IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 261

JOHN T. WATKINS,

Petitioner,

v.

UNITED STATES OF AMERICA

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

REPLY MEMORANDUM OF PETITIONER

I

Petitioner respectfully submits that nothing in the Brief for the United States in Opposition in any way detracts from the importance of the exposure question presented in the petition for certiorari or demonstrates that the exposure question is not ripe for adjudication in the case at bar.

Far from denying the importance of the exposure question raised by petitioner, the Government declines even "to affirm or deny the existence of a general Congressional

power of 'exposure' unrelated to a particular legislative inquiry" (Br. Opp. p. 19, n. 10).[1] This reticence has not been shared by the Committee on Un-American Activities over the years (Petition pp. 19-21, 66-80), nor by Government counsel in the courts below, nor, on other occasions, in this Court. See, e.g., *Brief for the United States, Emspak* v. *United States,* No. 67, October Term, 1953, pp. 108-111. Whatever the explanation for this present reticence, it cannot obscure the overriding need for a resolution of this issue, not only for the case at bar but also for the large number of cases involving this and related issues now before the courts and the large number of persons being called before "loyalty-security" investigating committees. See, e.g., *Brief for Robert M. Metcalf, Amicus Curiae,* pp. 4-5.

The Government relies entirely, in opposing certiorari, upon the ground that the questions asked petitioner "were not for the purpose of exposure" (Br. Opp. p. 15), and that "the Committee did have a valid, specific, legislative purpose in questioning petitioner" (Br. Opp. p 14). But nowhere does the Government set forth any but the most superficial answers to petitioner's overwhelming proof of exposure or lend support to its contention of a "valid, specific, legislative purpose in questioning petitioner." We turn first to the Government's answers to petitioner's proof of exposure and then to its contention of a specific legislative purpose.

1. The Government's chief response to petitioner's contention that the Committee has continuously asserted a separate and independent power of exposure unrelated to a legislative purpose appears to be that petitioner's proof of this contention "was made of newspaper reports and statements made by Committee members at various times" (Br. Opp. p. 18). But even a cursory examination of petitioner's Appendix B (Petition pp. 66-80) demonstrates that

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[1] The Brief for the United States in Opposition will be generally designated as "Br. Opp."

proof was made from Committee reports and official statements. And the Government's other answer to petitioner's contention, taken from the majority opinion below, that claims of an unbridled power of exposure "would not establish its use in any particular inquiry" (Br. Opp. p. 18), is unresponsive. Petitioner does not contend that the Committee's assertion of a separate and independent power of exposure unrelated to a legislative purpose in and of itself constitutes adequate proof in the instant case. What is at issue here is the District Court's refusal to consider or even receive this evidence (R. 61). Petitioner's contention, unanswered in the courts below or by the Government here, is that proof of the Committee's assertion of a separate and independent power of exposure should, as the dissenting judges held (Petition p. 63), have been considered by the District Court in determining whether the purpose here was in fact one of exposure. What we are witnessing in the decision below is the principle, unhealthy in a democracy, that legislators may maintain one official position in Congress and another in the courts.

The Government's response to petitioner's carefully-documented argument that what the Committee asked him and what it had failed to ask him demonstrated its purpose of exposure (Petition pp. 21-26, 30-32) appears to be its contention that petitioner "had shown himself to be a recalcitrant witness" (Br. Opp. p. 20). The Government makes this suggestion here for the first time, apparently overlooking the trial judge's direct refutation of any suggestion of recalcitrance (Petition pp. 10-11).

The Government's response to petitioner's argument that the Committee's prior knowledge and its failure to examine its own files evidenced a purpose to expose rather than legislate appears to be its contention that "Congress may conduct hearings to substantiate earlier testimony" (Br. Opp. p. 20). But the right to substantiate earlier testimony, which was expressly conceded in the peti-

tion for certiorari (p. 28), is not the issue here. What the Government has failed to answer is petitioner's argument 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 review of this truckload of information before calling petitioner was additional 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 Committee's asserted power of exposure, its questioning of petitioner, and the Committee's answer to petitioner's challenge to its authority (Petition pp. 24-25), there can be little doubt that the Committee was acting here in aid of its asserted power of exposure.

2. Thus, the Government's effort to answer petitioner's proof of exposure is half-hearted at best. Instead the Government appears to rely principally upon certain factors which, it argues, demonstrate that the Committee did have a specific legislative purpose in questioning petitioner. None of these factors, which we shall now review, support the Government's conclusion.

(i) The Chairman of the Committee, at the opening of the hearing in Chicago, pointed out "that forty-seven recommendations made by the committee had been acted upon by Congress . . ." (Br. Opp. p. 14). But petitioner has never suggested, as appears to have been done in some early broadside attacks upon the authority of the Committee on Un-American Activities, that this Committee was at no time engaged in legislative activities. As stated in the petition, "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 a legislative function" (Petition p. 68).

