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Miscellaneous

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No.

JOHN T. WATKINS,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

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

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, John T. Watkins, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

Opinions Below

The judgment and sentence of the District Court are not reported; they appear on pages 17 and 18 of the Record. The majority and dissenting opinions of the Court of Appeals have not yet been reported, but are printed in Appendix A, *infra,* pp. 39 to 66.

Jurisdiction

The initial opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit reversing the judgment of conviction were entered on January 26, 1956. After rehearing *en banc,* the initial opinion and judgment of the Court of Appeals were reversed on April 23, 1956, and an opinion and judgment were entered affirming the conviction. Petitioner's timely petition for rehearing was denied on May 22, 1956. On May 31, 1956, Mr. Chief Justice Warren entered an order extending the time within which a petition for certiorari might be filed until July 20, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioner appeared in response to a subpoena and testified fully before the Committee on Un-American Activities of the House of Representatives concerning his own past activities in the Communist movement. He refused to answer certain questions of the Committee relating to the identification of a number of individuals alleged to have been members of the Communist Party some ten years before. Thereafter he was cited for contempt and convicted of violating 2 U.S.C. § 192 by his refusal to answer. The questions presented by this petition are:

1. Does the Committee on Un-American Activities have a separate and distinct power under the Constitution to engage in the exposure of individuals as distinguished from its limited power to engage in such exposure as may be ancillary and incidental to its legislative activities?

2. If the Committee has no such separate and distinct power to engage in the exposure of individuals, was the questioning of petitioner, in the circumstances

of this case and in light of the Committee's repeated assertions of a separate and distinct power of exposure, an exercise of its asserted function of exposure and therefore beyond the constitutional authority of the Committee?

3. Does the First Amendment to the Constitution of the United States protect against forced disclosure of one's past political associations under the circumstances of this case?

4. Is 2 U.S.C. § 192, read together with the authorization of the Committee on Un-American Activities, so vague and indefinite as to violate the due process clause of the Fifth Amendment to the Constitution of the United States?

5. Is a defendant entitled to a dismissal of an indictment or a preliminary hearing thereon when he alleges by motion and affidavit that less than twelve jurors on the grand jury which indicted him were able to exercise an independent judgment by reason of the fear engendered by operation of the government employees security programs, a fear which amounted to actual bias and prejudice against him?

Statutes Involved

2 U.S.C. § 192, R.S. 102 (52 Stat. 942), as amended, provides:

"Refusal of witness to testify.

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default,

or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 812, 823, 828) provides in relevant part:

"(b) Rule XI of the Rules of the House of Representatives is amended to read as follows:

"Rule XI

"*Power & Duties of Committees*

"(1) All proposed legislation, messages, petitions, memorials, and other matters related to the subjects listed under the standing committees named below shall be referred to such committees, respectively: . . .

* * * * *

"(q)(1) Committee on Un-American Activities.

"(A) Un-American activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

Statement

John T. Watkins, petitioner herein, resides in Rock Island, Illinois (R. 71).[1] He has been an organizer for the United Automobile Workers since August 1953 (R. 72). Prior to that time he had been employed by other labor organizations (R. 72), including the Farm Equipment Workers, where in 1947 he had led the battle against the Communist faction for compliance with the Taft-Hartley Act (R. 75).

Petitioner was named as a member of the Communist Party in the period 1943-1946 by one Donald O. Spencer, who testified before the Committee on Un-American Activities [2] in a hearing in Chicago in September 1952 (R. 73, 154). Petitioner was not called to testify before the Committee at that time.

Petitioner was identified again as a member of the Communist Party in the early 1940s (R. 33-34, 136) when Walter Rumsey appeared before the Committee in March 1954. Thereafter petitioner was subpoenaed to appear, and on April 29, 1954, did appear, before the Committee (R. 70).

Prior to his appearance, petitioner had prepared a respectful and courteous written statement that he would tell the Committee all about himself but would not inform on past and reformed associates (R. 40, 85). He was prepared to, and did, answer all questions about himself. He frankly admitted cooperating with the Communist Party from 1942 to 1947 and willingly answered the few questions put to him about the extent of his cooperation with the Party (R. 75-77). He categorically denied past or present membership

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[1] The record references (R.) are to the pages of the Joint Appendix in the court below, copies of which have been supplied to the Clerk for distribution with this petition.

[2] The Committee on Un-American Activities of the House of Representatives will generally be referred to throughout this petition as "the Committee."

in the Communist Party; he reiterated those denials with respect to the details of both Spencer's and Rumsey's testimony about himself.

Petitioner was entitled to claim the privilege against self-incrimination for all his testimony concerning Communist Party membership, cooperation and associates. *Blau* v. *United States,* 340 U. S. 159; *Emspak* v. *United States,* 349 U.S. 190. But he was as unwilling to use this solution to his problem as he was to inform on his past and reformed associates. At the appropriate point in the hearing, he read the Committee his prepared statement, as follows (R. 85):

> "I would like to get one thing perfectly clear, Mr. Chairman. I am not going to plead the fifth amendment, but I refuse to answer certain questions that I believe are outside the proper scope of your committee's activities. I will answer any questions which this committee puts to me about myself. I will also answer questions about those persons whom I knew to be members of the Communist Party and whom I believe still are. I will not, however, answer any questions with respect to others with whom I associated in the past. I do not believe that any law in this country requires me to testify about persons who may in the past have been Communist Party members or otherwise engaged in Communist Party activity but who to my best knowledge and belief have long since removed themselves from the Communist movement.
>
> "I do not believe that such questions are relevant to the work of this committee *nor do I believe that this committee has the right to undertake the public exposure of persons because of their past activities.* I may be wrong, and the committee may have this power, but until and unless a court of law so holds and directs me to answer, I most firmly refuse to discuss the politi-

cal activities of my past associates." (Emphasis supplied.)

Petitioner followed the line of distinction in his statement in responding to the Committee's questioning. He declined to state whether or not a list of 29 persons, who had been named by Rumsey (and in most instances by Spencer also), had been known by him to be members of the Communist Party; significantly, in the one case where he believed the man still to be a member of the Party, petitioner interrupted this series of questions and answers to respond affirmatively with respect to Joseph Stern, whom he described as "carrying on Communist Party activities" in the Quad City area (R. 90).[3]

The Committee questioned him no further after his refusal to answer concerning the Party membership of the 29 individuals; it evinced no interest in any activities of petitioner jointly with Joseph Stern or the other 29 individuals or otherwise. Once he refused to expose, the Committee dismissed him (R. 91).

On May 11, 1954, the House of Representatives voted a contempt citation against petitioner, and on November 22, 1954, he was indicted under 2 U.S.C. §192 on seven counts for refusal to answer the Committee's questions as to whether the 30[4] named persons had been members of the Communist Party.

Petitioner moved to dismiss the indictment, or for preliminary hearing, on the ground that less than twelve jurors on the grand jury which indicted him were able to exercise an independent judgment by reason of the

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[3] Earlier petitioner had identified Gil Green, Fred Fine, and Bill Sentner in line with this same policy (R. 80).

[4] The indictment contains 31 names (R. 2-3). One of these, however, is a duplicate (Marie Wilson) and another is Joseph Stern about whom petitioner answered.

fear engendered by operation of the government employees security programs, a fear which amounted to actual bias and prejudice against him (R. 4-10). The motion was denied (R. 11).

Prior to trial, on May 16, 1955, petitioner served upon the Clerk of the Committee (and in case he should not have possession, also upon the Clerk of the House of Representatives), identical subpoenas calling for all the information in the possession of the Committee relating to petitioner and the persons named in the questions set out in the indictment (R. 11-14). The Government moved to quash these subpoenas primarily upon the ground that the material sought was irrelevant (R. 15), also asserting that it would take "three research analysts approximately two weeks to assemble the documents sought and would take a truck to bring it to the courthouse" (R. 19, 46). Petitioner filed counter-motions, requesting the court to rule the documents relevant and material to petitioner's defense and further to request the House of Representatives to permit the inspection and copying of the documents (R. 16).[5] Petitioner also moved for the dismissal of the indictment should the material essential to his case not be produced. The District Court quashed the subpoenas on the ground that the "documents which the subpoena seeks are not relevant to the issues in this case," and denied petitioner's counter-motions (R. 19).

Trial by jury was waived and the trial commenced on

[5] Petitioner's motion took this form because the House of Representatives has traditionally asserted a privilege to refuse access to documents even to the courts. 6 Hinds, *Precedents,* §587. However, the House will under certain circumstances, after affirmative vote of the House, make documents in its possession available for inspection and copying by a court and the parties. It has been the recent general practice of the House to grant such permission in cases in which the court finds that the documents subpoenaed are relevant and material. See instances cited in the Manual of the House of Representatives (1955) §291.

May 25, 1955 (R. 18). The Government called only Mr. Kunzig, who had been counsel for the Committee at the time petitioner testified. Mr. Kunzig read for the record the transcript of petitioner's appearance before the Committee, and testified as to certain aspects of Committee procedure. On cross-examination, counsel for petitioner read to Mr. Kunzig the Government's statement in its motion to quash the subpoenas that "it would take three research analysts approximately two weeks to assemble the documents sought [i.e., relating to petitioner and those about whom he was questioned and refused to answer] and would take a truck to bring it to the courthouse." Despite the fact that the District Judge, who had already ruled that this material was not relevant to the issues in the case, sustained objections to many questions put to Mr. Kunzig on this point, a reading of Mr. Kunzig's full testimony on this matter (R. 49-52) leaves little doubt that this truckload of material was never examined prior to the issuance of the subpoena to petitioner or prior to his testimony at the hearing.

At the close of the Government's case, the defense renewed its motion to dismiss on the ground that the grand jury was improperly constituted (R. 53). It also moved to dismiss, or for a judgment of acquittal, on the grounds that the Committee, in asking the questions petitioner would not answer, was engaged in the exposure of individuals unrelated to any legislative purpose and was thus exceeding its constitutional powers as a congressional investigating committee, that 2 U.S.C. §192, read together with the Committee's authorizing resolution, was so vague and indefinite as to deprive petitioner of due process of law, that the First Amendment protected petitioner against forced answers to the particular questions asked him, and on a number of other grounds not pursued in the Court

of Appeals or in this Court (R. 53-56). The District Court denied all of petitioner's motions (R. 17, 56).

The defense opened its case by renewing its motion to the court to request the House of Representatives to permit the inspection and copying of the material described in the subpoenas, which was denied (R. 58). Thereupon, the defense made an offer to prove "through the subpoenaed material that the committee had in its files all the information which it sought to elicit from the defendant about him and each of the other 30 individuals referred to and, in fact, a great deal more such information" from which "it would follow that the committee had no legislative purpose in its questions to defendant but rather had the sole purpose of . . . exposing him to the contempt of his labor associates by forcing him to inform on past associates and exposing to public contempt through the mouth of the defendant the persons about whom he was questioned" (R. 58-59). The defense further offered to prove, in large part by official public statements of the Committee, that the Committee has asserted a function and power to expose individuals to the public independent of any function related to legislation (R. 60). The District Court sustained the Government's objection to this evidence and it was included in the record as an offer of proof (R. 62-64).

The District Court thereupon found petitioner guilty (R. 64), and subsequently imposed a sentence of a $500 fine and a suspended sentence of imprisonment for one year (R. 18). At the time of sentencing the Court stated:

> "While I have found him guilty of contempt of Congress, he did not evidence any disrespect before the committee or engage in any disorderly conduct or attempt to impede the committee in any respect, other than his refusal to answer questions dealing with persons, who, to use his words,
>
> 'may in the past have been Communist Party mem-

> bers or otherwise engaged in Communist activities, but who to my best knowledge and belief have long since removed themselves from the Communist movement.'
>
> In other words, he claimed that he should not be required to 'inform' on people he had known.
>
> "He answered all questions about himself and his own activities. He did not claim the Fifth Amendment. He claimed it would be wrongful to testify with respect to former associates. He stated that he would answer if a court of law directed him to do so. In taking this position, he acted on the advice of counsel. While his reasons for refusing to answer do not constitute a defense, I think they should be taken into consideration in determining the penalty which should be imposed for the violation of the statute."

From the judgment of conviction and sentence, petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. A panel of that Court, on January 26, 1956, reversed the conviction by a two-to-one majority and remanded the case with directions to enter a judgment of acquittal.[6] After the government's petition for rehearing *en banc* was granted[7] and the case reargued

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[6] The opinion of the majority of the panel (Chief Judge Edgerton and Circuit Judge Bazelon) is "nearly identical" with the dissenting opinion of the same two judges after the case was reargued *en banc*. See p. 51, *infra*.

[7] The determination of the Chairman of the Committee to protect his asserted untrammeled power of exposure is evidenced by his own statement about petitioner's case while testifying on February 23, 1956, before another committee of Congress on an appropriation bill. There Mr. Walter stated: "The trouble is certain circuit courts of appeals lean over backwards to reverse convictions. It is such an outrageous thing that the Department of Justice on the insistence of your humble servant insisted on presenting a matter to a full court to review a decision. I invite you to look at the background of the two judges that set aside this conviction." *Hearings Before Subcommittees of the Committee on Appropriations,* House of Representatives, Eighty-fourth Congress, Second Session, Second Supplemental Appropriation Bill, 1956, p. 47.

before the full court, the court, largely accepting the opinion of the dissenting judge from the earlier panel, upheld petitioner's conviction by a majority of 6 to 2. See pp. 39 to 51, *infra*. Petitioner filed a petition for rehearing pointing out that the majority opinion seems to hold, erroneously, (i) that there *could* always be a valid legislative purpose in a Congressional committee asking witnesses whether certain persons had once been members of the Communist Party and (ii) that, therefore, since there *could* have been a valid legislative purpose, proof that there was in fact no valid legislative purpose in particular questions, but only a purpose to expose, does not invalidate Congressional committee action. Petitioner also pointed out in his petition for rehearing that the court had failed to make any reference in its opinion to the substantial question presented whether he had been deprived of his constitutional right to a fair and impartial grand jury. The petition for rehearing was denied.

