St. John's Law Review

Volume 41, January 1967, Number 3 Article 7

Constitutional Law--Congressional Investigations--Contempt Conviction Held Void Where Subcommittee Inquiry Is Neither Specified Nor Authorized by Parent Committee (Gojack v. United States, 384 U.S. 702 (1966))

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It seems clear that the new flexibility given the Federal Trade Commission by this decision is desirable. No longer need the Commission wait until the standards of illegality demanded by Section 3 of the Clayton Act are met in order to attack a particular trade practice. Instead, the Commission can now act in the manner originally intended and bring to a halt any unfair method of competition at the first hint of a potential lessening of competition.[37] However, this power is apparently limited by the condition that the practice attacked must *resemble* a Clayton Act violation, even though it is not specifically within the purview of that act.

CONSTITUTIONAL LAW — CONGRESSIONAL INVESTIGATIONS — CONTEMPT CONVICTION HELD VOID WHERE SUBCOMMITTEE INQUIRY IS NEITHER SPECIFIED NOR AUTHORIZED BY PARENT COMMITTEE. — Petitioner, while testifying before a Subcommittee of the House Un-American Activities Committee, refused to answer questions concerning his alleged Communist affiliations. He chose not to invoke the privilege against self-incrimination, but instead challenged the jurisdiction of the Committee and its Subcommittee, the authorization of each, and the constitutionality of the inquiry in general. The petitioner was convicted of contempt of Congress. This conviction was unanimously reversed by the United States Supreme Court which *held* that petitioner was not in contempt since the subject matter of the inquiry was never specified by the Committee, as required by its own rules, nor was there a lawful delegation of authority to the Subcommittee to conduct the investigation. *Gojack v. United States*, 384 U.S. 702 (1966).

The power of Congress to punish witnesses for contempt is derived by implication from its constitutional power to punish the contumacious behavior of its own members.[1] The purpose of this power is the self-protection of the legislative forum and the furtherance of its lawmaking functions.[2] Also, inherent in the congressional power to formulate laws is the power to investigate.[3] If legislation is to be sound it must be the product of a well-informed legislature, and undoubtedly one of the best methods of obtaining information is to conduct fact-finding hearings and

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[37] S. REP. No. 597, 63d Cong., 2d Sess. 13 (1914).

[1] Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 225 (1821). "Each House may determine the Rules of its Proceedings, punish its Members for Disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." U.S. CONST. art. I, § 5.

[2] Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 158-60 (1926).

[3] McGrain v. Daugherty, 273 U.S. 135, 160 (1927).

investigations.[4] Both the power to punish for contempt and the privilege to conduct legislative hearings can be traced to the House of Commons in Great Britain.[5] In colonial America, as part of a reaction to royal usurpation of governmental power, both these reflections of legislative power were quick to take root.[6] They survived the American Revolution,[7] and, in 1798, were embodied in a federal statute which authorized Congress to punish witnesses summoned by investigating committees for contemptuous behavior.[8]

Most early litigation arising from the exercise of the contempt power in conjunction with the privilege of inquiry concerned Congress' constitutional scope of authority.[9] The Supreme Court early held that the purpose of the House's power to punish witnesses for contempt was to enforce its laws.[10] It rejected the theory that an express constitutional grant of power to punish members of Congress necessarily implied a negation of power to punish non-members, since to so hold would, in its view, "lead to the annihilation of almost every power of congress." [11] In *Kilbourn v. Thompson,*[12]

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[4] See Watkins v. United States, 354 U.S. 178, 200 (1956).

[5] "'[The House of Commons] may inquire into every thing which it concerns the public weal for them to know.... Co-extensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, to enforce it by arrest where disobedience makes that necessary....'" Howard v. Gossett, 10 Q.B. 359, 380, 116 Eng. Rep. 139, 147 (1845). "Connected with these matters is the power (or if we please to call it so, the privilege) of each house to punish persons (whether they be members of it or not) for a contempt." MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 244 (1913). "May divides breaches of privilege into four classes: . . . (2) disobedience to particular orders . . . directing persons to come and be examined before the House or a committee...." *Id.* at 379. See generally HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 269-74 (1886 ed.) for a discussion and examples of the early exercise of the power to punish for a "breach of privilege" of the House of Commons. Hallam feels Hall's Case, 4 Co. Inst. 23 (1581), which arose from publication of a book unfavorable to the Parliament, to be the earliest precedent of Commons' power to punish for contempt. *But see* Mr. Justice Miller's opinion in Kilbourn v. Thompson, 103 U.S. 168, 183-89 (1880), for a discussion of why he felt the British Parliament could not serve as a precedent for a similar power in the Congress of the United States.