(ii) The Chairman of the Committee also stated that there had been referred to the Committee a bill which

would deny to Communist-controlled unions the benefits of the Labor-Management Relations Act of 1947 and, the Government goes on, "some four months later the bill became law" (Br. Opp. p. 14).[2] But the fact that the Chairman of the Committee made a passing reference to this bill in the course of a lengthy *pro forma* opening speech many weeks and many witnesses before petitioner testified cannot overcome the fact that the questions petitioner was asked in no way related to this bill or to any other (Petition pp. 21-26, 30-32.)[3] And the Committee's failure, for example, to question petitioner about the matter of compliance with the Taft-Hartley Act, after petitioner himself brought this matter before the Committee (R. 75), is particularly significant, for the bill referred to the Committee and relied on by the Government dealt with the same general subject matter of Communist infiltration of labor unions. But, as the dissenting opinion pointed out, what the Committee wanted was the identification of persons who may have been Communists before that time, not whether

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[2] Of course, as pointed out in footnote 23 on page 30 of the petition, the bill referred to by the Chairman never did become law. A bill on the same subject, copied from a Senate bill which had been reported favorably in that body two days earlier, was introduced in the House 2½ months after petitioner's hearing and enacted as part of the Communist Control Act of 1954. As indicated in the petition, the evidence in this case makes clear that the questioning of petitioner had nothing whatever to do with the bill that was then pending before the Committee or the bill, introduced later, which was finally enacted (Petition pp. 21-26, 30-32)

[3] In several places (Br. Opp. pp. 2, 16, 22) the Government seeks to give the Court the impression that the questioning of petitioner must have been related to the pending bill because the persons about whom he was asked were all engaged in union activities. Even if all of the persons about whom petitioner was asked had been engaged in union activities, this would hardly have demonstrated that the Committee was interested in the bill rather than exposure of union personnel. However, the record is clear that many of the persons about whom petitioner was asked were not engaged in any union activities whatever. Theo Kruse, for example, is identified as a "beautician operator"; Olaf Lidel as a watchmaker; Sarah and Murray Levine as "just citizens, but Communists"; John and Marie Wilson, as "man and wife, no official position, just Communists" (R. 144, 148).

the Taft-Hartley Act "is adequate or requires strengthening", which would have been relevant to the proposed bill (Petition p. 59).

(iii) The Government suggests that petitioner's "replies would have provided the basis for further inquiry as to the detailed character of the infiltration" (Br. Opp. p. 16). This suggestion was never made by the Committee, even when petitioner challenged its authority, nor by the Government at the trial or on the appeal below. Furthermore, it is refuted by the Committee's failure to follow up when petitioner did make the requested identification for the Committee (e.g., Joseph Stern, R. 90). What this point does demonstrate is the danger in *ex post facto* rationalization of a legislative purpose, when the Committee, in line with its own assertion of the power of exposure, had no such purpose. See *Bowers* v. *United States,* 202 F. 2d 447, 452 (C.A. D.C. 1953).

(iv) The Government argues, as did the majority below, that petitioner volunteered a direct attack on the credibility of Spencer and Rumsey and that, therefore, he could not refuse to answer any other questions which likewise bore on their credibility, such as whether certain persons named by Rumsey had been members of the Communist Party (Br. Opp. p. 16). But petitioner volunteered nothing. He was subpoenaed to testify at a hearing before the Committee on Un-American Activities. Two earlier witnesses before that same Committee had accused him of being a member of the Communist Party and, rejecting the shield of the Fifth Amendment (R. 85), he intended to testify to the contrary. Because of the risk of perjury inherent in the testimony of two adverse witnesses, he had prepared a careful statement setting forth the facts as he remembered them (R. 37, 39-40, 74-75). After Committee counsel had interrogated petitioner about Spencer's testimony against him, which included Rumsey's participation in Communist activities, and was about to go into Rumsey's testimony (R. 73-77), petitioner read his prepared statement

to the Committee (R. 75). It volunteered nothing; it did not attack the credibility of Rumsey and Spencer other than to deny their testimony concerning petitioner's alleged membership in the Communist Party. Petitioner's efforts to defend himself against a charge of perjury, when being forced to testify under subpoena, is hardly a "voluntary" attack upon the credibility of anyone or a waiver of his right to refuse to proceed further. Furthermore, since the issue here is one of legislative authority and jurisdiction rather than self-incrimination (*Cf. Rogers* v. *United States,* 340 U. S. 367), the question of waiver does not arise. *Cf. United States* v. *Corrick,* 298 U.S. 435; *Minnesota* v. *Northern Securities Co.,* 194 U.S. 48, 62.