Reasons for Granting the Writ

I

The Decision of the Court of Appeals Upholding the Power of the Committee to Compel Petitioner to Answer Questions Asked Solely as an Exercise of the Committee's Asserted Function of Exposure Conflicts With the Applicable Decisions of This Court and Constitutes an Important Question of Federal Law Involving the Basic Separation of Powers of Our Government

Petitioner contends (i) that it is beyond the power of the Committee on Un-American Activities to compel testimony for the sole purpose of *exposing* individuals to public scorn and retribution and (ii) that the questioning at which petitioner balked was such an exercise of the Committee's asserted power of exposure. The holding below, in reject-

ing petitioner's contention and proof of exposure on the apparent ground that there *could* have been a valid legislative purpose in the questions petitioner refused to answer, conflicts with the applicable decisions of this Court. *Kilbourn* v. *Thompson,* 13 Otto (103 U.S.) 168; *McGrain* v. *Daugherty,* 273 U. S. 135; *Sinclair* v. *United States,* 279 U. S. 263; *Quinn* v. *United States,* 349 U.S. 155, 160-161.

A. *The Implied Power of Congress to Investigate Is Limited by the Doctrine of Separation of Powers and Does Not Encompass Exposure Except Where Ancillary to a Valid Legislative Purpose*

The cornerstone of our government is the doctrine of separation of powers. "A legislative, an executive, and a judicial power comprehend the whole of what is meant and understood by government. It is by balancing each of these powers against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained, and any freedom preserved in the Constitution."[8] "The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[9]

Legislative power concerns the determination by duly enacted law of general standards of conduct. The prosecution of individuals under duly enacted law is the concern of the law enforcement officers of the Executive branch of the Gov-

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[8] John Adams, letter to Richard Henry Lee, November 15, 1775; quoted by Benjamin F. Wright, "The Federalist on the Nature of Political Man," *Ethics,* January 1949, p. 9.

[9] *Myers* v. *United States,* 272 U.S. 52, 293 (per Brandeis, J., dissenting).

ernment. The determination of individual guilt and law violation is the concern of the Judicial branch. Courses of conduct or patterns of action may be legislatively inquired into only for the purpose of revealing the need for new laws and the effectiveness of existing laws, not for the purpose of exposure and punishment of the individual in the absence of law. When a committee of Congress determines that a general standard of conduct (e.g., past membership in the Communist Party) is reprehensible and seeks to enforce this standard by building a list of persons who engaged in that conduct and then, by publicity, inflicting upon such persons public scorn and retribution, the Committee is arrogating to itself, in this process of exposure, legislative,[10] executive and judicial functions in derogation of our historic separation of powers.

This is what we believe Chief Justice Warren meant when he wrote in the *Quinn* case last year that "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." 349 U. S. at 161. This is also what we believe Mr. Justice Miller meant when he wrote in the *Kilbourn* case, in a discussion stressing the doctrine of separation of powers, that no congressional committee "possesses the general power of making inquiry into the private affairs of a citizen." 103 U. S. at 190. For, when a congressional committee inquires publicly into the private affairs of a citizen not in aid of a legislative purpose but for the purpose of holding that citizen up to public scorn and retribution, that committee

[10] If the Committee's determination of reprehensibility in the general standard of conduct (past membership in the Communist Party) can be deemed legislative in any sense, it is a legislative authority which belongs to the full Congress, not to one of its many committees. Furthermore, in so acting, the Committee is arrogating to itself legislative functions of a retroactive nature barred by the Constitution. Article I, § 9; Amendment V. See also *United States* v. *Lovett,* 328 U.S. 303.

is prescribing a general standard of conduct, not theretofore part of the law of the land, applying that standard and determining guilt under it. See also *Greenfield* v. *Russel,* 292 Ill. 392, 127 N.E. 102 (1920); *People ex rel. McDonald* v. *Keeler,* 99 N. Y. 463, 2 N. E. 615 (1885); Taylor, *Grand Inquest* (1955) pp. 30-183.

An example from another field might be helpful. Congress was acting within its constitutional authority in 1895 when it made the interstate transportation of lottery tickets a crime. *Champion* v. *Ames,* 188 U. S. 321. Despite this fact, no one would seriously contend that a congressional investigating committee could today use its compulsory process to build up a list and expose those who carried lottery tickets from state to state. Clearly this would be an encroachment upon the prosecutorial functions of the Executive and the adjudicatory functions of the Judicial branches. But how much more clearly would it have been an encroachment on the Executive and Judicial branches for a committee of Congress, in a wave of anti-gambling spirit in the early nineties, before the channels of interstate commerce were closed by law to lotteries, to have used its compulsory process to build up a list of those who had, in years past carried lottery tickets across state lines and to have exposed them for their past conduct to public scorn and retribution. This would indeed have been setting a general standard of conduct, applying that standard and determining guilt under it. As we shall see, that is exactly what the Committee asserts the constitutional power to do and what it has done in this case.

Nowhere is the wisdom of the doctrine of separation of powers more evident than in the field of congressional inquiries. The events of the past years have shown what happens when a Congressional committee crosses the line from investigation in aid of legislation to investigation for the

purpose of exposure and retributive justice. The investigation turns into a legislative trial with the functions of prosecutor and judge combined [11] and the accused denied the right to impartial and independent judgment. The protections of the Bill of Rights fall by the wayside; partisanship, passion and prejudice are substituted for the safeguards of the courtroom. Jefferson was unusually foresighted, even for him, when he warned against legislative despotism in these words: "One hundred and seventy-three despots would surely be as oppressive as one." [12]

Both the history and logic underlying the doctrine of separation of powers combine with the experience of recent years in which congressional investigations have been invading the province of the Executive and the Judiciary to demonstrate the necessity for limiting congressional committees to inquiry in aid of legislation. Exposure for exposure's sake is beyond the pale.[13]

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[11] The Court will find significance, or at least amusement, in the Freudian slip of the tongue by committee counsel when he was testifying at petitioner's trial. When asked whether it was his responsibility to grant extensions of time on subpoenas, he answered: "Since at that point there were usually lawyers in the case, lawyers for *the defendants*—pardon me—lawyers for the witnesses, I usually then would be called by one of the attorneys for a witness, and then usually, after conferring with the chairman, would grant the extension" (R. 42) (emphasis supplied).

[12] The Federalist, No. XLVIII (1778), p. 341. President Truman made the same point when he stated that the investigative power, if exercised beyond obtaining information for legislative functions, "raises the threat of legislative dictatorship." New York Times, May 9, 1954, p. 54.

[13] We have predicated our argument here against the right to expose on the doctrine of separation of powers. The argument could have been equally well pitched upon the limitations on the investigative power arising from its nature as an adjunct to legislative authority. So too, a legislative inquiry designed not to further a legislative purpose but to try and expose an individual is a bill of attainder expressly prohibited by the Constitution. Article I, Section 9. Again, the forced public disclosure of unpopular associations without adequate legislative purpose abridges the right to speak, assemble and petition Congress guaranteed by the First Amendment. See *United States* v. *Rumely,* 345 U.S. 41,

John Quincy Adams made this point well many years ago in 1832 at another period of stress:[14]

> ". . . the authority of the committee and of the House itself did not extend, under color of examining into the books and proceedings of the bank, to scrutinize, for animadversion or censure, the religious or political opinions even of the president and directors of the bank, nor their . . . private lives or characters, nor their moral, or political, or pecuniary standing in society; . . ."

A modern legislator, with outstanding experience in investigations, likewise views exposure investigations as beyond the power of Congress:

> ". . . the rights of Congress are no broader than the legitimate objects from which they have been implied. And I believe those objects are *only* the two referred to a moment ago: (1) to gather facts about proposed legislation, and (2) to inquire into the workings of existing federal laws. . . . I disagree strongly with those who argue that Congress is also responsible for informing and educating the public by looking into anything which may happen to catch the popular fancy of the moment." Keating, *Protection for Witnesses in Congressional Investigations,* 29 Notre Dame Lawyer 212, 214.

43-45. Finally, the contempt statute, read together with the authorization of the Committee on Un-American Activities, would quite clearly be unconstitutionally vague and indefinite if not limited to questions in aid of a legislative purpose. All of these constitutional doctrines—separation of powers, limited legislative authority, bill of attainder, freedom of speech and assembly, vagueness and indefiniteness—lead inexorably to the same conclusion forbidding exposure for exposure's sake.

[14] Quoted in Taylor, *Grand Inquest* (1955), p. 139. See also Landis, *Congressional Limits on the Congressional Power of Investigations,* 40 Harv. L. Rev. 153, 179-180, 213.

Dean Erwin N. Griswold of the Harvard Law School, in the course of his distinguished series of lectures on the Fifth Amendment and congressional investigatory power, has declared:[15]

> "In this connection I would like to state my own view that a legislative investigation is improper when its sole or basic purpose is to 'expose' people or to develop evidence for use in criminal prosecutions. We have had chairmen of legislative committees who have announced that that was the purpose of the hearings they were conducting. In my opinion, they have thus demonstrated the impropriety of the exercise of power which they are seeking to carry out, and I would hope that the courts, when properly invoked, would decide that there was no legislative power for such a purpose."[16]

The very idea of congressional committee exposure for the sake of exposure unrelated to a legislative purpose is incompatible with our constitutional system. If the Con-

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[15] Griswold, *The 5th Amendment Today* (1955), p. 48.

[16] In the same vein, Alan Barth, after a careful study of this entire problem, concluded that "it [the investigating power] cannot properly be used to 'expose' individuals and voluntary associations . . ." Barth, *Government By Investigation* (1955), p. 199. Woodrow Wilson's oft-quoted statement—"the informing function of Congress should be preferred even to its legislative function"—is misquoted in this connection. "The view that investigating committees may undertake a generalized program of exposure for the sake of informing the public sometimes appeals for authority to Woodrow Wilson's observation about the informing function of Congress. . . . It should be noted, however, that Wilson was writing not about investigating committees but about discussion and interrogation within the main bodies of Congress. Moreover, he was writing specifically about legislative supervision of executive operations. There is certainly no warrant in what Wilson wrote for use of the investigating power to accomplish . . . exposure of the personal opinions of private citizens." *Id.*, p. 23. "President Wilson did not write in light of the history of events since he wrote; more particularly he did not write of the investigative power of Congress in the context of the First Amendment." *United States* v. *Rumely,* 345 U.S. 41, 44.

gress deems a continuing system of exposing individual Communists is necessary or desirable to combat a present danger and existing legislation is inadequate to provide it, Congress has the authority to provide, prospectively not retroactively, for such disclosures and exposures by law as do not violate the Bill of Rights. *Cf. Internal Security Act of 1950,* 64 Stat. 987, 50 U.S.C. (Supp. V.) 781; *Communist Party* v. *Control Board,* 351 U.S. 115. But Congress has not the constitutional authority to delegate to itself or to a committee the power to define and determine individual wrongdoing by exposing persons to public scorn and retribution.

B. *Petitioner's Questioning Was a Clear Case Of Exposure For Exposure's Sake*

1. *The Committee Asserts the Power, as a Separate and Independent Function Apart From Any Investigation in Aid of Legislation, to Expose Allegedly Subversive Individuals to Public Scorn and Retribution.*

The Committee on Un-American Activities, from its earliest days down to the present, has asserted a separate and independent power of exposure unrelated to a legislative purpose. In the words of Chairman Walter, "Unlike most congressional committees, in addition to the legislative function we are required to make the American people aware if possible of the extent of the infiltration of Communism in all phases of our society." *U. S. News and World Report,* August 26, 1955, p. 71. Acting on this asserted function, the Committee has sought to identify present and past Communists, list them publicly, disseminate the listings as widely as possible, pronounce clearance or judgment of guilty and procure the application of social or economic sanctions to the guilty.

At the trial, as overwhelming proof that the Committee

had asserted this independent power of exposure, petitioner offered in evidence a series of excerpts from official reports and hearings of the Committee (R. 62-63, 111-163), excerpts from statements on the floor of Congress by the Chairman and members of the Committee in connection with Committee business (R. 63, 164-168) and statements to the press by the Chairman and members of the Committee on Committee business (R. 64, 168-174). The Government conceded by stipulation that all the reports and statements had in fact been made and that the transcriptions were accurate (R. 62, 109-111). The Government, however, objected to the introduction of this evidence on the ground that it was irrelevant to any issue in the case and the District Judge, consistent with his apparent position that petitioner had no right to prove that the Committee's purpose was one of exposure and retribution, sustained the objection (R. 63-64). The defense proffered the evidence as an offer of proof (R. 62-63) and it is in the record available for the examination of this Court.[17] For the convenience of the Court, we have summarized this evidence in Appendix B of this petition.

The majority of the court below stated that this "material is not evidence" (see p. 50, *infra*), but we submit that the minority was clearly correct (p. 63) when it said that, "by claiming that it had the authority and duty to expose, the Committee implied that it intended to expose" and that "it may be inferred from a person's statement that he intended to do something, that he later actually did it. *Mutual Life Ins. Co. of New York* v. *Hillmon,* 145 U.S. 285, 295; *Shurman* v. *United States,* 219 F. 2d 282, 290, fn. 9 (1955)." What we have here is the unhealthy

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[17] All apart from this offer of proof, however, it appears likely that most or all of the material would have been available to the courts on judicial notice. *Carolene Products Co.* v. *United States,* 323 U. S. 18, 28.

situation of a Congressional Committee making political capital of its exposure activities the length and breadth of the land while its attorneys in court continuously and solemnly proclaim that it had no such end in view. Exposure is the byword everywhere except in the courtroom.

