the relevant statutory provisions are vague and uncertain far beyond the permissible bounds, and the indictment must therefore be dismissed.

ARGUMENT

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.

There can be no question of the importance of the constitutional 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. But in the present case there is an important question of statutory interpretation which must be resolved before the constitutional questions are approached. *United States* v. *Rumely, supra; Hurd* v. *Hodge,* 334 U. S. 24 (1948); *Alma Motor Co.* v. *Timken-Detroit Axle Co.,* 329 U. S. 129 (1946).

I.

THE QUESTIONS PUT TO PETITIONER WERE BEYOND THE SCOPE OF AUTHORITY DELEGATED TO THE COMMITTEE BY CONGRESS, AND WERE NOT PERTINENT TO THE INQUIRY WHICH THE COMMITTEE WAS AUTHORIZED TO CONDUCT.[6]

The Legislative Reorganization of 1946 and House Resolution 5 (83rd Cong. 1st sess.), 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" and "the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attack the principle of the form of government as guaranteed by our Constitution." A third clause of the authorization covers in "all other questions in relation thereto that would aid Congress in any necessary remedial legislation." It is apparent from this language that the *subject* of the investigation is "propa-

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[6]In the Brief in Opposition to the Petition for Certiorari, the Solicitor General suggested (p. 15, note 7a) that this issue is not before the Court because petitioner has not raised it. But even if that were so, this Court can not be forced to decide constitutional issues when, as here, there is a non-constitutional issue dispositive of the case. *Peters* v. *Hobby,* 349 U. S. 331; *cf. Sibbach* v. *Wilson & Co.,* 312 U. S. 1 (1941); *Kessler* v. *Strecker,* 307 U. S. 22 (1939); *Swift & Co.* v. *Hocking Valley Ry. Co.,* 243 U. S. 281 (1917); see *Emspak* v. *United States,* 349 U. S. 190, 198, 204 (1955).

ganda" of the specified types, and that the *purpose* is to assist Congress in determining whether "remedial legislation" is necessary, and if so, what form it should take.

The questions which petitioner refused to answer were whether or not he knew certain named individuals as members of the Communist Party during the period 1942 to 1947. On their face, these questions bore no relation to "propaganda" of any sort.[7] As the dissenting judges below stated (233 F. 2d at 694):

> "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 indirectly, 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."

Nor do the questions relate to the necessity or form of "remedial legislation." The majority below relied heavily (233 F. 2d at 685-86) on the circumstance that the Committee, at the time of petitioner's appearance before it, had under consideration bills relating to wire-tapping, and a bill to deny the use of the National Labor Relations Board to "communist-infiltrated" labor unions. But the mere fact

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[7]See *United States* v. *Singer,* 139 F. Supp. 847, 851 (D. C. D. C. 1956): "On its face, the question . . . which concerns whether certain named individuals attended meetings mentioned by the defendant, does not appear pertinent to the inquiry." In that case (now pending in the Court of Appeals for the District of Columbia), which also involved the Committee on Un-American Activities, the district court held that since the defendant was a teacher, and the teaching profession is a possible channel of Communist propaganda, the identity of individual Communist teachers was a matter pertinent to the inquiry. This conclusion required, as in the present case, an extremely broad construction of the Committee's statutory mandate.

that such bills were under study by the Committee did not render these questions pertinent to their consideration. On the contrary, as the dissenting judges pointed out (223 F. 2d at 691-92 and 694), the significance of the questions for purposes of legislation was at best remote and theoretical.

But the lower court did not rest its decision solely on the supposed usefulness, of the answers demanded from petitioner, in connection with the bills then pending. It likewise embraced the sweeping interpretation of the Committee's delegated authority, put forward in that court's earlier decisions,[8] that the Committee is empowered "to identify individuals who believe in Communism and those who belong to the Party." Certainly there is no accepted meaning of the word "propaganda" to support such a construction, so out of keeping with the traditional functions of legislative committees. Indeed, the court's reading of the authorizing statute would appear to be expressly barred by its third clause, which prescribes as the Committee's purpose the consideration and formulation of "remedial legislation," and which thus authorizes only such questions (including "identifying" questions) as are reasonably related to that purpose.

In short, the petitioner's conviction is grounded on a painfully distended construction of the authorizing statute, which is at war alike with the wording, and with the historic practice of Congressional committees. This construction is so patently unsound that there is no occasion to look to legislative history or auxiliary principles of legislative construction. Nor has the government sought to buttress its position from these sources. This is hardly surprising, for their impact is strongly favorable to petitioner, as they reinforce the normal interpretation of the authorizing statute, and show that the Committee's delegated power was intended

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[8] *Barsky* v. *United States*, 167 F. 2d 241 (1948); *Lawson* v. *United States*, 176 F. 2d 49 (1949).

to be limited by the accepted bounds of legislative investigations.