(v) The Government contends that, "If the Committee had the additional (and more general) aim of ascertaining the number of Communists at a particular period in our recent history, that, too, would be a valid subject of inquiry . . ." (Br. Opp. p. 17). It is significant that this major point of reliance in the decision below—that Congress *could* have authorized the Committee to investigate the rate of growth or decline of the Communist Party—is introduced by the Government by the word "If". As pointed out in the petition (pp. 29-30), it is perfectly clear that the Committee, in questioning petitioner, was not seeking to ascertain the number of Communists during the 1942-1947 period. Information as to the number of Communists at a particular period was and is available from the Federal Bureau of Investigation's regular reports to the Congress; furthermore, the questioning of petitioner makes it perfectly clear that the Committee was not interested in the history of the Communist Party or its numerical strength at any particular time, but simply in exposing a specific group of persons as Communists (Petition pp. 21-26, 29-32).

(vi) The Government argues that "the Court of Appeals has definitely found that there was a specific and valid legislative objective to the inquiry" (Br. Opp. p. 13). But a reading of the Court's opinion makes clear that its action was predicated on the possibility (what *could* be, not what

was) of a legislative purpose (Petition pp. 29-32). The District Court refused to admit the evidence of exposure which petitioner presented (R. 19, 58, 59, 61). The Court of Appeals, relying upon the mere possibility of a legislative purpose, likewise refused to consider the proof of exposure presented by petitioner. The District Court, by its rejection of the evidence, and the Court of Appeals, by its refusal to consider that evidence, have effectively foreclosed a showing of exposure and an absence of legislative purpose.

(vii) Finally, the Government suggests that ". . . a court cannot go behind the stated purpose of the investigation to delve into some other, or ulterior, motive claimed to exist within the minds of the legislators" (Br. Opp. p. 19).[4] But we submit that this statement errs in equating the absence of a legislative purpose with an ulterior motive. Petitioner asserts that the Committee's purpose was one of exposure and not of legislation; petitioner has demonstrated this purpose through objective facts such as official assertions by the Committee of the power of exposure, the questioning of petitioner, the Committee's answer to petitioner's challenge to its authority, and the failure of the Committee to examine the vast material in its own files. This proof of purpose—the presence of a purpose of exposure and the absence of a legislative purpose—is thus based on objective facts and is entirely separate and apart from any effort to challenge the Committee for an ulterior motive.[5] We do not bring to this Court the case

[4] This argument, of course, presupposes a clearly-stated legislative purpose; here there was only the vague and rambling statement of past activities and generalized intentions (R. 43-44).

[5] We should point out too, in further answer to the suggestion that petitioner is trying to delve into some "ulterior motive claimed to exist within the minds of the legislators" (Br. Opp. p. 19), that it would hardly seem to be proof of an ulterior motive to demonstrate that the Committee was acting in pursuance of its *asserted* separate and independent power of exposure. As the dissenting judges put it: "No one's motives are impugned by showing the Committee's concept of its duty" (Petition p. 63, n. 18).

of a Committee Chairman acting out of bias and prejudice against the witness or the case of one receiving money from a third party. What we do bring to this Court is a case where the objective facts demonstrate that there is no legislative purpose. If the absence of a legislative purpose cannot be proven in this manner, then the doctrine of separation of powers in this field is indeed a nullity and a citizen has no protection against a legislative trial.

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Counsel for the *amicus curiae* has quite rightly suggested that the courts must look at the scope and effect of the questions asked petitioner as well as at their purpose and intent (*Brief of Amicus Curiae,* pp. 11-14). We believe the scope and effect of the Committee's action can more effectively be presented in relation to the safeguards of the First Amendment than in relation to the question of legislative-versus-exposure purpose. If the purpose here is one of exposure and not of legislation, the Committee had no power to require answers to its questions and it becomes unnecessary to consider the scope and effect of its action. If, however, this Court should find that the Committee did in fact have a legislative purpose, then a most serious question arises as to whether the First Amendment protects petitioner against forced testimony concerning the Communist Party membership of his past associates (Petition p. 3) and here the vast scope and effect of the Committee's action is compelling. The "accommodation of these contending principles—the one underlying the power of Congress to investigate, the other at the basis of the limitation imposed by the First Amendment" (*United States* v. *Rumely,* 345 U.S. 41, 44) could not have been meant by this Court to be accommodation by surrender of the latter principle to the former. There may, at times, be legislative need sufficient to support wholesale disclosure of the activities or affiliations of citizens in years long past. But no such legislative

need or danger to the Republic sufficient to warrant wholesale disclosure is evident here.

Petitioner argued the constitutional issue of free speech in full in the court below (Brief pp. 62-71), but places primary reliance in this Court, as it has throughout this proceeding, on the exposure-versus-legislative purpose contention. The free speech issue is properly before this Court and will be briefed and argued in full if the petition is granted.[6] *Cf. United States* v. *Rumely,* 345 U.S. 41; *United States* v. *Harriss,* 347 U.S. 612.