2. *The Committee Itself, By What It Did and What It Did Not Ask Petitioner and By the Information Already Available In Its Files Which It Did Not Even Examine, Demonstrated That The Questions Asked Petitioner Were Solely for the Purpose of Exposure.*

(i) *The Questioning of Petitioner*

Petitioner appeared before the Committee on April 29, 1954. Immediately after perfunctory questions relating to his background were completed, counsel for the Committee launched into the meat of the hearing (R. 73). He read testimony from Donald O. Spencer, in September 1952, concerning petitioner's involvement with the Communist Party and asked petitioner about the Spencer statement (R. 73). Petitioner denied the truth of Spencer's testimony (R. 73-75). Counsel then pressed petitioner concerning Spencer's testimony against him, at which point petitioner made the following statement (R. 75):

> "I am not now nor have I ever been a card-carrying member of the Communist Party. Rumsey was wrong when he said I had recruited him into the party, that I had received his dues, that I paid dues to him and that I used the alias Sam Brown.
>
> "Spencer was wrong when he termed any meetings which I attended as closed Communist Party meetings.
>
> "I would like to make it clear that for a period of time from approximately 1942 to 1947 I cooperated with the Communist Party and participated in Com-

munist activities to such a degree that some persons may honestly believe that I was a member of the party.

"I have made contributions upon occasions to Communist causes. I have signed petitions for Communist causes. I attended caucuses at an FE convention at which Communist Party officials were present.

"Since I freely cooperated with the Communist Party I have no motive for making the distinction between cooperation and membership except the simple fact that it is the truth. I never carried a Communist Party card. I never accepted discipline and indeed on several occasions I opposed their position.

"In a special convention held in the summer of 1947 I led the fight for compliance with the Taft-Hartley Act by the FE-CIO International Union. This fight became so bitter that it ended any possibility of future cooperation."

Petitioner was then questioned briefly about the extent of his cooperation with the Party. The Committee did not then or later delve into the mechanics of cooperation within the union between this non-Party labor leader and the Party either during the period of his cooperation with the Party or after the "fight became so bitter that it ended any possibility of future cooperation" (R. 75). The Committee did not ask one further question about the details of the internal fight about compliance with the Taft-Hartley Act to which petitioner referred in his testimony and which surely would have been of great significance to the Committee if it had been considering any legislation in the field of Communist infiltration of trade unions.

The questioning then moved into the Rumsey testimony concerning petitioner's alleged Party membership. Petitioner denied Rumsey's allegations, stating that possibly Rumsey was biased against him because petitioner had caused his expulsion from a union (R. 77-78).

The Chairman then returned to petitioner's participation in Communist Party activities. He did not question petitioner about what was discussed at any meetings; he did not question petitioner about how the Communist Party worked with non-Party labor leaders. He asked, ". . . with *whom* did you participate . . ." in these activities (R. 80)? After this question was answered, Mr. Velde continued in his search for names: "All right. Will you proceed, then, with *others* that you have participated with in Communist Party activity" (R. 80)? Again petitioner answered the question.

After a short recess, counsel returned to the Rumsey testimony and petitioner repeated his earlier testimony (R. 82-84). Then, without interrogating petitioner about his union activities, or about the effect on them of his cooperation with the Communist Party before 1947 and his opposition to it after 1947, the Committee counsel immediately went into wholesale identification (R. 84-85):

> "Mr. Kunzig. Now, I have here a list of names of people, all of whom were identified as Communist Party members by Mr. Rumsey during his recent testimony in Chicago, I am asking you first whether you know these people."

Petitioner did not know the first few (R. 85); at the next name, that of Harold Fisher (first count of the indictment), Mr. Kunzig asked whether petitioner knew Fisher to be a member of the Communist Party.[18] Petitioner then made his

[18] With respect to all except two persons, Harold Fisher (Count One) and Ernest DeMaio (Count Four) the questions asked petitioner were about past membership. In the cases of Harold Fisher and Ernest DeMaio questions were couched in the present tense. It seems clear, however, that what the Committee was after was petitioner's knowledge of the past membership of the 29 persons involved. In view of the earlier testimony by Rumsey and Spencer, who set the dates of petitioner's alleged party affiliation from 1943-46 (R. 136-137, 154), and petitioner's own uncontradicted statement that he had ceased any form of cooperation with the

statement, which he had carefully prepared in anticipation of this line of questioning, telling the Committee that he would answer all questions about himself, that he would answer questions about people he knew to be members of the Communist Party and who he believes still are, that he would not answer about people who once had been but no longer were Communist Party members, and that he did not believe the Committee had authority to ask about past political associations and to undertake the public exposure of persons (R. 85-86). The Chairman directed the witness to answer the question, stating that the Committee has authority "to ask you . . . concerning your knowledge of any persons . . . who have been members of the Communist Party . . ." (R. 86). Then counsel went through his prepared list and asked the witness whether he had known each of the named persons to be members of the Communist Party, ending with a question containing a long list of 26 names (count seven of the indictment). Petitioner interrupted his refusals to answer, in accordance with the principle he had announced that he would identify persons he believed still to be members of the Party, and

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Communists in 1947 (R. 75), there can be no doubt that the Committee was questioning petitioner about past political associations. At any rate, if the Committee was seeking information about present membership, petitioner answered the questions. Petitioner stated that he would "answer questions about persons whom I knew to be members of the Communist Party and whom I believe still are" (R. 85), and would only refuse to answer about those who had "long since removed themselves from the Communist movement" (R. 85). Indeed, in implementing this principle, petitioner extracted the name Joseph Stern from a long list of names and answered affirmatively about Stern's present membership. Consequently, when petitioner replied to any question about present membership by standing on his statement, he was in effect denying that he knew the particular individual to be a present member and refusing to answer about past membership. *All petitioner ever refused to do was to answer about past membership of others.* This position was accepted both by the majority opinion below (see p. 43, *infra*) and the minority (see n. 5, p. 53, *infra*).

stated that Joseph Stern, one of the names in the long list of names, had "carried on Communist Party activities in the Quad City area" (R. 90). Counsel did not follow up on this; no attempt was made to obtain relevant information about Joseph Stern's activities in the labor movement.

When counsel had completed his list, and the witness once again had been directed to answer, the Chairman of the Committee said (R. 90-91):

> "It seems very clear to me that the witness has pertinent information concerning Communist Party activities which we are authorized and dutybound to investigate, and that the witness should in the spirit of cooperation with his Government answer those questions.
>
> "However, upon his refusal to answer those questions, there is nothing we can do at the present time to force the witness to answer those questions." [19]

The Committee had before it a witness who had been in the labor movement for 18 years. He admitted that he had cooperated with the Communists for five years; that he had been involved in a bitter internal struggle with them. He was an expert on the actual workings of Communism in the labor movement. He did not claim the Fifth Amendment; he did not refuse to testify; he was not a recalcitrant witness. He was respectful to the Committee and ready to do his duty as a citizen. To the Committee, however, that duty was solely to elaborate publicly on his own involvement with the Communist Party and to identify publicly as members of

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[19] In no way did the Committee or the Committee's counsel indicate, as is usual in a court of law when the immediate relevancy of certain questions is not apparent, that the questions would illuminate or have a bearing on the nature or motivation of a course of conduct or pattern of conduct to be established, which would be relevant to the proceeding. *In no way did the Committee or the Committee's counsel attempt to rebut petitioner's assertion that the Committee was undertaking "the public exposure of persons because of their past activities"* (R. 85).

the Communist Party, 30 people who had already been identified by at least one, and in most instances, two people. The Committee did not want the benefit of petitioner's experiences as they related to Communist techniques in labor unions; it did not want the benefit of petitioner's informed opinion about Communist operations in the labor field. The Committee wanted only that petitioner point the finger publicly at himself and at a group of private persons whom he had known some ten years before. Nothing in the way of ex post facto legislative window-dressing or explanations that the questions petitioner would not answer *could* have had a legislative purpose can stand up against the stark facts of what the Committee wanted to know, and what the Committee was not at all concerned to know. The sole purpose of the questions underlying petitioner's indictment was the public identification and exposure of 30 individuals.

(ii) *The Committee's Prior Knowledge and Failure to Examine Its Own Files.*

Petitioner sought to prove in the trial court that the Committee actually had all the information about himself and the 30 individuals which it attempted to obtain from petitioner and that therefore the Committee's only purpose in forcing him to testify was to publicly expose him and these 30 individuals and was not a bona fide effort to obtain the testimony of the petitioner in aid of a legislative purpose. To this end, petitioner served upon the Clerks of the Committee and of the House of Representatives identical subpoenas calling for all the information in the possession of the Committee relating to the persons named in the questions set out in the indictment. Despite the fact that petitioner made out a prima facie case of exposure by demonstrating that the Committee asserted an independent power of exposure (Appendix B, pp. 66 to 80, *infra.*) and that

the questioning of petitioner itself demonstrated that the Committee was acting under that asserted independent power of exposure here (pp. 21 to 26, *supra*), the District Court nevertheless ruled that the subpoenaed documents were not relevant to the issues in the case. In effect, what the District Court held was that one indicted for contempt of a Committee would not be permitted to prove that the Committee was engaged in exposure rather than in investigation in aid of legislation.

The subpoenas being quashed, petitioner offered to prove in the court below, through the material which was described in the subpoenas, that the Committee "had in its files all the information which it sought to elicit from the defendant about him and each of the other 30 individuals referred to and, in fact, a great deal more such information" (R. 58). In connection with this offer of proof, petitioner submitted the extensive references to these 30 individuals which were to be found in the Committee's public reports and hearings (R. 94-109). While these references were many and varied, they were but a minute part of the total sum of knowledge which the Committee had about the list of names which was read to appellant. According to government counsel, the Clerk of the Committee informed him that the material was so voluminous that it would take three analysts two weeks to assemble it, and a truck to bring it to the courthouse (R. 46-47). If the Committee's purpose was to inform itself, and through itself the Congress, on matters in aid of legislation, it surely had no need to require petitioner to come from his home and place of employment merely to identify and expose individuals about whom the Committee had more information than the petitioner had or was questioned about. The calling and questioning of petitioner publicly under the circumstances of full prior knowledge on the part of the Committee is itself a demonstration that the Com-

mittee was performing its exposure function and not its legislative function in this line of questioning. Taken together with the Committee's asserted power of exposure and its lack of interest or concern in questioning petitioner along any except exposure lines, the demonstration is overwhelming.

The testimony of Committee counsel makes it clear that the Committee had no practice of searching its own files before using compulsory process to obtain information (R. 49-51); his testimony leaves little doubt that this truckload of material was never examined prior to the issuance of the subpoena to petitioner or his testimony at the hearing (R. 49-52). The ironic fact is that, although it boasted of its "comprehensive records" concerning "individuals",[20] and pointed out the effect of their use in arguing for its annual appropriation,[21] the Committee failed to exhaust the possibilities in these files in order to save a citizen the expense and adverse publicity of coming to testify, under compulsory process, about what the Committee already knew. Obviously petitioner was called not to give testimony relevant to a legislative purpose, but to play the role assigned to him by the Committee in its staging of the public identification of individuals.

We do not suggest that the Committee was without authority to obtain adequate corroborative evidence relevant to a legislative matter. Nor do we suggest that the Committee was without authority to compel oral testimony on a legislative matter simply because it already had some information in its files. What we do maintain is that the "truckload" of information in the Committee files concerning petitioner and the persons about whom he was asked and the failure of the Committee to make a thorough review of this truck-

[20] R. 128, Annual Report for 1949, p. 18.

[21] R. 168, 100 Cong. Rec. 2173.

load of information before calling petitioner is added evidence that the Committee's sole concern was to use petitioner as a vehicle of its policy of public identification. When taken together with the other evidence to this effect, there can be little doubt that the Committee was questioning petitioner solely in aid of its asserted power of exposure.

C. *The Position of the Majority Below*

Petitioner made these arguments on exposure, in greater detail, to the court below. Instead of considering the evidence of exposure presented by petitioner and passing on the issues thus raised, the majority opinion seems to hold (i) that there *could* always be a valid legislative purpose in a Congressional Committee asking witnesses whether certain persons had once been members of the Communist Party and (ii) that, therefore, since there *could* have been a valid legislative purpose, proof that there was in fact no valid legislative purpose in particular questions, but only a purpose to expose, does not invalidate Congressional Committee action. Thus, the majority opinion states (p. 43, *infra*):

> ". . . A majority of the court is of opinion that Congress has power to investigate the history of the Communist Party and to ask the questions Watkins refused to answer. It would be quite in order for Congress to authorize a committee to investigate the rate of growth or decline of the Communist Party, and so its numerical strength at various times, as part of an inquiry into the extent of the menace it poses and the legislative means that may be appropriate for dealing with that menace.[22] Inquiry whether thirty per-

[22] All apart from the fact that this information was already available to the Committee from the Federal Bureau of Investigation's regular yearly reports to the Congress on the membership of the Communist

> sons were Communists between 1942 and 1947 would be pertinent to such an investigation. The questions asked Watkins *could* be asked for a valid legislative purpose." (Emphasis supplied.)

Nowhere does the majority opinion deal with the issue whether the questions asked Watkins were in fact asked for a valid legislative purpose; the entire emphasis, as indicated in the quotation above, is that "the questions asked Watkins *could* be asked for a valid legislative purpose." Thus, the majority opinion, after quoting the opening statement of the Chairman of the Committee many weeks before petitioner testified, states that "the purpose of the Committee's hearing was to aid it [the Committee] in its study of a proposed amendment to the Internal Security Act of 1950." [23] Here again the majority opinion is dealing

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Party, the questioning of petitioner itself negatives any such purpose on the part of the Committee. Nowhere did the Committee ask petitioner for the names of other Communists in his union or for any estimate of the total number of Communists. Nowhere was it suggested that the question under inquiry concerned "the history of the Communist Party" or the "rate of growth or decline of the Communist Party." All the Committee wanted was his testimony concerning particular persons whom they desired to expose.

