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Volume 57  
Issue 1 *Dickinson Law Review - Volume 57,*  
*1952-1953*

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10-1-1952

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### Recommended Citation

Bernard Schwartz, *Legislative Powers of Investigation*, 57 DICK. L. REV. 31 (1952).  
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol57/iss1/3>

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## LEGISLATIVE POWERS OF INVESTIGATION

By

BERNARD SCHWARTZ\*

"The primary tasks of modern legislative assemblies," stated an acute student of government over a decade ago, "may be arranged in four classes.

"First, but not necessarily foremost, is the function of lawmaking. At least equally important is the responsibility of supervising the executive; the legislature in this role may be compared to a board of directors of a business corporation which at least theoretically, endeavors to hold 'administrative officers to a due accountability for the manner in which they perform their duties.' A third legislative office, broad in its implications, involves activities as an organ of public opinion; a lawmaking body may serve as a national forum for the expression, formulation or moulding of opinion. The remaining function, which may be termed membership, concerns internal matters, especially the judging of the qualifications and conduct of the delegates to the legislative assembly."<sup>1</sup>

The proper exercise of these basic legislative functions presupposes the existence of an informed judgment on the part of the members of the particular legislative assembly. Such informed judgment cannot normally exist, as a practical matter, if the members of the legislature do not possess sufficient information about the conditions which their acts are intended to affect. Nor is adequate information usually available within the legislative body itself. The knowledge possessed by its members must necessarily be supplemented by that obtained from outside sources. "A legislative body," the Supreme Court has asserted, "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it."<sup>2</sup>

In obtaining the information which is needed to enable their functions properly to be performed, legislatures in this country have made an ever-growing use of their powers of investigation. It is, indeed, not too much to say that, under contemporary conditions, investigating committees have become, in large part, the eyes and ears of our legislatures. It should, however, be noted that the authority to pursue investigations is one which is not expressly delegated to American legislatures in the various constitutions in this country.

In view, then, of our basic theory of governmental power as delegated, rather than inherent,<sup>3</sup> from where is the legislative authority in this respect de-

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<sup>1</sup> McGeary, *THE DEVELOPMENTS OF CONGRESSIONAL INVESTIGATIVE POWER* 23 (1940).

<sup>2</sup> *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

<sup>3</sup> Recently reaffirmed in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

rived? If a legitimate source be found for legislative investigatory authority, must the power be conceded to be an unlimited one? What are the legal rules governing the exercise of the investigatory power? These are the questions to which this paper will be devoted.

### *Existence of the Power*

"The power and jurisdiction of Parliament," says Sir Edward Coke, "is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds."<sup>4</sup>

This doctrine of Parliamentary supremacy is the dominant characteristic of British political institutions.<sup>5</sup> Under it, according to the almost proverbial English aphorism, "Parliament can do everything but make a woman a man, and a man a woman."<sup>6</sup> In Britain, of course, there can be no question with regard to the existence of a Parliamentary power of investigation, or, indeed, with regard to the existence of any authority which the legislature chooses to assert. And, in fact, the investigative power is one which has been exercised by the British Parliament ever since its emergence as a true legislative assembly.

The fact that the British Parliament unquestionably possesses authority to pursue investigations does not, however, mean that similar authority is necessarily vested in American legislatures. In the famous case of *Kilbourn v. Thompson*,<sup>7</sup> Mr. Justice Miller declared that English precedent on this point was not binding in this country. It is important, said he, "to understand on what principle this power in the House of Commons rests, that we may see whether it is applicable to the two houses of Congress."<sup>8</sup> And, inquiring into the basis of the Parliamentary power, he concluded that it was founded upon the fact that Parliament was, at least in its origins, a judicial, as well as a legislative, body. "It is upon this idea that the two houses of Parliament were each courts of judicature originally, which, though divested by usage, and by statute, probably, of many of their judicial functions, have yet retained so much of that power as enables them, like any other court, to punish for a contempt of these privileges and authority that the power rests."<sup>9</sup>

If the investigative authority of the British Parliament rests only upon the judicial origins of that body, then the British experience is of little help in this country, where our legislatures have never been considered as able to exercise other than purely legislative authority. "We are of opinion," reads Justice Miller's conclusion on this point in the *Kilbourn* case, "that the right of the House of Representatives . . . can derive no support from the precedents and practices

<sup>4</sup> Blackstone's Commentaries 160.

<sup>5</sup> Dicey, *LAW OF THE CONSTITUTION* 39 (9th ed. 1939).