[6] See generally Potts, *Power of Legislative Bodies to Punish for Contempt,* 74 U. PA. L. REV. 691, 708-12 (1926) for a complete discussion and thorough documentation of colonial precedents.

[7] *Id.* at 712-25.

[8] 1 Stat. 554, ch. 36 (1798). It should be noted, however, that under this statute Congress was authorized to punish witnesses directly; it was not required that the contumacious witness be judicially tried and convicted.

[9] See Kilbourn v. Thompson, 103 U.S. 168 (1880); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821).

[10] Anderson v. Dunn, *supra* note 9, at 233.

[11] *Ibid.*

[12] 103 U.S. 168 (1880).

the defendant had been subpoenaed to appear before a special committee appointed to inquire into the history and affairs of a real estate pool. After refusing to testify or to produce documents, Kilbourn was adjudged guilty of contempt by the House itself, and imprisoned. The Supreme Court held his conviction void stating that the contempt power could only be exercised when the testimony of the witness was required for the inquiry, and where the subject matter was within the jurisdiction of the House of Representatives.[13] There was deemed to be no "general power of making inquiry into the private affairs of the citizen." [14]

In *McGrain v. Daugherty*,[15] appellee had refused to answer subpoenas requesting him to appear before a committee investigating the "Teapot Dome" scandal. After tracing the long history of legislative power to secure essential information, it was determined that "the power of inquiry . . . is an essential and appropriate auxiliary to the legislative function." [16] The Supreme Court inferred from the facts that there was a proper legislative purpose, and, therefore, affirmed the conviction. However, it was noted "that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry." [17]

In 1938, Congress enacted a statute requiring the President of the Senate or the Speaker of the House of Representatives to certify to the Attorney General all cases of contempt. The Attorney General, in turn, was required to bring the matter before a federal grand jury.[18] This measure ended the practice of bringing witnesses directly before the bar of the legislature to answer for their contempt. Thus, the judiciary was made the instrument of what was formerly a purely legislative "power."

In the same year, a resolution was adopted by the House of Representatives forming a temporary committee whose purpose was to investigate un-American activities.[19] This committee remained in existence until 1944. A year later, a House proposal that there be a permanent inquiry into "un-American" activites was passed, and the House Un-American Activities Committee [hereinafter referred to as HUAC] was born.[20] Rule XI, the authorizing resolution of HUAC, states:

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[13] *Id.* at 190.
[14] *Ibid.*
[15] 273 U.S. 135 (1927).
[16] *Id.* at 174.
[17] *Id.* at 176. See also Sinclair v. United States, 279 U.S. 263 (1929), wherein the Court placed on the United States the burden of showing that the question asked was pertinent to the subject matter under inquiry.
[18] 11 Stat. 156 (1857), as amended, 2 U.S.C. § 194 (1964).
[19] 83 CONG. REC. 7568, 7586 (1938).
[20] 91 CONG. REC. 10 (1945) (Resolution introduced by Representative

The Committee on Un-American Activities as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and object of un-American propaganda activities in the United States, (2) 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 (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.[21]

Many of the more recent challenges to Congress' investigatory powers have involved the activities of HUAC. In *Watkins v. United States*,[22] petitioner was convicted of contempt for refusing to tell HUAC whether or not he knew certain persons to have been members of the Communist Party. His refusal was based, not on the privilege against self-incrimination, but, rather, on the ground that the questions asked him were beyond the authority of the Committee. The Court, in reversing his conviction, stated that the "inquiry . . . must be related to, and in furtherance of, a legitimate task of Congress. . . ." [23] In addition, "investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' . . . are indefensible." [24] In other words, the majority believed that there was no power to expose for the sake of exposure.[25] To insure that inquiry was limited solely to further legislative purposes, they required that there be instructions explicitly delineating the jurisdiction of the investigating committee (or subcommittee) and the purpose of the investigation.[26] The Court further stated that vagueness in the Committee charter was an indication that the Committee's activities lacked conformance with the will of the legislature.[27] In addition, the resolution authorizing HUAC was found to be highly amorphous, thus making it difficult to ascertain what kind of inquiries it was directed to make.[28]

With respect to the contempt statute, the Court believed that because it authorized a criminal prosecution, the same rights

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Rankin); See generally CARR, THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 1945-1950 19-23 (1952); TAYLOR, GRAND INQUEST 75 (1955).

[21] 91 CONG. REC. 10 (1945).

[22] 354 U.S. 178 (1956).

[23] *Id.* at 187. See also United States v. Rumely, 345 U.S. 41 (1953) (mere semblance of legislative purpose is insufficient to support an inquiry in the face of the Bill of Rights).