[23] The bill to which the Chairman apparently referred was one to amend the Internal Security Act of 1950 to deprive Communist-infiltrated labor unions of the use of the National Labor Relations Board. The bill pending at the time of the Chairman's statement and of petitioner's appearance was H.R. 7487. No hearings or other action were ever taken on this bill. Subsequently Congressman Reed of Illinois introduced H. J. Res. 528, another bill dealing with Communist-infiltrated labor unions; hearings were held on this bill by the House Judiciary Committee, but an adverse report was filed on the ground that the Committee did not possess sufficient information. H. Rep. No. 2280, 83rd Cong., 2d Sess., p. 3. On July 6, 1954, the Senate Judiciary Committee reported favorably on S. 3706, a bill to provide for hearings on Communist-infiltrated labor organizations. Two days later, on July 8, 1954, two-and-a-half months after petitioner's hearing, Congressman Velde introduced H. R. 9838, a bill identical with S. 3706, and it was this bill which was reported out on August 9, 1954, and enacted on August 24th as part of the Communist Control Act of 1954. As indicated in the body, the evidence in this case makes clear that the questioning of petitioner had

in the realm of what *could be,* not what *was.* The fact that the Chairman of the Committee referred to a proposed amendment to existing legislation in the course of a lengthy, *pro forma* opening speech many weeks (R. 33, 43-44, 70) and many witnesses before petitioner testified, hardly demonstrates that the purpose of the particular questions petitioner refused to answer was to elicit information about this amendment.

In fact the proof is clearly to the contrary. Immediately after the opening statement in Chicago, which made the passing reference to the bill in question (R. 44) upon which the court below relied, the Committee took testimony from six witnesses on the Federal employee security program and various college and farm activities. *Hearing before the Committee on Un-American Activities,* House of Representatives, 83rd Cong., 2d Sess., Investigation of Communist Activities in the Chicago Area—Parts 1 and 2. When petitioner finally testified, no questions were asked him in any way relating to this amendment or any other. When petitioner challenged the Committee's action as one of exposure (R. 86), the answer that came from the Committee was not that the desired testimony was relevant to any bill concerning Communist infiltration into labor unions or otherwise, but simply a veiled and not too subtle assertion of the power of exposure (see pp. 24-25, *supra*). Furthermore, the Committee report on the bill to which the court below refers did not claim there had been any hearings on the bill (H. Rep. No. 2651, 83d Cong., 2d Sess.); the minority report stated categorically that no hearings had been held. H. Rep. 2651, Part 2, 83rd Cong., 2d Sess.[24]

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nothing whatever to do with the bill that was then pending before the Committee or the bill, introduced later, which was finally enacted.

[24] One of the minority who stated that no hearings had been held, Congressman Frazier, was present at petitioner's interrogation (R. 70) and would have been in a position to know if the questioning had been directed in any way at the amendment to the Internal Security Act.

The holding of the court below that the possibility that certain questions *could* have had a valid legislative purpose is sufficient to justify Committee action regardless of proof that there was in fact no valid legislative purpose would render academic and meaningless the authoritative decisions of this Court limiting the investigative power. If the ruling below stands, there will be no limits to the exposure powers of Committees of Congress for *ex post facto* legislative rationalization for any question is always possible. For this Court to close its eyes to the fact that the Committee here acted as part of its asserted independent power of exposure, it "would have to be that 'blind' court against which Mr. Chief Justice Taft had admonished in a famous passage, *Bailey* v. *Drexel Furniture Co.* (Child Labor Tax Case) 259 U. S. 20, 37, that does not see what all 'others can see and understand' . . ." *United States* v. *Rumely,* 345 U. S. 41, 44.[25]

D. *The Position of the Minority Below*

Chief Judge Edgerton and Circuit Judge Bazelon in their opinion, both as the majority of the initial panel and the minority of the full bench, reviewed the evidence pre-

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[25] The majority opinion has created a confused legal situation even in the Circuit covered by its own ruling. On April 19, 1956, District Judge Richmond B. Keech, in acquitting Aldo Icardi of perjury, stated "that if the committee is not pursuing a bona fide legislative purpose when it secures the testimony of any witness, it is not acting as a 'competent tribunal,' even though that very testimony be relevant to a matter which *could* be the subject of a valid legislative investigation" (emphasis supplied). *New York Times,* April 20, 1956. In other words, in this Circuit there now appears to be one rule for ex-Communists—namely, that a legislative purpose could always have existed and the courts will say it did exist—and another rule for all other citizens—namely that there must be a legislative purpose by the particular committee in asking the particular questions that form the subject of indictment. See also, *Bowers* v. *United States,* 202 F. 2d 447 (C.A. D.C. 1953), where, in the case of gamblers, the Court of Appeals held that "the presumption or possibility of pertinency will not suffice."

sented by petitioner (pp. 57 to 63, *infra*) and concluded that if "obliged to decide what the Committee's purpose was in asking the questions Watkins would not answer, we might be forced to conclude that the Committee asked them for the sole purpose of exposure" (p. 57, *infra*). The dissenting judges, however, construing the authorization of the Committee narrowly in order to avoid the constitutional issues involved (cf. *United States* v. *Rumely,* 345 U. S. 41), concluded that it was unnecessary to decide the exposure question because the authorization of the Committee, narrowly construed, did not cover the questions petitioner refused to answer (p. 64, *infra*).

Petitioner submits that, whether proof of exposure be deemed a ground for so narrowly construing the resolution as to exclude the questions at which petitioner balked or be deemed a basis for holding the action of the Committee under the resolution beyond the powers of a Congressional Investigatory Committee, a clear-cut case of exposure has been made out here. This Court has referred to the "wide concern, both in and out of Congress, over some aspects of . . . the congressional power of investigation." *United States* v. *Rumely,* 345 U. S. 41, 44. The objectionable aspects of the exercise of Congressional power of investigation can largely be traced to the assertion and exercise of an untrammeled power of exposure. As a further indication of the wide concern over the matter of Congressional power of investigation, this Court, in a dictum in the *Quinn* case, set forth a careful catalogue of restrictions on the power of investigation. 349 U. S. 155, 160-161.

If petitioner's showing of the Committee's purpose of exposure is not deemed adequate, we doubt that it can be made in any case. For the Committee will hardly, in a proceeding likely to end in the courtroom, be more explicit in its unlawful purpose of exposure than it was here. We do not

believe that the "concern" expressed and limitations outlined by this Court were intended to be academic and incapable of proof.

The Committee on Un-American Activities has interpreted its resolution as giving it authority to investigate un-American and subversive activities unrelated to legislation and has delved into every aspect of unorthodox opinion and activity. The Congress has year after year ratified this interpretation. The very breadth of this asserted power calls for the judicially-imposed restraints suggested by the *Rumely* and *Quinn* opinions. Yet, we repeat, if the showing made here is not deemed adequate, there can be no effective judicial limitations in the very field of inquiry where they are most needed.

II

The Decision of the Court of Appeals Denying Petitioner's Right to a Fair and Impartial Grand Jury Raises an Important Question of Federal Law Which Has Been Decided by the Court Below in a Way in Conflict With the Applicable Decisions of This Court

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

auguration of the loyalty program; the *Watkins* grand jury was convened seven years later). Moreover, the affidavit filed in this case sets forth the fact that, at hearings under the security program, persons under investigation were asked their opinions on the *Hiss, Remington, Coplon* and *Rosenberg* cases and other similar matters which were considered evidence of an attitude sympathetic towards Communism. "If," the affidavit states, "the mere opinions of persons who have not even participated in a case thought to affect the security of the Government are treated by the authorities as relevant to a decision on a security or loyalty status, the grand jurors would recognize that a vote against an indictment in this case would be harmful to their security status" (R. 9-10).[26] Although the Government filed no answering affidavit challenging any of the facts in the affidavit, the District Court denied petitioner's motion (R. 10-11). The Court of Appeals, despite the fact that the question was placed squarely before them by petitioner (Brief for Appellant, pp. 72-74), omitted any reference to this point in its decision.

The refusal of the courts below to dismiss the indictment or grant a preliminary hearing because of grand jury bias created by the government employees security programs raises the identical question upon which this Court granted certiorari, but which it found unnecessary to decide, in *Quinn* v. *United States,* 349 U. S. 155, 170; *Emspak* v. *United States,* 349 U. S. 190, 202, and *Bart* v. *United States,* 349 U. S. 219, 223.[27] Indeed, the affidavit in this case goes con-

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[26] Compare the quoted statement in counsel's affidavit with the statement by the majority in the *Dennis* case, that, "As far as it appears, the court was willing to consider any evidence which would indicate that investigatory agencies of the Government had recognized in the past or would take cognizance in the future of a vote of acquittal, but no such proof was made (339 U.S. at 168).

[27] In *Emspak,* the original grant of certiorari (346 U.S. 809) excepted the grand jury question. Upon reargument (see 347 U.S. 1006) the

siderably beyond the offers of proof in *Quinn, Emspak* and *Bart* in that it states facts and affirmatively offers to prove

(i) the net effect of the long operation of the government loyalty-security programs, several more years of highly-publicized and widely-feared operation than in those cases;

(ii) that attitudes of grand jurors in cases involving allegations of communism would be considered relevant by security administrators;

(iii) that there was an actual fear on the part of grand jurors which would prevent the exercise of their free will.

The considerations which underlay the grant of certiorari in the *Quinn, Emspak* and *Bart* cases are thus even more applicable to the petition at bar. See also *Morford* v. *United States,* 339 U. S. 258.[28]

The Government suggested in the courts below that the grand jury bias was not prejudicial because the essence of petitioner's defense at the trial was a "legal justification" rather than a factual denial. Brief of Appellee, p. 18. This is reminiscent of the Government's argument, in opposition to certiorari in *Quinn, Emspak* and *Bart, supra,* that:

> "The subtler considerations as to a possible claim of privilege or the meaning of refusal to answer are obviously not the kind of question which a grand jury

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case was consolidated with *Quinn* (see 347 U.S. 1008) and *Bart* (see 347 U.S. 1011), wherein the grant of certiorari included the grand jury point. The *Emspak* grant was thus broadened to include the grand jury question, as indicated by the opinion of Chief Justice Warren in *United States* v. *Emspak,* 349 U.S. 190, at 202.

[28] The fact that the *Morford* and *Dennis* cases involve petit juries is not relevant here. Under the Fifth Amendment, petitioner had a "federal constitutional right to a fair and impartial grand jury" (*Cassell* v. *Texas,* 339 U.S. 282), acting as a "responsible tribunal." *Beavers* v. *Henkel,* 194 U.S. 73, 84. It is at this failure to accord petitioner his right to an impartial and responsible grand jury that petitioner's motion to dismiss and affidavit were directed. See also 2 U.S.C. § 194, requiring grand jury action for the misdemeanor involved in contempt.

> would be called upon to decide. There is thus no basis for a claim of prejudice on the grounds alleged."[29]

This argument, apparently unconvincing to this Court in passing upon the petitions for certiorari in the cases in which it was made, disregards the rule that where grand jury selection is likely to result in unfairness, *"reversible error does not depend on a showing of prejudice in an individual case"* because

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

Where the method of selecting grand and petit jurors presents the possibility of bias, this Court has from the first declined to look to the actual effect of the discrimination in the particular case, as long as the defendant was in the class likely to be injured. *Strauder* v. *West Virginia,* 100 U.S. 303; *Ballard* v. *United States, supra; Cassell* v. *Texas, supra; Thiel* v. *Southern Pacific,* 328 U.S. 217.[30]

It is no answer to state that a fair grand jury might also have indicted. Procedural due process assures that even a correct result may not be achieved by odious means. As was stated recently in a different but related context: "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts." *Communist Party*

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[29] Government's Brief in Opposition in *Emspak,* p. 25-26, adopted by reference in its briefs in opposition in *Quinn,* p. 14 and *Bart,* p. 13. The argument was subsequently reduced to its essentials in the Government's brief on the merits in *Quinn,* p. 68, in the assertion that "no grand jury would have failed to return an indictment."

[30] Precisely because the grand jury does not operate by any formal rules and because the accused's right to make a defense before it is sharply curtailed (*United States* v. *Costello,* 350 U.S. 359), the guarantee of uncoerced jurors becomes essential.

v. *Control Board,* 351 U.S. 115, 124. See also *Tumey* v. *Ohio,* 273 U. S. 510, 535.

Unless the Constitutional guarantee of an unbiased grand jury is now to be limited to persons likely to have avoided indictment before a fair grand jury, the Government's argument merits no consideration. But at the very least, so novel and restricted a view of the Fifth Amendment's scope as the Government has espoused in attempting to justify grand juror bias, merits full consideration before this Court.

Conclusion

Petitioner is literally one of thousands who have been subpoenaed before Congressional Committees and directed to confess their former associates. Whatever may have been the legislative justification for this use of the subpoena power at the outset of the cold war, years and years of repetition of questions serving only to identify persons as former Communists can have no purpose other than the exposure and punishment of these individuals. With even less justification state investigating committees have sought to imitate and rival their Congressional mentors. See *Sweezy* v. *New Hampshire,* No. 175, October Term, 1956. The questions presented by petitioner are ripe for decision.

For this reason, as well as the Court's responsibility to protect the integrity of the grand jury system, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,797

JOHN T. WATKINS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Rehearing En Banc

Decided April 23, 1956

Mr. Joseph L. Rauh, Jr., with whom *Mrs. Norma Zarky* and *Messrs. Daniel H. Pollitt* and *Sidney S. Sachs* were on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom *Messrs. Leo A. Rover,* United States Attorney, and *Lewis Carroll* and *William Hitz,* Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge*: On May 11, 1954, the House of Representatives voted a contempt citation against appellant and on November 22, 1954, he was indicted under 2 U.S.C. § 192 on seven counts for refusal to answer questions of

a subcommittee of the Committee on Un-American Activities as to whether some twenty-nine or thirty named persons had been members of the Communist Party. Having waived his right to trial by jury, appellant was found guilty in the District Court on all counts. He was fined five hundred dollars; execution of a one-year jail term was suspended and appellant was placed on probation. This appeal followed.