II

The Government's argument in opposition to petitioner's contentions concerning the impropriety of the grand jury indictment, presented by cross-reference to its Brief in Opposition in *Ben Gold* v. *United States,* No. 137, is made for the first time in this Court. In the trial court and in the court below, the Government relied principally upon *Dennis* v. *United States,* 339 U.S. 162, and the Court of Appeals decisions following the *Dennis* case.[7] Now, apparently recognizing that petitioner has made the affirmative showing of personal bias and fear found wanting in the *Dennis* case, the Government turns to new fields to support the decision below.

It is not entirely clear from an analysis of the Govern-

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[6] The Government argues that the First Amendment "point does not exist in petitioner's case since he freely testified as to his own past history and general associations" (Br. Opp. p. 22). But this argument overlooks the restraint on speech and association inherent in the public embarrassment of being forced into becoming an "informer". In other words, the restraint on speech and association here is the fear that one might ultimately be forced to become an informer on those with whom he had once banded in the exercise of his rights to freedom of speech.

[7] *Emspak* v. *United States,* 91 U.S. App. D.C. 378, 203 F. 2d 54 (D.C. Cir. 1952), *rev'd on other grounds,* 349 U.S. 190; *Quinn* v. *United States,* 91 U.S. App. D.C. 344, 203 F. 2d 20 (D.C. Cir. 1952), *rev'd on other grounds,* 349 U.S. 155; *Bart* v. *United States,* 91 U.S. App. D.C. 370, 203 F. 2d 45 (D.C. Cir. 1952), *rev'd on other grounds,* 349 U.S. 319.

ment's Brief in Opposition in the *Ben Gold* case (pp. 38-40) whether the Government's present argument is that petitioner is not entitled to a *voir dire* examination of the grand jurors or that petitioner is not entitled to a grand jury in which at least 12 grand jurors concurring in the indictment are free from bias and prejudice against him.

If the Government's argument is limited to the suggestion that petitioner is not entitled to a *voir dire* examination of the grand jurors, it has no application here. Petitioner seeks no such examination. Petitioner, by his counsel's affidavit (R. 5-10), set forth a *prima facie* case of bias and prejudice of a majority of the grand jurors. The Government, relying upon the *Dennis* case and the Court of Appeals decisions following it, failed to file an answering affidavit. Thus the facts set forth in the affidavit for petitioner must be taken as true. No one in this case is contending for a *voir dire* examination of the grand jurors.[8] Petitioner moved for a dismissal of the indictment on the ground that there were less than 12 members of the grand jury concurring in the indictment who were free from prejudice or bias against him "by reason of the facts stated in the affidavit" and, in the alternative, if these facts should be challenged, requested a hearing to give further proof in support of the affidavit (R. 4). This is a far cry from a request for a *voir dire* examination of the grand jurors.

If the Government is suggesting the broader point—that a defendant has no right to a fair and impartial grand jury —its suggestion raises an even more significant issue calling for review by this Court. The Government's implication that the only ground for invalidating grand jury action is the exclusion of the class of which the defendant is a member (*Ben Gold,* Br. Opp. p. 40, n. 21) [9] overlooks the

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[8] We are not entirely clear as to the contentions in the *Ben Gold* case. See Petition for Certiorari, *Ben Gold* v. *United States,* No. 137, October Term, 1956, pp. 22, 32.

[9] The Government states in this same footnote (*Ben Gold,* Br. Opp. p. 40, n. 21) that "It has never been suggested by the Court in any of

fact that in these exclusion cases there is a mere possibility of a biased and prejudiced grand jury, whereas here the unanswered affidavit for petitioner sets forth facts indicating an actually biased and prejudiced grand jury. The basic 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) has been denied petitioner. The fact that the grand jury process is not surrounded by all the "guarantees historically associated" with the petit jury (*Ben Gold,* Br. Opp. p. 40) does not mean that it is surrounded by none.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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these cases that the accused might be *entitled* to have an entire class of persons systematically excluded from the panel—the precise claim petitioner here makes." Whatever may be petitioner's claim in the *Ben Gold* case, the Government's statement does not describe petitioner's claim in this case. Petitioner's claim here is that he is entitled to have 12 members of the grand jury concurring in the indictment free from bias and prejudice against him or, stated in exclusion terms, that he is entitled to the exclusion of biased and prejudiced grand jurors where there are less than 12 members of the grand jury concurring in the indictment free from bias and prejudice against him (R. 4-10). So stated, petitioner's right appears undeniable. It is interesting to note in this connection that under the Federal Rules of Criminal Procedure petitioner is entitled to 12 legally qualified grand jurors concurring in the indictment. Rule 6(b)(2). It could hardly be suggested that he is not entitled to 12 grand jurors free from bias and prejudice.