The legislative history of the authorizing statute[9] goes back to 1930, when the House of Representatives adopted a resolution[10] calling for an investigation of "communist propaganda in the United States and particularly in our educational institutions; the activities and membership of the Communist Party of the United States"; and other closely related subjects. It will be observed that this resolution was significantly different from the statute under which the present Committee operates, in that it specifically directed an inquiry into the *membership* of the Communist Party. The reason for this is not far to seek, for it is apparent from the discussion on the floor, the hearings, and the ensuing report, that the sponsors of the investigation were deeply concerned with aliens, and the deportation of individual alien Communists.[11]

The true progenitor of the authorizing statute was the resolution introduced by Representative Samuel Dickstein in 1934,[12] calling for investigation of Nazi propaganda activities. The language of the Dickstein resolution is identical with that of the authorizing statute, except for the use of the word "Nazi" instead of "un-American" in the first clause, and the omission of the words "and un-American" in the second.[13] Pursuant to this resolution, a special House

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[9]The history of the authorizing statute is traced in Augustin R. Ogden, *The Dies Committee* (1945), pp. 14-46.

[10]H. Res. 220 (71st Cong. 2nd sess.), introduced May 12, 1930, debated and adopted May 22, 1930 (*Cong. Rec.*, 71st Cong., 2nd sess.) pp. 8810-11, and 9390-98.

[11]Ogden, *op. cit. supra,* pp. 21-31; see also the remarks of Representative Hamilton Fish (one of the principal initiators of the investigation) during the debate (*Cong. Rec.*, 71st Cong., 2nd sess.) p. 9393.

[12]H. Res. 198 (73d Cong. 2nd sess.), introduced January 3, 1934, debated and adopted March 20, 1934.

[13]*Cong. Rec.* (73 Cong. 2nd sess.), pp. 13 and 4934. The Dickstein resolution is quoted in Carr, *The House Committee on Un-American Activities* (1952) pp. 13-14.

Committee under the chairmanship of Representative John McCormack held hearings, and filed a report in February, 1935.[14]

From the discussion that preceded the adoption of the Dickstein resolution, it is plain beyond question that the sponsors of the resolution intended its language to be taken in accordance with its natural meaning. This was to be an investigation of *propaganda.*[15] Representative Dickstein, for example, told the House that:[16]

> "The special investigating committee should seek to accomplish three primary objects: First, ascertain the facts about methods of introduction of destructive, subversive propaganda originating from foreign countries; second, ascertain facts about organizations in this country that seem to be cooperating to spread this alien propaganda through their membership in this country; third, study and recommend to the House appropriate legislation which may correct existing facts and tend to prevent the recurrence of a similar condition in the future."

The investigation was conducted in line with these expressions. The leadership and activities of Nazi and Communist organizations was studied, with special emphasis on propaganda operations.[17] There was no effort to "identify" individual members of such organizations other than as became relevant to the inquiry's legislative objectives. The committee's primary recommendation was the enactment of legislation for the registration of foreign propaganda agents, a proposal which bore fruit in the Foreign Agents Registration Act of 1938.[18]

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[14]*Investigation of Nazi and Other Propaganda,* H. Rep. No. 153 (79th Cong. 1st sess.).

[15]See the debate on the resolution, *Cong. Rec.* (73d Cong., 2nd sess., March 20, 1936), pp. 4938-46.

[16]*Id,* at p. 4946.

[17]Ogden, *op. cit., supra,* pp. 34-37; *Investigation of Nazi and Other Propaganda, supra* note 14.

[18]Public Law No. 583, June 8, 1938, 22 U. S. C. 611-21.

In 1937, Representative Dickstein introduced yet another resolution for an investigation,[19] the language of which was remarkably sweeping, and which now utilized the expression "un-American". It called for an investigation of:

> "the character, objects, extent of operations, roster of membership and officers, all sources of revenue, and distribution of finances by and of any organizations or groups of individuals acting together found operating in the United States for the purpose of diffusing within the United States of slanderous or libellous un-American propaganda of religious, racial, or subversive political prejudices which tends to incite to the use of force or violence or which tends to incite libellous attacks upon the President of the United States or other officers of the Federal government, whether such propaganda appears to be of foreign or domestic origin; . . ."[20]

This second Dickstein resolution did not purport to embrace the membership of such organizations in years long past, and in that respect was perhaps less sweeping than the authority now claimed by the Committee. But the 1937 resolution did specifically envisage the "identification" of all members of "un-American propaganda" organizations, and in that respect cuts very close to the question of interpretation presently at issue. This resolution was debated at some length on April 8, 1937,[21] and on the division was overwhelmingly defeated.[22]

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[19]H.Res. 88 (75th Cong., 1st sess.).

[20]The second clause of the resolution concerned the use of the mails, and the third clause covered in "related" questions.

[21]*Cong. Rec.* (75th Cong., 1st sess.) pp. 3283-89.