Appellant had been named as a member of the Communist Party for the period 1943-1946 by one Donald O. Spencer, who testified before the Committee in a hearing in Chicago in September 1952. Appellant was identified again as a member of the Communist Party in the early 1940's by one Walter Rumsey, who appeared before the Committee in March 1954.

In his appearance before the Committee, appellant answered questions concerning himself. He admitted cooperating with the Communist Party from 1942 to 1946 and answered concerning the extent of this cooperation. He denied past or present membership in the Communist Party and reiterated these denials specifically with respect to the details of both Spencer's and Rumsey's testimony about him. In the course of this questioning, the following occurred:

[Joint Appendix, at 84, 85]

> "Mr. Kunzig: Now, I have here a list of names of people, all of whom were identified as Communist Party members by Mr. Rumsey during his recent testimony in Chicago. I am asking you first whether you know these people. My first question: Warner Betterson?"

Watkins said he did not know the first three persons named. Then he was asked about a Harold Fisher, whom he knew, and the following ensued [*id.* at 85, 86]:

"Mr. Watkins: Mr. Chairman, in regard to that question, I would like to make a very brief statement I prepared in anticipation of this answer.

"Mr. Velde: You may proceed.

"Mr. Watkins: Thank you. I would like to get one thing perfectly clear, Mr. Chairman. I am not going to plead the fifth amendment, but I refuse to answer certain questions that I believe are outside the proper scope of your committee's activities. I will answer any questions which this committee puts to me about myself. I will also answer questions about those persons whom I knew to be members of the Communist Party *and whom I believe still are.* I will not, however, answer any questions with respect to others with whom I associated in the past. I do not believe that any law in this country requires me to testify about persons who may in the past have been Communist Party members or otherwise engaged in Communist Party activity *but who to my best knowledge and belief have long since removed themselves from the Communist movement.*

"I do not believe that such questions are relevant to the work of this committee nor do I believe that this committee has the right to undertake the public exposure of persons because of their past activities. I may be wrong, and the committee may have this power, but until and unless a court of law so holds and directs me to answer, I most firmly refuse to discuss the political activities of my past associates.

"Mr. Kunzig: And I want to get this clear for the record. You are not in any way raising the fifth amendment?

"Mr. Watkins: I am not.

"Mr. Kunzig: But you are refusing to answer the question I have just asked you?

"Mr. Watkins: Based upon the statement just read, yes.

"Mr. Kunzig: And you, of course, have advice of counsel. He is sitting right next to you at this moment and you just conferred with him, is that correct?

"Mr. Watkins: That is correct.

"Mr. Scherer: Mr. Chairman, I ask that you direct the witness to answer.

"Mr. Velde: Yes. *This committee is set up by the House of Representatives to investigate subversion and subversive propaganda and to report to the House of Representatives for the purpose of remedial legislation.*

"The House of Representatives has by a very clear majority, a very large majority, directed us to engage in that type of work, and so we do, as a committee of the House of Representatives, have the authority, the jurisdiction, to ask you concerning your activities in the Communist Party, concerning your knowledge of any other persons who are members of the Communist Party or who have been members of the Communist Party, and so, Mr. Watkins, you are directed to answer the question propounded to you by counsel.

"Now, do you remember the question that was propounded to you?

"Mr. Watkins: I remember the question, Mr. Chairman, and I have read my answer which, among other things, states that your committee may have this power, and I stand on my statement."

[Emphasis supplied.]

Similar refusals and directions to answer followed and, like those previously described in appellant's testimony with regard to Fisher, they became the subject of the

various counts of the indictment. In all, appellant refused to answer, although directed to do so, with respect to approximately thirty persons.

Appellant argues that the trial court erred in failing to grant his motion to dismiss the indictment or for acquittal. He says the Committee was exceeding its constitutional powers as a congressional investigating committee; that 2 U.S.C. § 192, read together with the Committee's authorizing resolution, was so vague and indefinite as to deprive appellant of due process of law; and that the First Amendment protected appellant against being forced to answer the particular questions asked him.

We must delimit the question before us. A majority of the court is of opinion that Congress has power to investigate the history of the Communist Party and to ask the questions Watkins refused to answer. It would be quite in order for Congress to authorize a committee to investigate the rate of growth or decline of the Communist Party, and so its numerical strength at various times, as part of an inquiry into the extent of the menace it poses and the legislative means that may be appropriate for dealing with that menace. Inquiry whether thirty persons were Communists between 1942 and 1947 would be pertinent to such an investigation. The questions asked Watkins could be asked for a valid legislative purpose.

The precise question upon which the decision must rest is a narrow one. It is whether the Act authorized the Committee to ask the questions asked Watkins, in the particular context in which the Committee propounded them, and whether the Committtee's purpose in asking the questions was a valid legislative purpose. A majority of the court is of opinion that the questions were pertinent to a valid legislative purpose and were authorized by the Act.

According to the Legislative Reorganization Act of 1946

(60 Stat. 812, at 822, 823),[1] the Committee on Un-American Activities is one of several standing committees elected by the House of Representatives. The act sets forth in no uncertain terms the subject and scope of inquiry intrusted to this Committee. It provides [*id.* at 828]:

> "(A) Un-American activities.
>
> "(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

In March 1954, the Committee conducted hearings in Chicago. At their commencement the chairman expressed the purpose of the hearings. It was to investigate, for a definite legislative purpose, communist infiltration into labor unions. The chairman stated [Joint Appendix, at 43, 44]:

> "Mr. Velde: The committee will be in order. I should like to make an opening statement regarding our work here in the city of Chicago. The Congress of the United States, realizing that there are individuals and elements in this country whose aim it is to subvert our constitutional form of government, has established the House Committee on Un-American Activities. In establishing this committee, the Congress

[1] See H. R. Res. No. 5, 83d Cong., 1st Sess. (1953) adopting provisions of the Legislative Reorganization Act as rules of the 83d Congress.

has directed that we must investigate and hold hearings, either by the full committee or by a subcommittee, to ascertain the extent and success of subversive activities directed against these United States.

"On the basis of these investigations and hearings, the Committee on Un-American Activities reports its findings to the Congress *and makes recommendations from these investigations and hearings for new legislation. As a result of this committee's investigations and hearings, the Internal Security Act of 1950 was enacted.*

"Over the past fifteen years this committee has been in existence, both as a special and permanent committee, it has made forty-seven recommendations to the Congress to insure proper security against subversion. I am proud to be able to state that of these forty-seven recommendations, all but eight have been acted upon in one way or another. Among these recommendations which the Congress has not acted upon are those which provide that witnesses appearing before congressional committees be granted immunity from prosecution on the information they furnish.

"The committee has also recommended that evidence secured from confidential devices be admissible in cases involving the national security. The executive branch of Government has now also asked the Congress for such legislation. A study is now being made of various bills dealing with this matter.

"The Congress has also referred to the House Committee on Un-American Activities a bill which would amend the National Security Act of 1950. This bill, if enacted into law, would provide that the Subversive Activities Control Board should, after suitable hearings and procedures, be empowered to find if

certain labor organizations are in fact Communist-controlled action groups. Following this action, such labor groups would not have available the use of the National Labor Relations Board as they now have under the provisions of the Labor-Management Relations Act of 1947.

"During the first session of this 83rd Congress, the House Un-American Activities Committee has held hearings in Los Angeles and San Francisco, California; Albany and New York City, New York; Philadelphia, Pennsylvania, and Columbus, Ohio. We are here in Chicago, Illinois, realizing that this is the center of the great mid-western area of the United States.

"It cannot be said that subversive infiltration has had a greater nor a lesser success in infiltrating this important area. The hearings today are the culmination of an investigation that has been conducted by the committee's competent staff and is a part of the committee's intention for holding hearings in various parts of the country.

"The committee has found that by conducting its investigations and holding hearings in various parts of the country, it has been able to secure a fuller and more comprehensive picture of subversive efforts throughout our nation. Every witness who has been subpoenaed to appear before the committee here in Chicago, as in all hearings conducted by this committee, are known to possess information which will assist the committee in performing its directed function to the Congress of the United States." [Emphasis supplied.]

Later, in April of the same year, at a continuation of the March hearings, the chairman, upon calling the committee to order, announced, just prior to the swearing of appellant [*id.* at 70]:

"Mr. Velde: The Committee will be in order.

"Let the record show that I have appointed as a subcommittee for the purposes of this hearing Mr. Scherer, Mr. Moulder, Mr. Frazier, and myself as chairman.

"The hearing this morning is a continuation of the hearings which were held in Chicago recently by a subcommittee composed of Mr. Scherer, Mr. Moulder, and myself. At that time two witnesses were unavailable, at least the committee staff were unable to find these two witnesses to issue a subpoena for them. Subsequent to that time I believe that these witnesses have been subpoenaed, so we will proceed, Mr. Counsel, at the present time with the witnesses."

In other words, the purpose of the Committee's hearing was to aid it [the Committee] in its study of a proposed amendment to the Internal Security Act of 1950. That amendment was in fact enacted into law four months after appellant's refusal to testify.[2] It made unavailable to labor unions found to be communist-infiltrated procedures established in the Labor-Management Relations Act of 1947. This is a proper example of the exercise of a legitimate legislative purpose.

This court's decision in *Barsky* v. *United States,* 83 U. S. App. D. C. 127, 167 F. 2d 241, cert. denied, 334 U. S. 843 (1948), as well as the decisions in *United States* v. *Josephson,* 165 F. 2d 82 (2d Cir. 1947), cert. denied, 333 U. S. 838 (1948), and *Dennis* v. *United States,* 339 U.S. 162 (1950), read in the light of *Sinclair* v. *United States,* 279 U.S. 263

[2] The Communist Control Act of 1954 was passed in August 1954 (68 Stat. 775, 50 U.S.C. § 841 (Supp. 1955)). This contained, among other things, amendments to the Internal Security Act of 1950 and had to do, in part at least, with infiltration by communists into labor unions. Other changes having to do with communist infiltration into organizations were also included.

(1929), establishes that the contempt statute, 2 U.S.C. § 192, when read together with the Committee's authorizing resolution is not so vague or indefinite as to be invalid.

With respect to appellant's claimed protection under the First Amendment, we refer to the *Barsky* case, *supra,* where this court indicated that, having power to inquire into the subject of communism and the Communist Party, Congress has the authority to identify individuals who believe in communism and those who belong to the Party, since the nature and scope of the program and activities of the Communist Party depend in large measure on the character and number of its adherents. In *Barsky* we said [167 F. 2d, at 246]:

> "If Congress has power to inquire into the subjects of Communism and the Communist Party, it has power to identify the individuals who believe in Communism and those who belong to the party. The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. Personnel is part of the subject. Moreover, the accuracy of the information obtained depends in large part upon the knowledge and the attitude of the witness, whether present before the Committee or represented by the testimony of another. We note at this point that the arguments directed to the invalidity of this inquiry under the First Amendment would apply to an inquiry directed to another person as well as to one directed to the individual himself. . . ."

And at p. 247 we said:

> "Moreover, that the governmental ideology described as Communism and held by the Communist Party is antithetical to the principles which underlie the form of government incorporated in the Federal Constitu-

> tion and guaranteed by it to the States, is explicit in the basic documents of the two systems; and the view that the former is a potential menace to the latter is held by sufficiently respectable authorities, both judicial and lay, to justify Congressional inquiry into the subject. In fact, the recitations in the opinion of the Supreme Court in Schneiderman v. United States, 1943, 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796, are sufficient to justify inquiry. To remain uninformed upon a subject thus represented would be a failure in Congressional responsibility."

Congress has before it the important duty to legislate effectively, but at the same time wisely, upon the problems posed by the world communist movement. It cannot perform that duty without information. It ought not try to perform it without information. We think the Act authorized an inquiry into infiltration by communists into labor unions and that this inquiry was such an inquiry. The face of the Act seems to us to speak for itself. The inquiry here is likewise plain on its face. It was whether certain persons, members of the union, were indeed communists. The inquiry was specific. It seems to us it was directly part of the inquiry the Committee was directed to make.

Points four and five of appellant's statement of errors can be combined for our purposes here. He says the Committee asserted an independent power of exposure. Congress has power of exposure if the exposure is incident to the exercise of a legislative function. Congress certainly has the power of inquiry or of investigation when the inquiry or investigation is upon a subject concerning which Congress may legislate. The fact that such an inquiry or investigation may reveal something or "expose" something

is incidental and without effect upon the validity of the inquiry.

Appellant would have us judge the present controversy upon the basis of speeches made by members of Congress and others, and upon newspaper articles, etc. We cannot do so. Such material is not evidence. The question is an individual one, whether the inquiry is indeed pertinent to a valid legislative purpose. It cannot be solved by generalities culled from speeches—many of them no doubt partially extemporaneous—or from partisan assailants, critics, friends or defenders of some project or cause. Moreover, even if the unbridled power of exposure were claimed by some members of Congress, the claim would not establish its use in any particular inquiry. We must judge each inquiry in its own setting and upon its own facts.

Appellant cites many authorities, beginning with *Kilbourn* v. *Thompson,* 103 U. S. 168, to the effect that Congress does not possess the general power of making inquiry into the private affairs of citizens. This point needs no additional exploration. The inquiry here had to do with a valid legislative purpose.

In *Young* v. *United States,* 212 F. 2d 236, cert. denied, 347 U. S. 1013 (1954), this court pointed out that a committee, holding a hearing to substantiate an earlier report pertinent to legislation pending before the Congress, was engaged in a legislative function and its competency was not subject to question in a subsequent prosecution. Further in that case we indicated that this legislative purpose for which the subcommittee had convened was not vitiated by the incidental desire of the subcommittee to give interested parties a chance to reply to statements made in such report.

Having volunteered an attack on the credibility of a prior witness, appellant could not later refuse to answer

questions concerning Communist Party membership of other union associates of appellant and of the prior witness on the ground that this particular phase of testimony was beyond the scope of the Committee's investigating power. Indeed, an inquiry may not only be detailed when credibility is involved but "a legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress." Cf. *Townsend* v. *United States*, 68 App. D. C. 223, 95 F. 2d 352, cert. denied, 303 U. S. 664 (1938).

