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THE CAUSE FOR CONSTITUTIONAL LIBERTIES BECOME UNPOPULAR?
THE ROLE OF THE SUPREME COURT.

Today with few exceptions the championing of the individual liberties guaranteed in our constitution has become unpopular. The reason for such unfriendliness apparently stems from the opinion that these liberties prevent revelations of communist activity and corrupt practices in high places which are necessary for the preservation of the nation.

No greater illustration of this antipathy is found than in the fallacious, inquisitorial congressional investigation. Without meaning to be cynical, we might infer from the number and popularity of these investigations that the congressmen and senators have embraced such an instrument political motives as much as legislative reasons. If the investigation has become a weapon with which to wage political warfare to embarrass and batter the opposing political party, it follows that our representatives must be convinced that such methods capture votes. We may conclude then, that our

elected representatives evaluate the public temper as clamoring for exposure of communists and corruption at the expense of constitutional rights if need be. Thus impressive numbers of the public can be added to the list of those who desire to affirm present opinions and passions by dismantling the armor of rights that protect the individual from the seesaw of man's emotions.

But what these persons and groups have forgotten is how often a policy has been shipwrecked, which has thought to avail itself of great interests and great passions for some end immediately in view.

In this setting and against these formidable odds, it has fallen upon the Supreme Court of the United States to remind the public and the other branches of the government that Constitutional rights do not bow to the spirit of the times. A review of their decisions on this subject reveals a return to principles that have passed ~~the~~ under the hammer of time and through the fire of debate. In short a restating of bedrock constitutional principles. The court is

asserting the theory that when governmental action, whether motivated by opinions natural and familiar or novel and even shocking, conflicts with Constitutional rights such action becomes unlawful. This simple principle affords the explanation of the Supreme Court's decisions in the area of individual rights. A striking example of opinions to substantiate this analysis is found in the cases dealing with contempt prosecutions of a witness who refused to answer questions asked by a congressional committee.

In the latter part of the 1870's a special House Committee was inquiring into the nature and history of a "real estate pool" and transactions involved in the bankruptcy of Jay Cooke & Co. The House resolution, which granted the Committee the power to compel testimony, stressed the government's interest in the case as a result of "improvident deposits" of public money having been made with the London branch of the bankrupt company. The manager of the pool, Hallet Kilbourn, who had been brought before the Committee to testify concerning the pool, refused to produce

certain papers and declined to answer the question: "Will you state where each of the five members reside, and will you please state their names?"

Kilbourn, arrested by the sergeant-at-arms of the House of Representatives, was brought before the bar of the House where he still refused to comply with the Committee's requests. The House thereupon approved a resolution declaring him to be in contempt and directed that he be kept in custody until he was ready to produce papers and answer the question. Kilbourn was released after habeas corpus proceedings. He was unsuccessful in his suit against the sergeant-at-arms as well as the Speaker of the House and members of the Committee for false imprisonment. He appealed to the United States Supreme Court.

Mr. Justice Miller, speaking for the Court, vigorously attacked the House resolution. "To inquire into the nature and history of the real estate pool," he exclaimed, "[how] indefinite!" He denounced the resolution as containing "no hint of any intention of final action by

Congress on the subject . . . Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their county."

The Kilbourn decision, therefore, required all investigations to have a clear and precise constitutional purpose. In addition the opinion supported the doctrine that a broad area of the private affairs of citizens is immune from congressional scrutiny.

The next significant ~~legal~~ judicial exposition on investigations was provided in the case of *McGrain v. Daugherty*, 273 U.S. 135. The controversy in this case arose in the course of an investigation by a Senate Committee into the administration of the Department of Justice under ex-Attorney General Harry Daugherty. The Senate resolution provided for the inquiry of alleged failures of Mr. Daugherty to prosecute and defend cases wherein the government of the United States was interested. During the hearings the

Committee served a subpoena on Mally Daugherty, the brother of Harry, requiring him to appear and testify and to bring with him certain of the records of the bank of which he was president. When he failed to appear, a second subpoena ordered him to come before the Committee, but made no reference to records or papers. Again~~x~~ the witness did not comply; nor did he offer any excuse. Mally Daugherty arrested, but released in a habeas corpus proceeding.

The Supreme Court reversed. It was ruled that Congress had the power to compel the presence of witnesses before any of its committees to enable it efficiently to exercise a legislative function belonging to it under Constitution. The court implied that the subject of inquiry was stated with sufficient definiteness, but notwithstanding it was made clear that Congress did not have an unfettered power to investigate. The court carefully pointed out that limitations do exist. The Kilbourn case was affirmed by agreeing that "neither house is invested with general power to inquire into private affairs and compel disclosures," and

that "a witness rightfully may refuse to answer where the bonds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

As much as these decisions are helpful in protecting witnesses, it was never determined precisely how far a committee may search into the private affairs of a citizen. To be sure the Fifth Amendment served as checks on the method used by committees, but the courts that spoke on the subject seemed reluctant to balk or interfere with procedures. (United States v. Bryan, 72 F. Supp. 58.)