[22]*Id.*, p. 3289. The vote on the motion to lay the resolution on the table was 184 to 34. It is of interest that Representative Hamilton Fish, usually a strong protagonist of investigations of this type, opposed the 1937 Dickstein resolution on the ground that it would "restore the alien sedition laws". *Id.*, p. 3285.

Shortly after the defeat of the 1937 Dickstein resolution, Representative Martin Dies introduced the resolution[23] under which the special committee that came to bear his name was established in 1938. Its language, identical with that under which the Committee presently operates, has remained the charter of the House "un-American activities" investigation since that time.

As is apparent from the foregoing account, therefore, the language of both the Dies resolution and the present statutory authorization was derived from that of the 1934 Dickstein resolution. Both called for an investigation of "propaganda", and if the discussion on the floor in 1938[24] covered a broader range than in 1934, there was certainly nothing in 1938 to support the notion that the Committee was empowered to "identify" all Communist Party members and believers, as is now claimed.[25]

On the contrary, the legislative history traced above plainly shows that the House had no such broad power of individual exposure in mind when it adopted the Dies resolution. For the House had refused to adopt the 1937 Dickstein resolution which expressly embraced that power. Then in 1938 it approved the Dies resolution with the much narrower language, relating only to propaganda, which had previously been utilized in the 1934 Dickstein resolution. The implications of this sequence are obvious, and clearly show that the language of the statutory authorization, when adopted, was not intended to be stretched beyond its natural intendment.

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[23]H. Res. 282 (75th Cong. 1st sess.), introduced June 21, 1937.

[24]*Cong. Rec.* (75th Cong., 3d sess., May 26, 1938), pp. 7568-861.

[25]Representative Dies did speak of the "exposure" of "subversive activities". *Id.*, p. 7570. But this is a far cry from the public identification of all individuals who "believe" in Communism, or who have ever been Party members.

The Solicitor General may perhaps argue[26] that the practice of the Un-American Activities Committee over a period of years has been to put questions to all "suspect" witnesses similar to those put to petitioner, and that the Committee's practice has been Congressionally "ratified" by reenactment of or failure to amend the statutory authorization, or by repeated appropriations to support the Committee's activities. Such an argument might perhaps be formulated by analogy from the principle of "administrative construction", sometimes reinforced by that of "Congressional reenactment".

But these principles are of no avail to the Government in the present case. There are no words in the authorizing statute susceptible to the interpretation that "identification" of Communist Party members and "believers" is within the Committee's power. On the contrary, the language permits no such construction.[27] The broad scope given the statute by the court below does not lie within the area of reasonable interpretation, and therefore can not be established by the Committee's own practice. See *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, 640: "Where a statutory body has assumed a power plainly not granted, no amount of such [administrative] interpretation is binding upon the courts."[28]

Furthermore, the argument that Congress has effectively "ratified" the broad construction for which the Government must contend is at war with two well-established and plainly applicable principles of statutory interpretation. The first is that criminal statutes are to be narrowly con-

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[26]See the Petition for Certiorari at p. 34, and the Government's reference thereto in its Brief in Opposition at p. 15, note 7a.

[27]*Supra,* pp. 12-13.

[28]To the same effect, see *Biddle* v. *Commissioner,* 302 U. S. 573 (1938); *Louisville & N. R. Co.* v. *United States,* 282 U. S. 740 (1931); *United States* v. *Missouri Pac. R. Co.,* 278 U. S. 269; *Chicago, M & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.,* 253 U. S. 94 (120).

strued in favor of the defendant. The second is that statutes are, whenever possible, to be so construed as to avoid constitutional doubts.

This is, after all, a criminal case. The House could have sought to compel petitioner to answer by exerting its own contempt power.[29] Instead, petitioner has been indicted for a crime under the statute punishing failure to answer questions "pertinent" to a matter under inquiry before the Committee. Whether or not the questions were "pertinent" is determined by reference to the authorizing statute, which thus becomes an essential part of the legal basis of the alleged offense. Under accepted principles of criminal law, therefore, the authorizing statute must be construed narrowly, in favor of the defendant. See, *e.g.*, *United States* v. *Resnick,* 299 U. S. 207 (1936). The Committee's own conception of its power under the authorizing statute can not be allowed to overcome the natural meaning of the language, or to expand that meaning so as to impose penal consequences in cases not plainly covered by the actual language. *United States* v. *Standard Brewery,* 251 U. S. 210 (1920); *cf. Iselin* v. *United States,* 270 U. S. 245 (1926).

The House authorized this 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 have been held not pertinent in other cases. *Bowers* v. *United States,* 202 F. 2d 447 (C. A. D. C. 1953); *United States* v. *Lamont,* 236 F. 2d 312 (C. A. 2d 1956); *United States* v. *Kamin,* 136 F. Supp. 791

[29] *Jurney* v. *MacCracken,* 294 U. S. 125 (1935); *McGrain* v. *Daugherty,* 273 U. S. 135 (1927).