We have examined appellant's other points urged on this appeal and find no error.

The judgment of the District Court is

Affirmed.

Circuit Judge Burger, who took office after the hearing and consideration of this case, took no part in its decision.

EDGERTON, *Chief Judge,* with whom BAZELON, *Circuit Judge,* joins, *dissenting*:[3] The appellant has been convicted of refusing to answer certain questions before a subcommittee [4] of the Committee of the House of Representatives on Un-American Activities. He told the Committee he had cooperated with the Communist Party from 1942 to 1947. He did not plead the Fifth Amendment. Asked whether he knew certains persons as Communists, he answered freely concerning all whom he believed to be Communists at the time of the hearing. He refused to answer concerning other persons. As the District Court said in sentencing him, he did not "attempt to impede the committee in any respect, other than his refusal to answer questions dealing

[3] This opinion is nearly identical with one which, as the majority of a division of the court, we filed January 26, 1956, and which was superseded when a rehearing *in banc* was ordered.

[4] We shall call the subcommittee the Committee.

with persons who, to use his words, 'may in the past have been Communist Party members or otherwise engaged in Communist activities, but who to my best knowledge and belief have long since removed themselves from the Communist movement.' " We have to decide whether his refusal to expose their past history was a crime.

Since 1953 he has been a United Automobile Workers organizer. From 1935 to 1953 he was employed by the International Harvester Company at East Moline, Illinois, but from 1942 to 1953 he was on leave and worked for the Farm Equipment Workers, CIO, and its successor. At a hearing of the Committee in 1952, one Spencer named him as having been a member of the Communist Party between 1943 and 1946. At a hearing of the Committee in Chicago in March 1954, one Rumsey testified that in 1942 or 1943 Watkins recruited him into the Party and collected his Party dues.

In April 1954, in response to a subpoena, Watkins appeared and testified before the Committee in Washington. He said: "I am not now nor have I ever been a card-carrying member of the Communist Party. Rumsey was wrong when he said I had recruited him into the party, that I had received his dues . . . Spencer was wrong when he termed any meetings which I attended as closed Communist Party meetings.

"I would like to make it clear that for a period of time from approximately 1942 to 1947 I cooperated with the Communist Party and participated in Communist activities to such a degree that some persons may honestly believe that I was a member of the Party. I have made contributions upon occasions to Communist causes. I have signed petitions for Communist causes. I attended caucuses at an FE convention at which Communist Party officials were present. Since I freely cooperated with the

Communist Party I have no motive for making the distinction between cooperation and membership except the simple fact that it is the truth. I never carried a Communist Party card. I never accepted discipline and indeed on several occasions I opposed their position.

"In a special convention held in the summer of 1947 I led the fight for compliance with the Taft-Hartley Act by the FE-CIO International Union. This fight became so bitter that it ended any possibility of future cooperation."

He was asked: ". . . with whom did you participate in the Communist Party in [its] activities . . . ?" He named several people. Mr. Kunzig, Committee counsel, said: "Now, I have here a list of names of people, all of whom were identified as Communist Party members by Mr. Rumsey during his recent testimony in Chicago. I am asking you first whether you know these people." He did not know the first three. He knew the fourth, who was Spencer, and the fifth, one Harold Fisher. He was asked, "Do you know Harold Fisher to be a member of the Communist Party?"[5] He consulted his counsel and then read this statement to the Committee: "I would like to get one thing perfectly clear, Mr. Chairman. I am not going to plead the fifth amendment, but I refuse to answer certain questions that I believe are outside the proper

[5] As to all except Fisher and one other, the Committee's questions were expressly about past Party membership. As to those two persons, the questions were phrased in the present tense. But in view of the earlier testimony of Rumsey and Spencer, who set the dates of appellant's Party affiliation from 1943-46, and appellant's uncontradicted statement that he had ceased cooperation with the Party in 1947, it is plain that the Committee was questioning appellant about the past. He did not refuse to testify about the present. His statement which we proceed to quote shows that when he replied to a question about present membership by standing on the statement, he was in effect denying that he knew the named individual to be a present member of the Party and refusing to answer about past membership.

scope of your committee's activities. I will answer any questions which this committee puts to me about myself. I will also answer questions about those persons whom I knew to be members of the Communist Party and who I believe still are. I will not, however, answer any questions with respect to others with whom I associated in the past. I do not believe that any law in this country requires me to testify about persons who may in the past have been Communist Party members or otherwise engaged in Communits Party activity but who to my best knowledge and belief have long since removed themselves from the Communist movement.

"I do not believe that such questions are relevant to the work of this committee nor do I believe that this committee has the right to undertake the public exposure of persons because of their past activities. I may be wrong, and the committee may have this power, but until and unless a court of law so holds and directs me to answer, I most firmly refuse to discuss the political activities of my past associates."

After testifying that Joseph Stern, one of the men on the Committee's list, had carried on Party activities, he said: "In regard to the other names that you have read, I will not answer, based upon the statement that I read into the record. . . ." The Committee directed him to answer. He refused again. The Committee did not question him further.

He was indicted in November 1954 and tried in May 1955. He waived a jury. The government called only one witness, the Committee counsel, who put into the record the transcript of the Committee's examination of Watkins. The court found Watkins guilty, fined him $500, sentenced him to a year's imprisonment, suspended the sentence, and placed him on probation.

I

The Committee on Un-American Activities is a standing committee of the House of Representatives. The Committee and its subcommittees are authorized by Act of Congress "to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." 60 Stat. 812, 823, 828.

A witness before a congressional committee is guilty of a misdemeanor if he "refuses to answer any question pertinent to the question under inquiry . . . ." 2 U.S.C. §192, R.S. §102, 52 Stat. 942, as amended. Pertinence is part of the government's case. In order to convict, the government must plead and prove that the questions the witness would not answer were pertinent to an inquiry Congress had authorized. *Sinclair* v. *United States,* 279 U.S. 263, 296-297. *Bowers* v. *United States,* 92 U.S. App. D.C. 79, 80, 202 F. 2d 447, 448; *Keeney* v. *United States,* 94 U.S. App. D.C. 366, 369, 218 F. 2d 843, 845.

An important preliminary question is whether the authorizing Act is to be construed broadly or narrowly for the purpose of deciding whether the questions Watkins would not answer were pertinent to the inquiry authorized. The Act must be construed narrowly if a narrow construction avoids a serious constitutional question. *United States* v. *Rumely,* 345 U.S. 41.

If the questions Watkins would not answer were pertinent to the inquiry authorized by the Act, we should have

to decide whether they were within the constitutional power of Congress. Like the question in the *Rumely* case, this question is serious, as we shall presently show. It follows that, for the purposes of this case, the Act must be construed narrowly if the questions Watkins refused to answer would otherwise appear pertinent.

"There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power . . . is indeed co-extensive with the power to legislate. . . . *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, such as the Fifth Amendment's privilege against self-incrimination . . ." *Quinn* v. *United States,* 349 U.S. 155, 160, 161 (1955). (Emphasis added.)

The only limitation dealt with in the *Quinn* case was the privilege against self-incrimination. The fact that the Supreme Court called attention to other limitations, including the necessity of a "valid legislative purpose", suggests that the Court shares the "wide concern, both in and out of Congress, over some aspects of the exercise of the congressional power of investigation." *United States* v. *Rumely,* 345 U.S. 41, 44.

It is very questionable whether exposure of individuals to public contempt or hostility is a "valid legislative purpose". Since Congress has "no powers of law enforcement" it would have no power, in the absence of a valid

legislative purpose, to expose former Communists, even if there were a law requiring that former Communists be exposed. If we were obliged to decide what the Committee's purpose was in asking the questions Watkins would not answer, we might be forced to conclude that the Committee asked them for the sole purpose of exposure.

By "exposure" we mean injurious publicity. The fact that Rumsey, at Chicago in March, publicly called Fisher a Communist, does not mean that if Watkins had done so at Washington in April, this new publicity and its repetition in and out of the press would not have been injurious. Obviously the new publicity would have been injurious. As the law of slander and libel recognizes, the fact that a derogatory statement has been made previously does not make it harmless. And the fact that Rumsey had called Fisher a Communist does not show that the Committee sought to serve some other purpose than injurious publicity when it asked Watkins "Do you know Harold Fisher to be a member of the Community Party?"

II

The government argues that the Committee's purpose in asking the questions was to investigate Communist infiltration of labor unions, in order to determine the need for pending legislation to deprive Communist-infiltrated unions of the use of the National Labor Relations Board.[6]

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[6] In opening the hearing in Washington at which Watkins testified, on April 29, 1954, the chairman said nothing directly about purpose. He said: "The hearing this morning is a continuation of the hearings which were held in Chicago recently . . . ." In opening the Chicago hearings, in March 1954, the chairman said Congress had directed the Committee "to ascertain the extent and success of subversive activities directed against these United States", and mentioned bills of two sorts as pending before the Committee, one of which would make evidence "secured from confidential devices" admissible in "cases involving the

But several aspects of the Committee's examination of Watkins tend to show that the Committee did not ask these questions for that purpose, or for any purpose except exposure.

(1) The Committee made no attempt to learn from Watkins either the total number of Communists in his union, or what positions Communists held in the union, or whether or how, or how far, or in what direction, they influenced the union. The Committee showed no interest in anything but a list of names. Whether Communist infiltration of unions creates a need for legislation would seem to depend on the number, and the nature, extent, and effectiveness of the activities, of Communists in unions. Watkins named several people, who apparently had been fellow-members of his union, as having been Communists while he cooperated with the Party. If the Committee had been questioning him for a legislative purpose, it could hardly have failed to question him about what, if anything, these Communist members of the union did.

(2) It is not clear, and the government does not suggest, how the questions Watkins would not answer could have served the purpose the government now attributes to the Committee.

These questions concerned the presence of Communists in a union between 1942 and 1947. Their presence or absence in unions then had little or nothing to do with the question whether, at the time of the Committee hearing in 1954, Communists in unions were so numerous, so active, and so effective as to create problems that called for legis-

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national security". Another, he said, "would provide that the Subversive Activities Control Board should, after suitable hearings and procedures, be empowered to find if certain labor organizations are in fact Communist-controlled action groups. Following this action, such labor groups would not have available the use of the National Labor Relations Board as they now have under the provisions of the Labor-Management Relations Act of 1947."

lation. This is true partly because of the lapse of time, but chiefly because times had changed and legislation had changed.

Communist affiliation between 1942 and 1947 did not mean what Communist affiliation meant in 1954. In December 1941 the United States joined Russia in the war against Germany. President Roosevelt wrote to Admiral Land in January 1942: "I am still terribly disturbed about the fact that an adequate number of ships are not available for Russia. . . . This Government has made a firm pledge to Russia and we simply cannot go back on it." In February 1942 General MacArthur honored the 25th anniversary of the Red Army with a message in which he said: ". . . the hopes of civilization rest upon the worthy banners of the courageous Russian Army. . . ." [7] Friendly relations between the United States and Russia continued throughout the war and did not cease immediately at the end of the war.

The Labor Management Relations Act, which requires non-Communist affidavits from officers of unions that use the National Labor Relations Board, was not passed until 1947, close to the end of the period to which the Committee's questions relate. Whether the Act is adequate or requires strengthening would seem to depend upon what has happened since, not what had already happened. Likewise the Internal Security Act and the Immigration and Nationality Act, passed in 1950 and 1952, were in effect at the time of the Committee hearing but not at the time to which the Committee's questions relate.[8]

(3) When Watkins refused to answer the Committee's

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[7] Quoted in Robert E. Sherwood, ROOSEVELT AND HOPKINS, p. 496, 497 (1948).

[8] 64 Stat. 987; 66 Stat. 163. The Communist Control Act of 1954 is not pertinent in this connection, since it was passed in August 1954, after the Committee hearing. 68 Stat. 775.

questions, saying he thought their purpose was "public exposure of persons because of their past activities", the Committee was under no obligation to reply. However, the chairman chose to reply. His reply did not suggest that the questions had a legislative purpose related to unions. It did not mention unions. Instead, it claimed for the Committee unlimited authority to question Watkins concerning his knowledge of former Communists. The chairman said: "This committee is set up by the House of Representatives to investigate subversion and subversive propaganda and to report to the House of Representatives for the purpose of remedial legislation. The House of Representatives has by a very clear majority, a very large majority, directed us to engage in that type of work, and so we do, as a committee of the House of Representatives, have the authority, the jurisdiction, to ask you concerning your activities in the Communist Party, concerning your knowledge of any other persons who are members of the Communist Party or who have been members of the Communist Party, and so, Mr. Watkins, you are directed to answer the question propounded to you by counsel."

(4) The Committee seems to have had in its possession, before it questioned Watkins, the information about other persons which it asked him to supply.[9]

(5) The purpose the government attributes to the Committee, and practically any other purpose except exposure, might have been served by questioning Watkins in a closed session. But the Committee questioned him at a public hearing.

III

Words and conduct of the Committee on other occasions go far to confirm the inference that its purpose on this occasion was exposure.

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[9] *Cf. Slochower* v. *Board of Education,* — U.S. —, decided April 9, 1956 (slip opinion p. 7.)

"The Committee and its members have repeatedly said in terms or in effect that its main purpose is to do by exposure and publicity what it believes may not validly be done by legislation." [10]

At the trial, the defense offered in evidence "excerpts from House committee reports, House committee hearings, Congressional Record statements and newspapers, going to the point that the House committee asserts an independent power all apart from legislation to expose persons to public knowledge." The court excluded these excerpts as evidence, but they are in the record as an offer of proof. They cover some 64 printed pages.[11] They show beyond doubt, and it is not disputed, that the Committee on Un-American Activities claims an independent power of exposure and sometimes investigates for the purpose of exposure. We give a few illustrations.