With the naming of Earl Warren as Chief Justice the court embarked on a new era. After years of hot and cold war, which climate generated decisions favoring the state, the court rose^{up}/to breathe spirit again into those Constitutional rights created to protect individuals. Specifically the court plunged into the task of redefining the rules protecting witnesses at congressional investigations.

In Quinn v. U.S. and Bart v. U.S., the court declared that if a committee wishes to hold a witness for contempt, it must specifically overrule his claim of privilege

under the Fifth Amendment and order him to answer. Any ambiguity on the committee's part will bar the prosecution of the witness.

In clear language the Chief Justice reasoned that "Unless the committee's ruling is made clear the witness is never confronted with a clear-cut choice between compliance and non compliance, between answering the question and risking prosecution for contempt . . . Our view, that a clear disposition of the witness' objection is a prerequisite to prosecution for contempt is supported by long-standing tradition here and in other English-speaking nations."

Thus, the court made it unequivocal, ~~xx~~ as it had in earlier cases, that Congress' investigative powers are limited by the "specific individual guarantees of the Bill of Rights."

The rush of members of Congress to investigate communism required the court to turn its attention to legislative enactments designed to facilitate such inquiries. The questions that arose were primarily those of federalism

but the court's rationale was clearly intended to protect witnesses from unfairness. Two cases illustrate this point.

Under section 3486 of the Federal Criminal Code the use of testimony of a congressional committee witness is barred in a federal criminal prosecution against the witness. In *Adams v. Maryland* the question presented was whether the statute applied to the states, and thus precluded the use of such testimony in a state prosecution. A unanimous court ruled that the statute bars the use of such testimony in such proceeding.

A problem closely allied to that of *Adams v. Maryland* was decided in *Ullmann v. U.S.* ~~It was argued that~~ That case dealt with the prosecution of federal witnesses in the several states after testifying before a congressional committee under the Compulsory Testimony Act. The court ruled that the Act prohibits state prosecutions as well as federal of federal witnesses for offenses about which they were compelled to testify.

Another variant of the ~~Ullmann v. U.S.~~ problem occurred in

Offcut v. U.S. There an attorney was tried in a summary proceeding for contempt. The judge of this trial witnessed the alleged misconduct. The court upset the summary contempt sentence and remanded the case for trial before another judge. It was the court's position that, in a proceeding of this type, determination of guilt and punishment should not be made by a judge who was involved with the conduct leading to the charge

It is evident from all these cases that interest of the court lay in finding means for eliminating opinions from being the basis of censure. The norm it was seeking was fairness.

It was during this period that the court recognized the need to forge new constitutional safeguards for witnesses appearing before legislative committees. The court was provided with the occasion to satisfy this need in the Watkins and Sweezy cases.

In the Watkins decision the Chief Justice, speaking for the court, reviewed the limitations on Congressional

investigations that had previously been delineated. He summarized these limitations as meaning that an investigation committee can ask no questions not related to a legislative purpose. This manner of phrasing the restriction is not new, but the elaboration of it by Chief Justice Warren added two significant features heretofore unknown. The first and most important is that a witness' prerogative not to answer questions beyond Congress' power is protected by the First Amendment of the Constitution. It was stated that to be able to exercise this prerogative not to answer questions, the witness must know (1) the question under inquiry and (2) whether that question is within the scope of the authority delegated to the Committee by the House or Senate. The first requirement eliminates the "vice of vagueness, which obviously is aimed at providing basic fairness. The second element, however, appears aimed at restricting the scope of questions committees are wont to ask. The second novel feature the Chief Justice discusses is directed at elaborating this point.

Throughout the opinion the court is concerned with keeping legislative committees mindful that the purpose is to legislate and not to inquire into a witness' private affairs. The court implies that where the investigation is not concerned "with the power of Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government" the informing function of Congress will not be tolerated where a committee sets out to grill a witness by inquiring into his private associations. In other words with the exceptions above noted, a legislative purpose is required in any investigation, and the informing function alone does not justify an investigation.

The victory for individual rights is clear cut after reading this decision. But more important it was accomplished by adhering to a logical growth from precedent. The decisions from Kilbourn to Watkins are in keeping with the best traditions of stare decisis, but never sacrificing an opportunity to improve what has gone on before. These decisions demonstrate Chief Justice Warren's judicial statesmanship conclusively

and at the same time confirming our belief that the United States remains a democracy that is a government of laws not of men.