[24] *Id.* at 187.

[25] *Id.* at 200.

[26] *Id.* at 201.

[27] *Ibid.*

[28] *Id.* at 202-04.

accorded to defendants in other criminal cases must be accorded to defendants accused of contempt. This is especially important in ascertaining the pertinency of the questions asked the witness, which can only be done by considering the subject matter under investigation.[29] In order to avoid vagueness, this subject matter must be revealed with "indisputable clarity"[30] by "the authorizing resolution, the remarks of the chairman or members of the subcommittee, or even the nature of the proceedings themselves. . . ." [31]

Subsequently, in *Barenblatt v. United States,*[32] petitioner, when questioned by HUAC, refused to answer questions concerning (1) his alleged Communist activity at a university, and (2) his membership in the Communist Party. He expressly waived the privilege against self-incrimination, and, instead, attacked, *inter alia,* the jurisdiction of the Committee with respect to its right to delve into his "religious," "political," or "other personal and private affairs. . . ." [33] Barenblatt was convicted of contempt of Congress. The Supreme Court, in a five-to-four decision, affirmed the conviction and distinguished *Watkins* on the facts. Since Watkins had not been informed of the subject of inquiry, *i.e.,* Communism in labor, he could not be convicted of contempt for refusing to answer questions pertinent to the subject of the investigation. Barenblatt, however, had been told the subject of the investigation and knew the question was pertinent thereto. The Court held that since the necessity of inquiry into Communist activities to effectuate legislation outweighed the appellant's right to remain silent concerning his associations, he could be constitutionally held in contempt of Congress.[34]

Mr. Justice Black, in a strong dissent, argued that the conviction of the petitioner violated the Constitution in several aspects. Rule XI which created HUAC authorized such broad and indiscriminate inquiry of witnesses that it contravened procedural requirements found in the fifth amendment's due process clause. In addition, by compelling Barenblatt to answer the questions posed, his freedom of expression was abridged in violation of the first amendment. Finally, it was Mr. Justice Black's contention that the HUAC hearings constituted part of a program

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[29] *Id.* at 208.
[30] *Id.* at 214.
[31] *Id.* at 209.
[32] 360 U.S. 109 (1959).
[33] 240 F.2d 875, 879 (1957).
[34] Barenblatt v. United States, 360 U.S. 109 (1957). The Court seemed to rely on dictum in *Watkins v. United States* which stated: "It is manifest that despite the adverse effects which follow... compelled disclosure . . . the critical element is the existence of, and the weight to be ascribed to, the interest of . . . Congress in demanding disclosures from an unwilling witness." 354 U.S. 178, 198 (1957).

to brand and punish—by public identification and exposure—all witnesses considered by the Committee to be guilty of Communist leanings, as well as to punish witnesses who refused, on constitutional grounds, to answer questions asked by the Committee. Thus, HUAC was improperly attempting to adjudge and punish—a task exclusively delegated by the federal constitution to the courts.[35]

The predecessor of the instant case was one of six cases decided simultaneously by the Supreme Court under the name of *Russell v. United States.*[36] There, the Court reversed petitioner Gojack's conviction since the subject under inquiry by the Committee was not stated in the grand jury's indictment for contempt. It reasoned that the case hinged on the pertinency of the questions, and that subject matter is an important factor in determining pertinency. To uphold the validity of an indictment which merely recited the statutory language would force "the defendant to go to trial with the chief issue undefined." [37] In a concurring opinion, Mr. Justice Douglas, adopting Mr. Justice Black's position in *Barenblatt,* stated that in a majority of the cases decided with *Russell,* the indictment, in and of itself, was unconstitutional as a contravention of the first amendment.[38]

In the instant case, Gojack, as did Barenblatt and Watkins, refused to answer questions posed to him. He challenged the constitutionality of both the inquiry in general and the specific questions posed. He also attacked the authorization of both HUAC and the subcommittee conducting the inquiry. The procedural defect of the prior indictment in *Russell* was sought to be remedied on re-indictment by a recital that "the subject of these hearings was Communist Party activities within the field of labor. . . ." [39] Nevertheless, the Court reappraised the *Russell* decision and concluded that there existed a fundamental fault in the HUAC proceeding which could not be cured by a mere recitation in the indictment. The Court found that "the subject of the inquiry was never specified nor authorized by the Committee, as required by its own rules, nor was there a lawful delegation of authority to the Subcommittee to conduct the investigation." [40] Approval by the Committee would not be inferred merely from the fact that

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[35] *Id.* at 134.