(D. Mass. 1956); *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, supra;* 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). Nor will "administrative construction" or "Congressional re-enactment" be allowed to give a statute a meaning or application which raises or aggravates constitutional problems. *United States* v. *Standard Brewery, supra.*

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.

II.

THE QUESTIONS PUT TO PETITIONER WERE BEYOND THE CONSTITUTIONAL LIMITS OF CONGRESSIONAL INVESTIGATIVE POWER, UNDER THE PROVISIONS PRESCRIBING SEPARATION OF LEGISLATIVE, EXECUTIVE, AND JUDICIAL POWER, AND GUARANTEEING THE RIGHTS OF FREE SPEECH AND ASSEMBLY.

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 present case:[30]

> "But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate. Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary. Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights . . . "

If the constitutional questions in this case are to be determined, therefore, the crucial issues are whether the questions put to petitioner were within the reasonable reach of legislative power, and whether, even if they were, the Bill of Rights protected petitioner against the compulsion of answering.

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[30]See *Quinn* v. *United States,* 349 U. S. 155, 160-61 (citations omitted).

A. Separation of Powers

The investigative power of Congress is derived by implication from Article I of the Constitution, vesting "All legislative powers" in Congress. Accordingly, the Houses of Congress cannot validly exercise their investigative power outside the legislative sphere or in such a way as to usurp or destroy executive or judicial functions, and efforts to do so are subject to check by judicial review. *Kilbourn* v. *Thompson,* 103 U. S. 168 (1880).

The court below and the Solicitor-General have sought to justify the questions put to petitioner on the basis that they were, on their face, relevant to a legislative purpose—*i.e.*, to an investigation of the sources and diffusion of "un-American" propaganda, or to the study of possible "remedial legislation" in that field. If the questions were indeed fair *prima facie*, then it might well be that extrinsic evidence of the Committee's subjective motives would be judicially irrelevant. Lawful power may be abused for personal or political ends; the courts cannot constantly look behind the facts of its possession and exercise to check its misuse. If the legislature specifies a proper subject of inquiry, and its investigating committee puts questions that are *prima facie* relevant to the subject, ordinarily the courts will not review the motives of the committee's members.[31]

But in the present case, the questions put to petitioner were not ostensibly relevant to a legislative purpose. They did not on their face relate to propaganda. They bore no apparent relation to any question of remedial legislation. The court below and the Solicitor General feebly urge that the questions were relevant to the Committee's consideration of a bill relating to Communist-infiltrated labor unions.[32]

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[31]See, *e.g., People ex rel. McDonald* v. *Keeler,* 99 N. Y. 463, 487 (1885): "We are bound to presume that the action of the legislative body was with a legitimate object, if it is capable of being so construed . . . ".

[32]See 223 F. 2d at 686-87, and the Brief in Opposition to Certiorari, p. 16.

But in neither place are any reasons given why the matter of identifying these particular individuals as Communists in the period 1942-47 had even the slightest bearing on any legislative problem.

The personal conduct of individuals *may* be pertinent to the study of legislation, but the pertinence must be apparent, or emerge from evidence, if questions are to be justified. It is not a blanket proposition. The consideration of "remedial legislation" does not *ipso facto* warrant a legislative committee in compiling a running, public roster of all individuals whose past or present conduct might bring them within its ambit. It is obvious that the consequences of so radical and sweeping a concept of legislative power would be truly revolutionary.

If on their face the questions put to petitioner served no legislative purpose, can that purpose be gathered from extrinsic evidence? The government has made no effort to supply it. Failing such a showing, the petitioner cannot be compelled to answer the questions. *Kilbourn* v. *Thompson, supra; United States* v. *Lamont,* 236 F. 2d 312 (C. A. 2d 1956); *Bowers* v. *United States,* 202 F. 2d 447 (C. A. D. C. 1953); *United States* v. *Icardi,* 140 F. Supp. 383 (D. C. D. C. 1956); *Ward Baking Co.* v. *Western Union Telegraph Co.,* 205 App. Div.) 723, 200 N. Y. Supp. 865 (1923); *People* v. *Webb,* 5 N. Y. Supp. 855 (1889).

Furthermore, the petitioner has come forward with abundant and compelling proof[33] that the Committee did *not,* in putting the questions, have in mind any purpose relating to the inquiry into propaganda specified by Congress, or to "remedial legislation." Rather, this extrinsic evidence conclusively shows that the Committee's purpose was purely one of exposure, and was part of the Committee's continuing program of compiling a roster of past and present Communists and Communist "believers", in no matter what circumstances or walk of life.

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[33]Petitioner's Brief, pp. 39-76.

The court below and the Solicitor General attempt to brush away petitioner's showing[34] on the ground that it is not "evidence", and that the issue of legislative purpose cannot be "solved by generalities culled from speeches", which would not establish whether the asserted power of exposure was being exercised "in any particular inquiry". Whatever weight these arguments might have if the questions were *prima facie* related to a legislative purpose,[35] they can have none where, as here, the questions have no ostensible relation to legislative activity. See *United States* v. *Lamont, supra,* at p. 316; *United States* v. *Kamin,* 136 F. Supp. 791, 804. For in this posture, the legislative quality of the questions can *only* be determined by reference to extrinsic circumstances. So tested, they are patently non-legislative in their actual purpose.