Mr. Dies, the first chairman of the Committee, said during debate in the House on his resolution for the appointment of such a Committee, "I am not in a position to say whether we can legislate effectively in reference to this matter, but I do know that exposure in a democracy of subversive activities is the most effective weapon that we have in our possession." [12]

The Committee said in 1951: "Exposure in a systematic way began with the formation of the House Committee on Un-American Activities, May 26, 1938. . . . The House Committee on Un-American Activities was started on its way May 20, 1938, with instructions from the United States

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[10] Dissenting opinion in *Barsky* v. *United States,* 83 U.S. App. D.C. 127, 142, 167 F. 2d 241, 256. A footnote quotes many such statements.

[11] Counsel stipulated that the excerpts from official sources are accurate and that those from newspapers are "true and correct quotations, digests or reports as the case may be of the statements and events reported therein."

[12] 83 Cong. Rec. 7570 (May 26, 1938). Quoted in ROBERT K. CARR, THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES (1952) at p. 15.

House of Representatives to expose people and organizations attempting to destroy this country. That is still its job, and to that job it sticks." [13]

Mr. Velde, the Chairman of the Committee in the 83d Congress, who presided at the Watkins hearing, said at another hearing: "we feel that we have a duty and that duty has been imposed upon us by Congress not only to report to Congress for the purpose of remedial legislation but to inform the people who elected us about subversive activities. . . ." [14]

Chairman Walter said in 1955: "Unlike most congressional committees, in addition to the legislative function we are required to make the American people aware if possible of the extent of the infiltration of Communism in all phases of our society." [15]

The Committee has publicized the names of persons identified to it as Communists or former Communists. Its Report for 1952 devotes 54 out of a total of 89 pages to the names and addresses of such persons. Its Report for 1953 devotes 59 out of 193 pages to a similar list.

Though the Committee's Report for 1954, the year of the Watkins hearing, does not contain a list of names, it points to exposure as the Committee's function. It says, *e.g.*, that in 1952 the Committee "reported that during its investigation the identity of over 600 individuals as Communist Party members was obtained. . . . During the committee's investigation, it uncovered members of the Communist Party holding influential positions in the school systems of Detroit and other communities. . . . Most of the teachers called have been suspended or permanently removed from their positions. The Committee on Un-

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[13] *100 Things You Should Know About Communism* (1951), 82d Cong., 1st Sess., House Document No. 136, pp. 19, 67.

[14] Hearing Before the Committee on Un-American Activities, House of Representatives, 83d Cong., 1st Sess., p. 1106.

[15] U.S. News and World Report, August 26, 1955, p. 71.

American Activities approves of this action . . ." [16] In a separate pamphlet issued in 1954 the Committee said: "This committee and the special committee have over the past 16 years held hundreds of hearings and issued and distributed throughout the United States hundreds of thousands of reports exposing the operations of the Communist Party and its fronts." [17]

The District Court ruled that express claims of an independent power of exposure, made without particular referance to the Watkins hearing, do not tend to prove that the Committee's purpose in the Watkins hearing was exposure. In our opinion this was error. Although general propositions do not decide concrete cases, they help to decide them. Intentions tend to result in acts. By claiming that it had the authority and duty to expose, the Committee implied that it intended to expose. And as the Fifth Circuit recently said, "of course it may be inferred from a person's statement that he intended to do something, that he later actually did it. Mutual Life Ins. Co. of New York v. Hillmon, 145 U.S. 285, 295, 12 S. Ct. 909, 36 L. Ed. 706." *Shurman* v. *United States,* 219 F. 2d 282, 290, fn. 9 (1955).[18]

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[16] Committee on Un-American Activities, Annual Report for the Year 1954, pp. 14-15, 17.

[17] *This is YOUR House Committee on Un-American Activities,* p. 25.

[18] *Morford* v. *United States,* 85 U.S. App. D.C. 172, 176 F. 2d 54, *reversed* on other grounds, 339 U.S. 258, is not to the contrary. Morford refused to give the Committee on Un-American Activities the financial records, and the names of the publications committee, of the National Council of American-Soviet Friendship, which had put out "a flood of propaganda . . . of the nature described in the Resolution". Unlike this case, the Committee's questions were clearly pertinent to its authorized investigation and nothing in its examination of the witness suggested that it did not ask the questions for that purpose. The presumption of a legislative purpose, which resulted, "cannot be rebutted by impugning the motives of individual members of the Committee." 85 U.S. App. D.C. at 176, 176 F. 2d at 58. No one's motives are impugned by showing the Committee's concept of its duty.

IV

In our opinion the questions Watkins refused to answer are not pertinent to the inquiry authorized by the Act, even if the Act is not construed narrowly. If it is construed narrowly, the questions are clearly not pertinent.

The key words of the Act are (i) "extent, character and objects of un-American propaganda activities"; (ii) "diffusion . . . of subversive and un-American propaganda"; and (iii) "questions in relation thereto that would aid Congress in any necessary remedial legislation." 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.

As to clause (iii) of the Act: possibly questions concerning Communist Party membership might be considered "questions in relation" to the "extent, character and objects" or the "diffusion" of propaganda, if the phrase "in relation" were construed very broadly, but these questions certainly cannot be so considered if the phrase is construed narrowly. Moreover, clause (iii) contains the further requirement that the questions "would aid Congress in any necessary remedial legislation". If a mere theoretical chance of very slight aid were to be considered sufficient, possibly it might be thought that the questions "would aid". But that would be a broad construction of those words. Construed narrowly, the words require more than a theoretical chance. The questions Watkins would not answer plainly do not meet this requirement.

"The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial." *Sinclair* v. *United States,* 279 U.S. 263, 296. We conclude that the government failed to show, either beyond a reasonable doubt or even by a preponderance of the evidence, that the questions Watkins would not answer were pertinent to any investigation the Committee was authorized to make.

Barsky v. *United States,* 83 U. S. App. D. C. 127, 167 F. 2d 241, is not to the contrary. The court held that, in the circumstances of that case, Congress and the Committee on Un-American Activities had "power to make an inquiry of an individual which may elicit the answer that the witness is a believer in Communism or a member of the Communist Party." 83 U. S. App. D. C. at 136, 167 F. 2d at 250. But the circumstances of that case and of this are very different. (1) As the court pointed out, Barsky and his co-defendants "were not asked to state their political opinions. They were asked to account for funds." 83 U. S. App. D. C. at 130, 167 F. 2d at 244. (2) As the court pointed out, the Congressional Committee had been informed that Barsky's organization, the Joint Anti-Fascist Refugee Committee, was engaged in "political propaganda." 83 U. S. App. D. C. at 129, 167 F. 2d at 243. It has not been shown that the Congressional Committee had any comparable information in this case. (3) The question Barsky refused to answer related, though indirectly, to his *present* Communist membership. The questions Watkins refused to answer related to Communist membership of other persons at a time long past. To hold, as *Barsky* does, that the Committee may inquire whether members of an organization shown to engage in propaganda are now Communists, does not imply that it may inquire whether members of

a union not shown to engage, or to be likely to engage, in propaganda were once Communists.[19]

We need not consider appellant's other contentions.

APPENDIX B

The Committee on Un-American Activities Asserts the Power, as a Separate and Independent Function Apart From Investigation in Aid of Legislation, to Expose Allegedly Subversive Individuals to Public Scorn and Retribution.

1. *Exposure*

As the Committee itself proudly states, "exposure in a systematic way began with the formation of the House Committee on Un-American Activities, May 26, 1938." This Committee, again in its own words, "was started on its way May 20, 1938, with instructions from the United States House of Representatives to expose people and organizations attempting to destroy this country. That is still its job and to that job it sticks" (R. 130, 131, *100 Things You Should Know About Communism* (1951), 82d Cong., 1st Sess., House Document No. 136, pp. 19, 67). These statements by the House Committee, made in a pamphlet especially designed for public distribution and

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[19] In *Lawson* v. *United States,* 85 U.S. App. D.C. 167, 176 F. 2d 49, the Committee asked each of two "prominent writers" in the motion picture industry "whether or not he was or had ever been a member of the Communist Party". Though this question included past as well as present membership, neither the briefs nor the opinion of the court show consideration of the fact. The court's ruling, as expressed, is limited to questions regarding *present* membership: "we expressly hold herein that the House Committee on Un-American Activities, or a properly appointed subcommittee thereof, has the *power* to inquire whether a witness subpoenaed by it is or is not a member of the Communist Party or a believer in Communism . . . ." The court held that since motion pictures "are, or are capable of being, a potent medium of propaganda dissemination", the question was pertinent. 85 U.S. App. D.C. at 170, 171, 176 F. 2d at 52, 53.

distributed in more than a million copies,[1] accurately reflect the view of its own power and functions which the Committee has taken. Identification, the listing of individuals, the passing of a judgment of guilt or innocence without regard to any statutory period of limitation and without regard to any preexisting law, the attempt at sanctions, in short, exposure—all directed toward the public, rather than toward the House to which it is an appendage—have been a coordinate part of the Committee's work.

The Chairman of the Committee on Un-American Activities in the 83rd Congress, the Committee which questioned petitioner, described the Committee's function as one to "ferret out Communists" and track "down individual Communists" (R. 169-170), stating:

> "So as a committee of Congress, elected by the people, we feel that we have a duty and that duty has been imposed upon us by Congress not only to report to Congress for the purposes of remedial legislation but to inform the people who elected us about subversive activities" (R. 150).

This asserted independent power to expose had long before been described as a *"special function"* of the Committee—"the discovery and exposure of those enemy groups which fight with non-physical weapons as a fifth column on our home front" (R. 151-152).

Possibly the clearest statement on this subject is that of the present Chairman of the Committee. Defending the Committeee's August, 1955, investigation of Communism in the theatre, Chairman Walter stated: "Unlike most congressional committees, in addition to the legislative function we are required to make the American people aware

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[1] Carr, *The House Committee on Un-American Activities* (1952), p. 357.

if possible of the extent of the infiltration of Communism in all phases of our society." *U. S. News and World Report,* August 26, 1955, p. 71.

While at some times and on some occasions the Committee may well have performed a legislative function, it is quite clear that in the proceedings in which petitioner was involved, the Committee was not performing or even attempting to perform a legislative function. It was acting, in the Chairman's words, "unlike most congressional committees." It was asserting, in addition to and completely apart from its legislative functions, a power and duty to find and publicly identify by a "friendly witness" and, if possible, more than one, every past or present Communist, and then to embody that identification in some printed report to be circulated to the American people—that whole system of operation which has come to be called "exposure."

2. *Identification*

The identification of individuals is the first step in this well-organized system of exposure. Here is how the Committee, over the years, and up to and including the Committee in the 83rd Congress, before which petitioner appeared, has openly proclaimed that identification of individuals is what it is looking for.

> "While Congress does not have the power to deny to citizens the right to believe in, teach, or advocate communism, fascism, and nazism, it does have the right to focus the spotlight of publicity upon their activities." (R. 163, H. Rep. No. 2, 76th Cong., 1st Sess., p. 13 (1939)).
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> * * * * *
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> ". . . Investigation to inform the American people . . . is the real purpose of the House Committee . . . The committee conceives its principal task to have

been the revelation of the attempts now being made by extreme groups in this country to deceive the great mass of earnest and devoted American citizens . . . The purpose of this committee is the task of protecting our constitutional democracy by . . . pitiless publicity. . . ." (R. 163, H. Rep. No. 1476, 76th Cong., 3d Sess., pp. 1, 3, 24 (1940)).

* * * * *

"This committee is the only agency of Government that has the power of exposure. . . . There are many phases of un-American activities that cannot be reached by legislation or administrative action." (R. 163, H. Rep. No. 1, 77th Cong., 1st Sess., 24 (1941)).

* * * * *

"The Committee would like to remind the Congress that its work is part of an 11-year continuity of effort that began with the establishment of a Special Committee on un-American Activities in August 1938. The committee would also like to recall that at no time in those 11 years has it ever wavered from a relentless pursuit and exposure of the Communist fifth column." (R. 128, *Annual Report for 1949,* p. 15).

* * * * *

"The Senate group, Mr. Velde said, is searching for 'organized' communistic activity in the educational system and dealing with institutions. His committee will continue to concentrate upon 'individual members of the Communist Party who in the past and possibly at the present time, are engaged in the field of education'." (R. 169, New York TIMES, February 12, 1953).

* * * * *

"In an opening statement, Mr. Velde insisted that the investigation was no different from preceding inquiries into labor unions and other areas. He emphasized that the committee was not seeking to investigate institutions as such, but to ferret out Communists operating within them." (R. 169-170, New York TIMES, February 26, 1953).

* * * * *

"The House Un-American Activities Committee said today it had decided to make no changes in its methods of ferreting out Communists wherever it found them." (R. 170, New York TIMES, May 21, 1953).

* * * * *

"These hearings could be properly considered as a continuation of the hearings which the Committee on Un-American Activities held in Detroit, Mich., in 1952. As a matter of fact, in 1952 the committee reported that during its investigation the identity of over 600 individuals as Communist Party members was obtained." (R. 113, *Annual Report for 1954,* pp. 14-15).

* * * * *

"In this annual report, the committee feels that the Congress and the American people will have a much clearer and fuller picture of the success and scope of communism in the United States by having set forth the names and, where possible, the positions occupied by individuals who have been identified as Communists, or former Communists, during the past year. In the matter of hearings relating to the motion-picture industry and professional groups, the committee

is including those individuals who were named during 1951, inasmuch as these hearings have been of a continuing nature." (R. 120-121, *Annual Report for 1952,* p. 6).

* * * * *

"Mr. Moulder. . . .

"The Committee on Un-American Activities has and will continue to expose communism. It has an excellent record of public service in exposing and warning the American people of the evils of communism, and we must not permit baseless propaganda to injure the work of the committee." (R. 165, 99 Cong. Rec. p. 1985, March 16, 1953).