[36] 369 U.S. 749 (1962). *Russell* was decided with five other cases: Shelton v. United States; Whitman v. United States; Liveright v. United States; Price v. United States; Gojack v. United States (to which the instant case is a sequel). All six cases were brought under 11 Stat. 155 (1857), as amended, 2 U.S.C. § 192 (1964).

[37] *Id.* at 759.

[38] *Id.* at 773.

[39] Gojack v. United States, 384 U.S. 702, 705 (1966).

[40] *Ibid.*

the investigation was a part of a continuing Communist-labor investigation. The Court also reasoned that "as a matter of law . . . the usual standards of the criminal law must be observed; including proper allegation and proof of all essential elements of the offense." [41] One element of the offense is an authorized subject of investigation. This failure of HUAC to expressly authorize the inquiry was fatal to the prosecution of petitioner.

The Court further found that the existence of a proper legislative purpose with respect to the investigation was in doubt. This finding was based on various policy declarations made by members of the Committee regarding the investigation's purpose. It appeared that: (1) six weeks before the Subcommittee's appointment, the Chairman of HUAC reportedly announced that "large public hearings in industrial communities" against "Communists and sympathizers" would be conducted, exposing and "driving Reds out of important industries"; [42] (2) HUAC's Chairman stated that the Committee was interested in seeing petitioner's union go out of business; [43] (3) the Chairman of the Committee allegedly intended to "give known or suspected commies a chance in a full glare of publicity to deny or affirm their connection with a . . . conspiracy—or to take shelter behind constitutional amendments"; [44] (4) the Chairman and members of the Subcommittee stated during the course of the inquiry that the purpose of the Committee was to expose and disintegrate union control by Communists; [45] and (5) there were instances where Subcommittee members would state one purpose and then refer to another.[46]

Mr. Justice Black, although concurring, indicated that he preferred to reverse on the grounds stated in his dissenting opinion in *Barenblatt*.[47]

The instant case is illustrative of the Court's reluctance to review its conclusion in *Barenblatt*, that the vagueness of HUAC's charter did not per se prevent compliance with the statutory requirements of congressional contempt. Rather, in approaching HUAC convictions since *Barenblatt*, the Court has consistently avoided appellants' contentions as to violations of constitutional freedoms, and instead has reversed each contempt conviction on a narrow procedural ground.[48] The lower federal courts have fol-

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[41] *Id.* at 707.
[42] *Id.* at 709, n.8.
[43] *Id.* at 710.
[44] *Id.* at 709, n.8.
[45] *Id.* at 710.
[46] *Id.* at 710-11.
[47] *Id.* at 717. See Mr. Justice Black's dissent in Barenblatt v. United States, 360 U.S. 109, 134-62 (1959).
[48] Yellin v. United States, 374 U.S. 109 (1963); Deutch v. United

lowed this approach with the result that, in the past five years, every contempt-of-HUAC conviction has been voided by the appellate courts.[49] This consistent quashing of HUAC convictions has consequently resulted in an antagonistic bravado on the part of many witnesses at Committee hearings.[50]

It would appear, however, that the Court's avoidance of constitutional questions in reversing every conviction via procedural reforms has ended. In order to successfully prosecute a witness for contempt after the holding in *Gojack,* it is required that: (1) the subject matter under inquiry is expressly authorized by the parent committee; (2) the parent committee has expressly authorized the subcommittee to conduct the particular hearing out of which the contempt has arisen; (3) the inquiry is in furtherance of a valid legislative purpose; (4) the subject matter of the inquiry is pertinent to that purpose; and (5) the question which the witness refuses to answer is pertinent to the subject matter under inquiry. In a future case, if these requirements are met, it is difficult to conceive that the Supreme Court will again be able to reverse a contempt conviction because of procedural defects.

The Supreme Court's policy appears to have been composed of a recognition of the importance of the protections which must be afforded the individual coming before the Committee coupled with an awareness of the importance of the function being served by HUAC. While the existence of HUAC itself has not been challenged effectively in any of these cases, a judicial determination that the Committee cannot initiate a contempt prosecution against a hostile witness under any circumstances would conclusively reduce this legislative body to the status of a "paper tiger."

Having fully developed the procedural safeguards which must be employed by HUAC, it appears likely that cases will arise wherein the determination will have to be made as to whether or not a contempt of HUAC conviction can be sustained under *any* circumstances. While there is no indication available as to what the Court's determination would be in that instance, it is not impossible to speculate as to the consequences of *any* decision the Court might make in its review of this legislative activity.