Possibly aware that the legislative character of the questions put to petitioner is conspicuously lacking, both in appearance and actuality, the court below and the Solicitor General are obliged to fall back on the position which lies at the root of the prosecution's case. This is the proposition that exposure—or identification, which amounts to the same thing—of all past and present Communists and Communist believers *is* a legitimate legislative function.[36] The implications of this position in terms of the First Amendment are discussed below.[37] But quite apart from the Bill of Rights, such a conclusion is an impossible one to support within the constitutional framework of our government, and the separation of powers which is one of its fundamental features.

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[34]233 F. 2d at 687, and Brief in Opposition to Certiorari, pp. 18-20.

[35]*Supra,* p. 22.

[36]233 F. 2d at 684, and 686-87, and Brief in Opposition to Certiorari, pp. 17-18.

[37]*Infra,* pp. 26-31.

It is wholly inconsistent with our constitutional structure that legislative committees should abandon themselves to a chase after individuals, and dedicate themselves to wholesale and retail "exposure", without limit in time, place or circumstance. Such conduct constitutes a patent invasion of executive and judicial functions, for it is the task of the executive to collect evidence against individuals, and the task of the judiciary to determine whether evidence establishes criminal guilt. And no branch of the government is empowered to "expose" individuals by force of law for anything other than criminal conduct, unless such exposure is incidental to the accomplishment of other authorized objectives.

Furthermore, it is well settled that the principle of separation of powers is not merely a matter of governmental housekeeping; it is also a cornerstone of individual rights. *Kilbourn* v. *Thompson, supra; Jones* v. *Securities Commission,* 298 U. S. 1 (1936); see *Jurney* v. *MacCracken,* 294, U. S. 125, 147-48 (1935). A striking illustration is to be found in *Greenfield* v. *Russel,* 292 Ill. 392, 127 N. E. 102 (1920), wherein an attempted investigation of charges of corruption against a religious sect was held unauthorized as an invasion of the judicial sphere, to the injury of those who were accused. And many years earlier the Court of Appeals of New York State declared in *People ex rel. McDonald* v. *Keeler,* 99 N. Y. 463 (1885) that (at p. 485):

> "An investigation instituted for the mere sake of investigation, or for political purposes, not connected with intended legislation, or with any of the other matters upon which the house could act, but merely intended to subject a party or body investigated to public animadversion, or to vindicate him or it from unjust aspersions, where the legislature had no power to put him or it on trial for the supposed offenses . . . would not, in our judgment, be a legislative proceeding, or give to either house jurisdic-

> tion to compel the attendance of witnesses or punish them for refusing to attend."

Finally, the Committee's attempt to exercise this non-existent power of "exposure" infringes not only the doctrine of separation of powers, but the basic theory of the federal government as one of *limited* powers, comprising only those delegated to it by the Constitution. By necessary implication, and by the express provision of the Tenth Amendment, all other powers are reserved to the States or the people.

For this very reason, Alexander Hamilton and others opposed the Bill of Rights as unnecessary, because Congress had been given no powers that could be used to restrict basic freedoms. See *The Federalist,* No. 81 (Hamilton). In seeking to compel petitioner to answer the questions put to him, the Committee can have had no purpose other than to hold his and other names up to the "public animadversion" condemned by the New York Court of Appeals in the *Keeler* case, *supra.* The Constitution gives neither Congress nor the federal government itself any power to do this.

B. The First Amendment

Even if there were an arguable relation between the questions put to petitioner and an authorized legislative purpose, that would not establish the Committee's right to require him to answer. The powers of Congress are not only limited to those of "legislative" character; they are likewise restricted by the specific prohibitions contained in the Bill of Rights. Those prohibitions, as this Court has recently declared, apply not only to legislation, but to legislative investigations as well. See *Quinn* v. *United States,* 349 U. S. 155, 160-61. In the present case the relevant constitu-

tional provisions are those in the First Amendment, guaranteeing freedom of speech, press, and assembly.[38]

In his brief, petitioner has stated[39] the nature of the infringement of the First Amendment which would result from his being compelled to answer the questions put to him, and little more need be said here. It is true that one of the principal historical purposes of that Amendment was to guarantee the individual's right to speak out, orally or in writing, on controversial public matters, and especially to protect him against subsequent prosecution for seditious libel.[40] But even in Revolutionary times it was recognized that freedom of speech and press are far more than the personal right of an individual to speak or write. They guarantee to the people that there shall be *freedom of communication among men.* As early as 1774 the Address of the Constitutional Congress to the inhabitants of Quebec referred to freedom of the press as ensuring the "ready communication of thoughts between subjects".[41]