* * * * *

"Mr. Jackson. . . .

"The work of the House Committee on Un-American Activities is one designed to give the American people a continuing picture of the Communist Party at work; to expose its propaganda efforts, and to inform citizens of organizations and individuals dedicated to the destruction of the American Republic. Its investigations are confidential only to the extent necessary to determine facts. Its hearings are public, open to all informational media, and its millions of publications go directly to the people of this Nation." (R. 165, 99 Cong. Rec. p. 2019, March 17, 1953).

* * * * *

"Mr. Velde. . . .

"No. 1. Demands and requests that an investigation be made of individual Communists in the religious field. To these loyal and sincere citizens, may I say that I

feel Communists should and will be ferreted out and reported to the Congress and to the people, wherever they may be found." (R. 165, 99 Cong. Rec. p. 2130, March 19, 1953).

* * * * *

"Mr. Jackson. Mr. Speaker, during the past 3 years, the Committee on Un-American Activities, of which I am a member, has been conducting an investigation into the extent of Communist infiltration of the Hollywood motion-picture industry. During this period, the committee has exposed several hundred persons who were employed in the motion-picture industry and who were or are members of the Communist Party." (R. 166, 99 Cong. Rec. p. 1371, February 24, 1953).

Identification has been the primary preoccupation of the Committee not only in statements such as those quoted above but also in the actual conduct of its hearings. A comparison of the number of times in the course of its hearings that the Committee has asked the question, "Do you know John Doe to be or have been a member of the Communist Party?", to the number of times it has asked substantive questions demonstrates that the paramount interest and concern of the Committee is in identification. It is conceivable that some years ago, at the beginning of Congressional interest in subversive activities, that identification of Communists in strategic positions pursuing currently or recently a course or pattern of conduct prescribed by the Communist Party might well have had a direct relevance to appropriate legislative inquiry with respect to adherents of the Communist Party, and the need for new legislation or more effective enforcement of existing legislation. But it is inconceivable that some fifteen years of repetition of questions serving only to identify as

Communists—not presently but in years long past—thousands of ordinary individuals all over the country without even attempting to show the nature of their work for the Party in recent years, has any purpose other than the exposure of those individuals.[2]

As part of its identification process, the Committee invites individuals and patriotic organizations to send in the names of suspected Communists.[3] From these and other sources, the Committee maintains extensive files, which it has variously described from time to time as including: 1,000,000 names,[4] individual files on 3500 leaders of the Communist Party, its front organizations and leaders of Fascist groups,[5] and a collection of lists of signers of Communist Party election petitions, which contain 363,119 signatures.[6]

As far as can be determined, persons are listed in the files prior to formal "identification" by a friendly witness before the Committee. Any information received about

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[2] ". . . the committee has sometimes seemed more interested in exposing allegedly subversive *persons* than it has in exposing subversive *activity*. Admittedly, the committee has many times sought and obtained evidence showing that actual misdeeds have been committed. Its hearings on atomic espionage and on espionage in the government service were certainly concerned with such misdeeds. But all too frequently the committee has been content to put the finger on Communists or fellow travelers while making little or no attempt to demonstrate that they have engaged in any acts of a subversive character." Carr, *op. cit., supra,* p. 454.

[3] R. 125, Annual Report for 1951, p. 5; Statement of Chairman Velde in New York Times, January 28, 1954, R. 171:

> "The House Un-American Activities Committee moved into the picture this afternoon. Its chairman, Harold H. Velde, Illinois Republican, suggested that the VFW supply names of suspected Communists to the Committee as well as to the FBI.
>
> "We welcome the cooperation of such patriotic organizations," he declared.

[4] *Barsky* v. *United States, supra,* dissent by Judge Edgerton, p. 141, note 18; Carr, *op. cit., supra,* p. 253.

[5] R. 129, Annual Report for 1949, p. 19.

[6] R. 127, Annual Report for 1950, p. 41.

"subversive" individuals is apparently sufficient to cause the listing of an individual in the files of the Committee. This is evident from the fact that the Committee has issued "reports" to members of Congress on tens of thousands of persons,[7] but is has only "obtained positive identification of 4151 persons who had been Communist Party members."[8] Moreover, the nature of these public files is evidenced by a typical report issued on Herman F. Reissig, a Protestant minister, which was published in the Congressianl Record.[9] The "so-called" public files of the Committee appear to consist in part of names obtained, without sifting, from a mass of documentary material relating to alleged Communist and front organizations.[10]

The formal public identification takes place in the Committee hearing room, which in recent years and particularly in the 83rd Congress has tended to be in the city in which the individuals to be identified live, and not at the seat of Government (R. 44, 116). The Committee's interest in "identifying" at the place of recidence so as to bring maximum public attention to those being identified goes so far that it will sometimes call the same identifying

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[7] R. 119, Annual Report for 1954, p. 133.

[8] R. 130, "This is YOUR House Committee on Un-American Activities," p. 18.

[9] R. 164-165; 100 Cong. Rec. 11589.

[10] Carr. *op. cit. supra,* pp. 253-254: "First, it has been argued that the committee has shown little discretion or responsibility as to the kind of information or material it has allowed to be placed in its files, and second, the committee has been attacked for the irresponsible manner in which it has allowed its files to be used. There is much justification for both criticisms.

"The files are a voluminous mass of miscellaneous, undigested materials and information pertaining to thousands of organizations and perhaps one million individuals. Physically, the file material is of two types: a card index consisting of hundreds of thousands of entries, and a very much smaller number of folders containing exhibits and source materials. A typical card carries the name of a person and makes a brief reference to some activity or organizational affiliation viewed as suspicious or questionable by the research or investigative divisions of the staff."

witness a number of times in a number of different cities so as to achieve this result. See, for example, the appearance of Mrs. Hartle in both Portland and Seattle (R. 113-114, *Annual Report for 1954,* pp. 18-19); the appearance of Bella Dodd and Dorothy K. Funn in New York and Philadelphia (R. 116, *Annual Report for 1953,* pp. 57, 100).

3. *Listing*

Subsequent to the formal identification in a public session of the Committee comes the public listing of the identified individual. The Annual Report of a Standing Committee of the House is generally intended to inform the House of the facts necessary for the latter to exercise its legislative powers; in the case of this Committee, the recent Reports have been largely a compilation of names with no effort to weigh the nature or character of their activities, past or present, or the relevance of the evidence concerning them to any legislative purpose. In the Report for 1953, 59 pages of a total 133 were devoted to listing the names and addresses of individuals who had been named before the Committee as present or former members of the Communist Party. The prior report for 1952 had utilized 54 out of 89 pages for the same purpose.[11]

4. *Dissemination*

The Committee's view of its function and power as being one of exposure to public scorn and retribution appears concretely through its emphasis on dissemination of the lists and identifications which it has gathered. In a recent pamphlet which was intended to describe its operations and silence its critics, the Committee pointed out:

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[11] The Annual Report for 1954, issued March 1955, omitted this personalized listing, possibly in response to the extensive criticism of the Committee on this point. But the emphasis on identification as the Committee's function had not changed. See R. 113, Annual Report for 1954, pp. 14, 17.

> "This committee and the special committee have over the past 16 years held hundreds of hearings and issued and distributed throughout the United States hundreds of thousands of reports exposing the operations of the Communist Party and its fronts" (R. 130, *This is YOUR House Committee on Un-American Activities*, p. 25).

Getting the information to the public is the aim and very heart of the process of exposure. In the course of the series of hearings at which petitioner testified, the Chairman stated:

> "Of course, we have had a great many hearings all throughout the country dealing with the subject of communism and the labor union movement. We have had a lot of our hearings printed, pamphlets, so that members in the Communist-dominated unions should know that we have the information and should be willing to read the information that is furnished free of charge in most instances by the Federal Government." [12]

These statements on the dissemination of information to the public must be read with the constant remembrance that the reports and hearings to which reference is made consist in major part of names, addresses and lists of individuals. It is that type of information which the Committee is desirous of putting into the hands of the public.[13]

5. *Clearance—or Judgment of Guilty*

While the judgment of the guilt or innocence of an individual has traditionally in our Government been the

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[12] R. 149, Hearings, Investigation of Communist Activities in Chicago Area (1954), Part 2, p. 4255.

[13] The Guide to Subversive Organizations, which the Committee publishes in up-to-date form from time to time, is another type of *list* which the Committee distributes wholesale.

function of the Judiciary, and perhaps for limited purposes of quasi-judicial officers of the Executive branch, the determination of individual guilt or innocence of past or present Communist affiliation has been considered by the Committee to be an integral part of its exposure function. It demonstrates this in many ways: in its reiterated invitations to persons and organizations to "deny or explain" testimony given about them;[14] in its issuance to a research organization of an official "clearance"[15] and to a labor union of a finding of not guilty of being a Communist-front organization which reads like a judicial decree;[16] in its

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[14] R. 116, Annual Report for 1953, pp. 60, 99; R. 124, Annual Report for 1951, p. 1.

[15] R. 117, Annual Report for 1953, p. 127; R. 172, New York TIMES, February 7, 1954.

[16] "Upon request of the officers of this union a subcommittee of this committee, on August 17, 1950, heard the testimony of Mr. Martin Wagner, President of the organization. From this evidence the committee finds:

"(1) the UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA has taken energetic and effective measures to eliminate such influence.

"(2) All persons against whom substantial evidence of Communist activities or views exists in the records of the Committee on Un-American Activities, have been removed as officers.

"(3) The charters of local unions found by the parent organization to be following the Communist Party line have been revoked.

"(4) According to a constitutional amendment adopted by the union, no person who is a member of a Communist, Nazi, or Fascist organization may be a member of the executive board or an employee of this union.

"Upon this testimony, the Committee on Un-American Activities has adopted a resolution providing:

"(1) The name of the UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA shall be dropped from future editions of the committee pamphlet '100 Things You Should Know About Communism.'

"(2) No additional copies of the present issue of any committee publication containing reference to this union shall be issued without notation that the statement about the union is no longer true.

"(3) Any statement by any person to the effect that this committee now finds that the UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA under its present officers and bylaws, to be under Communist influence or leadership, is unauthorized and untrue.

"(4) That a copy hereof, over the signature of the committee chairman shall be furnished the union." (R. 131-133, 100 Things You Should Know About Communism, p. 125.)

issuance of a finding that an individual was "not qualified for acceptability to any security position";[17] and in its determination to keep confidential an investigation because the suspected person has died.[18]

But clearance is the exception to the rule. Identification before the Committee automatically establishes the guilt and the guilty one's name is published in the lists of the Committee for all the world to see. This judgment stands unless and until counteracted by what the Committee, sitting as judge, considers as genuine evidence of mistake or repentance; then the Committee will amend its records.[19]

6. *Public Retribution*

The exposure operation would not be complete were not some results obtained from the identification and listing of individuals and the dissemination of their names to the public. No attempt to conceal the hope that some form of social or economic sanction will result from its activities is made by the Committee. Perhaps the most frank statement concerning the object of the Committee's exposure system was made a few months after petitioner's appearance, by Representative Walter, then the ranking Democratic member of the Committee in the 83rd Congress and now its Chairman:

> "Rep. Francis E. Walter (D., Pa.) who will take charge in the new Congress of House activities against communists and their sympathizers, has a new plan for driving Reds out of important industries. He said today he plans to hold large public hearings in industrial communities where subversives are known to be operating, and to give known or suspected commies a

[17] R. 123, Dr. Condon, Annual Report for 1952, p. 74.
[18] R. 126, Agnes Smedley, Annual Report for 1950, p. 4.
[19] R. 129, Annual Report for 1949, p. 46.

> chance in a full glare of publicity to deny or affirm their connection with a revolutionary conspiracy—or to take shelter behind constitutional amendments.
>
> " 'By this means,' he said, 'active communists will be exposed before their neighbors and fellow workers, and I have every confidence that the loyal Americans who work with them will do the rest of the job.' "[20]

Industries or institutions which "clean house" to the liking of the Committee are praised;[21] those which do not do so are castigated.[22] Threats of deportation are made when aliens claim the privilege of the Fifth Amendment.[23] Gratification is expressed when those whom the Committee has exposed are released from their employment,[24] or otherwise socially punished[25] as by expulsion from their union.[26] Unions are urged to expose the Communists and seek their prosecution.[27] The Committee has not exhorted in vain; these hoped-for results of social and economic sanctions have been forthcoming for thousands of individuals. Committee trials have in fact resulted in "punishment".[28]

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[20] R. 174, Washington Daily News, November 19, 1954, See also Carr, *op. cit supra* p. 452. "It [the Committee] also had the much more simple goal of driving men from their jobs."

[21] R. 163, Hearings Communist Methods of Infiltration (Education—Part 2), p. 221; R. 121, Annual Report for 1952, pp. 8, 12.

[22] R. 124, 125, Annual Report for 1951, pp. 2, 16.

[23] R. 173, New York TIMES, July 16, 1954.

[24] R. 112, 113, Annual Report for 1954, pp. 7, 17; R. 115, Annual Report for 1953, p. 4.

[25] The fact of blacklisting in entire industries is a notorious consequence of exposure. Cogley, *Report on Blacklisting,* Fund for the Republic (1956).

[26] R. 121, Annual Report for 1952, pp. 8, 12.

[27] R. 131, 100 Things You Should Know About Communism, p. 76.

[28] Carr, *op. cit. supra,* p. 452-453.

7. *Conclusion*

"The committee's search for information that might lead to the enactment of laws—either the revision of existing laws dealing with espionage and sedition or the passing of entirely new statutes in this area—has been the slightest of all its interests through the years. Occasionally its interest in checking the work of administrative agencies, particularly that of the Department of Justice, has been substantial. But always its interest in public opinion has been paramount. Always the committee has been concerned lest the American people fail to share its understanding of the nature of subversive activity and the many forms it may take, or appreciate the seriousness of the threat offered by this activity to the 'American way of life' as seen by itself."[29]

[29] Carr, *op. cit. supra*, p. 272.