Thus, an affirmance of *Barenblatt* would revitalize HUAC to the extent that when the procedural standards of *Gojack* are met,

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States, 367 U.S. 456 (1961). As a general rule, "grave constitutional questions are matters, properly to be decided . . . only when they inescapably come . . . for adjudication. Until then it is . . . [the court's] duty to abstain from marking the boundaries of congressional power. . . ." United States v. Rumely, 345 U.S. 41, 48 (1953).

[49] N.Y. Times, Sept. 18, 1966, § 4 (News of the Week in Review), p. E7, col. 6.

[50] *Id.* at col. 5-6.

witnesses can be compelled to testify under threat of contempt. Such a decision would probably reiterate the "balancing of interests" concept employed in *Barenblatt*. If, on the other hand, the Court should decide that this legislative committee could never employ congressional contempt because of the vagueness of its purpose, it is not inconceivable that the House would merely re-establish the same committee, but with specifically enumerated areas of inquiry. In this event, it does not seem likely that the structure of HUAC would be substantially affected.

One further point requires clarification. A major prerequisite for any HUAC inquiry is that the inquiry be in furtherance of a valid legislative purpose. Indeed, it has been Mr. Justice Black's contention that the Committee's activities constitute a usurpation of judicial power in that they are aimed at punishing witnesses, rather than at obtaining information which will aid in drafting legislation. Where HUAC acts to influence public opinion or to expose, and while acting in this role reports a witness for contempt, its resolution is vulnerable to this attack. When it acts in this way, the authorizing resolution becomes an insufficient basis upon which to rest all the authority of the Committee. Withdrawn from the authorizing resolution, in such a case, is the strength it derives from the presumption of validity because of investigation for a "legislative" purpose. A suggested gauge by which it may be determined whether HUAC is engaged in its investigations in order to legislate is the correlation between hearings and legislation.

Where there is a high correlation between the number of hearings and the number of bills introduced by a committee, one could safely presume the committee was acting for a legislative purpose. Hence, the punishment of witnesses for contempt, in all likelihood, would be a mere by-product of the legislative process, and the Committee's authority would not be seriously questioned. But where there is a low correlation, there should not be a presumption of a legislative purpose, but rather a presumption of a purpose either to influence public opinion or to expose. In that case, abuse of congressional power would seem more probable. Hence, the Committee's activities would be subject to closer procedural scrutiny.

It is submitted that the House of Representatives should modify HUAC's authorizing resolution to assure effective use of the contempt power in the course of its investigations. Since it can be determined from the Committee's past investigations which areas of inquiry are pursued with greatest frequency, enumeration of specific areas of intended investigation could be accomplished with relative facility. An enumerated authorizing resolution would give both clarity of purpose and specificity of subject matter without sacrificing flexibility since the resolution can be modified

session-to-session. In this way, the effectiveness of the Committee can be immediately established without the necessity of further judicial decisions. Such a procedure would also eliminate any controversy between the judiciary and the legislature. With the power of contempt firmly restored, HUAC would then be able effectively to fulfill its designated purpose, *i.e.*, to conduct investigations essential to the formulation of laws.

CONSTITUTIONAL LAW — DUE PROCESS — FAILURE TO INSULATE CRIMINAL TRIAL FROM PREJUDICIAL PUBLICITY DEEMED A DENIAL OF DUE PROCESS. — Petitioner Sheppard was tried and convicted in an Ohio court of second degree murder. Prior to and throughout the course of the trial petitioner was the subject of extensive publicity which focused heavily on matters unfavorable to him. No evidence concerning these matters was ever introduced at the trial. The trial court refused to take steps to restrict the activities of the news media in gathering material during the course of the trial, and denied petitioner's request to poll the jury to determine its exposure to such publicity. On certiorari, the Supreme Court of the United States voided petitioner's conviction and *held* that the failure of the trial court to insulate petitioner's trial from pervasive and prejudicial publicity together with a disruptive courtroom environment deprived him of the fair and impartial trial guaranteed by the due process clause of the fourteenth amendment. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

It has long been a principle of Anglo-American criminal justice that a person accused of a crime be afforded a public trial.[1] In the United States, this guarantee is embodied in the sixth amendment of the Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." [2] This guarantee has been made applicable to state courts through the due process clause of the fourteenth amendment.[3] Its purpose has been stated to be that of serving "as a safeguard against any attempt to employ our courts as instruments of persecution," [4] by insuring that the accused's trial will be open to members of the family and other interested parties rather than merely to

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[1] See Note, *Televising Judicial Proceedings—A Denial of Due Process?*, 11 CATHOLIC LAW. 331 (1965).

[2] U.S. CONST. amend. VI.

[3] See *In re* Oliver, 333 U.S. 257 (1948).

[4] *Id.* at 270.