Freedom of communication can be as effectively suppressed by inquisition as by censorship. Judges have found diverse expressions of this fact. In the past century, Justice Miller spoke of "private affairs",[42] and in several subsequent decisions in the investigative field this Court has

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[38]These are restrictions not identical with but additional to those arising out of the separation of powers. For example, the several state laws which this Court has set aside under the First (*via* the Fourteenth) Amendment were indubitably the exercise of legislative power, in a field appropriate to its exercise. But the manner or extent of exercise abridged the individual freedoms guaranteed by the Bill of Rights, and the laws were therefore held invalid. See, *e.g., Fiske* v. *Kansas,* 274 U. S. 380 (1927); *cf. American Communications Ass'n.* v. *Douds,* 339 U. S. 846 (1950).

[39]Petitioner's Brief, pp. 100-110.

[40]See, *e.g.,* Chafee, *Freedom of Speech and Press* (Freedom Agenda Committee, 1955), pp. 35-41.

[41]*Id.,* at 40-41, where it is also mentioned that in 1789 the National Assembly in Paris declared as one of the Rights of Man: "The free communication of thoughts and opinions".

[42]*Kilbourn* v. *Thompson, supra,* at 195.

spoken of "private" matters or the "right of privacy".[43] In the context of the Fourth Amendment, Justice Brandeis referred[43a] to "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Twenty years ago Justice Sutherland listed as one of "the three protective rights of the individual" his freedom from "unlawful inquisitorial investigations."[44] More recently Justice Jackson wrote:[45]

> "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 . . ."

But however this "anti-inquisitional" right is phrased, there is no longer any doubt that it is a part of the freedom safeguarded by the Bill of Rights, especially in the First and Fourth Amendments. Therefore, questions put by a legislative investigating committee which search a witness' record of political association, expression, and belief undeniably impinge on the First Amendment guarantees, and infringe those guarantees unless justified under the judge-made qualifications of the Amendment's absolute language, such as the "clear and present danger" doctrine or its later variants.

Questions such as those put to petitioner have been involved in earlier cases, both in this Court and the lower court. Although the lower court, by a divided vote, has upheld the Committee's constitutional power to require answers to "identifying" questions of this type,[46] apparently

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[43]*Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407, 417-18 (1908); *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298, 305-06 (1924); *Sinclair* v. *United States,* 279 U. S. 263, 291-92 (1929).

[43a]*Olmstead* v. *United States,* 277 U. S. 438, 478 (1928).

[44]*Jones* v. *Securities Commission,* 298 U. S. 1, 28 (1936).

[45]*Board of Education* v. *Barnette,* 319 U. S. 624, 642 (1943).

[46]In addition to the instant case, see *Barsky* v. *United States,* 167 F. 2d 241 and *Lawson* v. *United States,* 176 F. 2d 49.

without limit if related to Communism, it has nevertheless explicitly recognized that such questions impinge on the First Amendment, and seriously.[47] This Court has not hitherto undertaken to pass on the problem of constitutional power, but has made clear its awareness that sharp and searching issues under the First Amendment are indeed presented by "identifying" questions such as were put to petitioner. *United States* v. *Rumely,* 345 U. S. 41 (1953).

In the present case, accordingly, the issue is whether the questions put to petitioner were of such a nature that the courts should sanction their inroads on freedom of speech and association, for overriding reasons of national interest. The questions relate to Communism and the identification of Communists, and for the court below that is enough to dictate an affirmative answer. In the context of lobbying, it has ruled, the "identifying" questions put to Rumely were at best of dubious constitutional validity; in the context of Communism, such questions to Barsky or the petitioner are abundantly justified despite the impingement on the First Amendment.[48]

The essential vice and fallacy of the position taken by the majority of the lower court is that it totally subordinates to the legislative power the constitutional provisions that limit that power. To establish an absolute and unlimited investigative power to "identify" every individual

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[47]See Judge Prettyman's opinions in the *Barsky* case, *supra,* at pp. 249-50, and the *Rumely* case, 197 F. 2d at 174 ("the realistic effect of public embarrassment is a powerful interference with the free expression of ideas").

[48]See footnote 47, *supra.* Judge Prettyman went so far as to suggest that in the field of national security Congress may use its investigative power not only in support of its legislative responsibilities, but as an independent weapon of governmental self-presentation. In a dissenting opinion in a later case concerning other questions, he distinguished between the "factually real" danger necessary to justify legislation in derogation of the First Amendment, and the "potential" danger which is enough to warrant such investigative action. See *National Maritime Union* v. *Herzog,* 78 F. Supp. 146, 177-78 (D. C. D. C. 1948).

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. *Brandhove,* 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.

Neither in this nor earlier cases has the court below applied the standards laid down by this Court, which must be met if restrictions on free speech, press, or assembly are to be held valid. *Dennis* v. *United States,* 341 U. S. 494 (1951). Grave as is the danger of Communism, there is no basis here for finding that the information sought to be

elicited by the questions put to petitioner was necessary or even useful for legislation in the field of national security. Lacking any indication of such necessity or usefulness, the First Amendment bars the imposition of penal consequences for petitioner's failure to answer.[49]

C. Unconstitutionality

The two main branches of the constitutional problem in this case—separation of powers and the First Amendment—are distinct in theory[50] and may in many circumstances differ in their impact. But in the present case, it is perhaps artificial to endeavor to keep the two in separate compartments. Rather, the First Amendment and the principle of separation of powers should be considered in conjunction, in finally determining the constitutionality of the statute under which the Committee operates, if construed as authorizing the questions put to petitioner.

Unquestionably, Congress has the authority and responsibility to protect the Government against violent overthrow, by legislative means reasonably adapted to that purpose. So

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[49]The Solicitor General's suggestion (Brief in Opposition to Certiorari, p. 22), that petitioner has waived his right to challenge the Committee's authority under the First Amendment because he "freely testified as to his own past history and general associations," is without substance. This is not a question of privilege, as in the case (*Rogers* v. *United States,* 340 U. S. 367) relied on by the Solicitor General. A witness before a legislative committee may voluntarily answer questions which are outside the compulsory powers of the committee, without sacrificing his right to challenge the committee's authority to put other questions. See *Bowers* v. *United States,* 202 F. 2d 447, 452 (C. A. D. C. 1953). The privilege against self-accusation (at issue in the *Rogers* case, *supra*) is "a privilege to withhold answers and not a privilege to limit the range of public inquiry". See *United States* v. *Monia,* 317 U. S. 424 (1943); *cf. Emery's Case,* 107 Mass. 172, 184 (1871). One can waive by not asserting a personal privilege to refuse to answer questions that a tribunal is empowered to put, but one cannot waive one's right to refuse to answer some unauthorized questions by voluntarily answering others.

[50]See footnote 48, *supra.*

too, the investigative power should be allowed ample scope in order that Congress may obtain the information it needs for its deliberations.

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, 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[51] and Judge Learned Hand's formulation,[52] 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. 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 argu-

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[51]*Schenck* v. *United States,* 249 U. S. 47, 52.
[52]*United States* v. *Dennis,* 183 F. 2d 201, 212 (C. A. 2d 1950).

able. The proof that the Committee's real purpose was not legislative but punitive is compelling. There is no reasonable 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 constitutional issue in the general terms that this Court has laid down in related cases. 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.

III.

THE STATUTE AND RESOLUTIONS ESTABLISHING THE COMMITTEE, ESPECIALLY IF CONSTRUED SO BROADLY AS TO AUTHORIZE THE QUESTIONS PUT TO PETITIONER, ARE SO VAGUE AND INDEFINITE AS TO FURNISH NO ASCERTAINABLE STANDARD OF GUILT, AND THEREBY DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

The statute under which petitioner was indicted (2 U. S. C. 192) punishes only the failure to answer questions "pertinent" to the inquiry, and witnesses before this Committee are therefore relegated to the authorizing statute in determining whether particular questions are or are not

"pertinent." In the authorizing statute, the qualifying adjectives "un-American" and "subversive", even if read in conjunction with the phrase "attacks the principle of the form of government as guaranteed by our Constitution", are far too general to furnish a valid basis for a criminal indictment. *United States* v. *Cohen Grocery Co.,* 255 U. S. 81 (1921); *Musser* v. *Utah,* 333 U. S. 95 (1948).

This contention has, to be sure, been rejected by the federal courts of appeal in two circuits.[53] In both cases, however, the dissenting judge was of the opinion that the Committee's statutory authorization is fatally defective for purposes of constitutional due process. In support of this conclusion, Judge Edgerton pointed out[54] that the President's Advisory Commission on Universal Training had described the expression "un-American" as an "epithet" which meant only that something "has not been done before in America." He declared that:

> "The term un-American is completely indefinite. Government counsel do not attempt to define it and concede that they cannot define it. . . . In a literal sense whatever occurs in America is American."

The judges on the majority side thought that the validity of the authorizing statute is saved by the phrase "principle of the form of government as guaranteed by the Constitution." The Committee itself, in one of its publications, endeavors to equate the adjectives "subversive" and "un-American" with "seeking to overthrow it [the form of government guaranteed by our Constitution] by use of force and violence, in violation of established law."[55] Under this in-

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[53]*United States* v. *Josephson,* 165 F. 2d 82 (C. A. 2d 1948) *cert. den.* 333 U. S. 838; *Barsky* v. *United States,* 167 F. 2d 241 *cert. den.* 334 U. S. 843 (C. A. D. C. 1948).

[54]167 F. 2d at 261-63.

[55]*This is YOUR House Committee on Un-American Activities* (1954), p. 2.

terpretation, the authorizing statute would appear to call for an investigation of the sort of propaganda activities punishable under the Smith Act (18 U. S. C. 2385).

Whether the authorizing statute is susceptible to such a construction is, for present purposes, academic. So construed, the questions put to petitioner would obviously fall far outside the scope of the investigation authorized by Congress, and the indictment would have to be dismissed for lack of any showing of pertinence.[56] In any event, this "Smith Act" construction certainly bears no relation to the interpretation which the Committee has followed in actual practice. Petitioner has mentioned in his brief[57] the remarkable variety of subjects in which the Committee has interested itself, for which it is quite impossible to discover any common denominator. As Judge Charles Clark pointed out in his dissenting opinion in the *Josephson* case, *supra*,[58] the Committee has applied the term "un-American" so broadly as to suggest that motion pictures which "placed bankers in an unfavorable light" are un-American, and therefore presumably within the ambit of the Committee's scrutiny.

And so, even if "un-American" *might* be given a content sufficiently precise for criminal purposes, that theoretical possibility is of no assistance to a witness before the Committee, endeavoring to determine whether or not a question which has been put to him is pertinent to the authorized inquiry. Cf. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 533 (involving the word "sacrilegious"). It therefore becomes important once more[59] to recall that where the precision of an investigatory authorization is at issue, a distinction is properly to be drawn between an exer-

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[56]See Point I, *supra,* pp. 11-20.
[57]At pp. 122-23.
[58]165 F. 2d at 96.
[59]*Supra,* p. 19.

cise of the legislature's own contempt power, and a criminal prosecution for failure to answer questions.

Where the contempt power is utilized, the witness is haled before the bar of the House or Senate itself and ordered to respond to specific questions. There is then no longer any question of the precision of the resolution empowering the committee to investigate, for the House or Senate itself has taken over the inquisitorial role. Furthermore—and here is the even more crucial point—once the witness discovers at the bar of the House or Senate that the question is indeed deemed pertinent, he has an opportunity to answer it and thus avoid punishment. But if his case is sent to the courts for criminal trial, his fate hangs on the accuracy of his original judgment of the question's pertinency to the authorizing resolution. It is too late for him to stand corrected and mend his ways. If wrong, he goes to jail.

For these reasons, the precision of a legislative resolution authorizing a committee to investigate a matter is of less importance when testimony is to be compelled only by the legislature's own power to punish uncooperative witnesses for contempt. That is why this issue never arose in early times, and why the broadest and most general authorizations to committees aroused no criticism. In 1781, for example, the Virginia House of Delegates authorized several of its standing committees—*e.g.* on religion, courts of justice, and trade—to send for persons and papers, without further specification.[60] This amounted to no more than a division of general categories of legislative business among several committees, but no one worried about this generality because no one was going to be criminally liable for refusing to answer questions.

But in a criminal prosecution for failure to answer, the precision of the authorizing resolution is a matter of crucial

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[60]See Potts, *Power of Legislative Bodies to Punish for Contempt,* 74 U. of Penn. Law Rev. 691, at 716 (1926).

importance. If Congress chooses to inflict punishment in the case of "pertinent" questions, then is should be held to accepted constitutional standards of precision, so that witnesses are not obliged to gamble in deciding whether questions put to them are or are not pertinent. In the present case the relevant statutory provisions are vague and uncertain far beyond the permissible bounds, and the indictment must therefore be dismissed.

CONCLUSION

A reversal of petitioner's conviction will not diminish the value of legislative investigations as an instrument of government, nor hamper Congress in obtaining information needed in the conduct of its legislative business. It will not in any way obstruct the Government's activities or limit its powers in the field of national security.

It is, rather, investigations such as the one out of which this prosecution arises that have done incalculable harm to the prestige, and capacity for good, of legislative inquiries as an institution of democratic government. The ill repute into which they have fallen is a matter of common knowledge, of which this Court has taken judicial notice.[61] This is only partly due to the extravagant behavior of certain members of Congressional committees; much more, it is the result of some committees' total disregard of their historic function, their obvious lack of interest in serious problems of legislation, and their incessant grasping for the powers of inquisitional tribunals.

And so today, nothing would do more to restore dignity and health to this tremendously valuable but much-abused governmental institution, than for this Court to reaffirm its true purposes, and retrace the constitutional framework within which it operates. For in this prosecution, as in

[61]See *United States* v. *Rumely, supra,* at p. 44.

others currently pending, the Government seems to have forgotten that Congressional inquiry, and the contempt power which gives teeth to the process, are "a means to an end and not the end itself", and that their exercise should be governed by the salutary, republican principle:[62] "the least possible power adequate to the end proposed."

The *amicus curiae* respectfully joins in petitioner's prayer that the decision below be reversed.

December 7, 1956.

Respectfully submitted,

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[62]See *Marshall* v. *Gordon,* 243 U. S. 521, 541 (1917), quoting *Anderson* v. *Dunn,* 6 Wheat. 204, 230-31 (1821). *Cf. Toth* v. *Quarles,* 330 U. S. 11, 23 (1955).