<sup>6</sup> And, legally speaking, it should be noted, Parliament can do even these things.

<sup>7</sup> 103 U.S. 168 (1880).

<sup>8</sup> *Id.* at 183.

<sup>9</sup> *Id.* at 184.

of the two houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices."<sup>10</sup>

The approach of the Court in *Kilbourn v. Thompson* to the question of the existence of a legislative investigatory power rest essentially upon a separation-of-powers analysis. "It is believed to be one of the chief merits of the American system of written constitutional law," affirms Justice Miller's opinion, "that all the powers intrusted to government, whether state or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined."<sup>11</sup>

The doctrine of the separation of powers, though not expressly provided for in most constitutions in this country, is implicit, in all, as a conclusion logically following from the separation of the three departments. "It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power."<sup>12</sup>

It is, of course, almost a truism that the British doctrine of Parliamentary supremacy is one which is foreign to American public law. The authority of legislatures on this side of the Atlantic is restricted by the express limitations contained in our various organic instruments. And, in addition, American legislatures are limited by the doctrine of separation of powers. Even though a specific power is not precluded by the constitution, it cannot be exercised by the legislature if it is *non-legislative* in nature.

To assume, however, that the power of investigation is primarily a judicial power and, consequently, one which the legislature is barred from exercising because of the separation of powers is completely to misapply the constitutional doctrine. It is a mistake to think of that doctrine as dividing the government into three watertight compartments. "If we look into the constitutions of the several states," wrote James Madison in the *Federalist*,<sup>13</sup> "we find that notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct."

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<sup>10</sup> Id. at 189. For criticisms of Justice Miller's view, see Landis, CONSTITUTIONAL LIMITATIONS ON THE CONGRESSIONAL POWER OF INVESTIGATION, 40 Harv. L. Rev. 153, 159 (1926); Potts, POWER OF LEGISLATIVE BODIES TO PUNISH FOR CONTEMPT, 74 U. of Pa. L. Rev. 691, 692 (1926).

<sup>11</sup> 103 U.S. at 190.

<sup>12</sup> *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 201 (1928).

<sup>13</sup> N. 47.

The proper approach in cases involving an alleged violation of the separation of powers is that contained in one of Mr. Justice Holmes' most famous dissents. "It does not seem to need argument," he asserted, "to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires."<sup>14</sup>

It is, of course, recognized that there are lines beyond which one cannot go. Certain powers belong clearly to one of the branches of government. Thus, the executive cannot exercise lawmaking authority, in the absence of a valid legislative delegation, for the power to make the laws is a function vested exclusively in the legislature.<sup>15</sup> But, if the power at issue does not so obviously fall within the exclusive orbit of one of the three branches, a more difficult problem is presented. One can, of course, carry the separation-of-powers doctrine to an analytical logical extreme, as did the Supreme Court in the well-known *Springer* case.<sup>16</sup> The power in question there was the voting upon government owned stock in certain corporations. The Court examined the power to vote such stock, decided that it was clearly not legislative or judicial in nature, and hence concluded that it must be executive.

"It is clear that they are not legislative in character and still more clear that they are not judicial. The fact that they do not fall within the authority of either of these two constitutes logical ground for concluding that they do fall within that of the remaining one of the three among which the powers of government are divided."<sup>17</sup>

The Court's approach in the *Springer* case is like that followed in the familiar parlor game—"It is not animal. It is not vegetable. Therefore, it must be mineral." One wonders whether it is the way to deal with difficult separation-of-power cases. The better approach would appear to be that of Justice Holmes, in his dissent, which has already been cited. In his view, if the authority at issue does not manifestly belong to one of the three branches, it falls "into the indiscriminate residue of matters within legislative control."<sup>18</sup> In such a case, it is for the legislature to determine which branch shall exercise the particular power. The Holmesian approach, recognizing that there are powers of a doubtful nature which need not be arbitrarily fitted into the Montesquieuan trichotomy, holds that it is within the legislative competence to assign their exercise how it will.

It is the "parlor-game" approach of the majority of the Court in the *Springer* case that leads to the conclusion that the exercise by the legislature of investigatory

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<sup>14</sup> *Springer v. Government of the Philippine Islands*, n. 12, *supra*, at 211.

<sup>15</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), contains a striking application of this principle.

<sup>16</sup> *Springer v. Government of the Philippine Islands*, n. 12, *supra*.

<sup>17</sup> *Id.* at 202.

<sup>18</sup> *Id.* at 212.

power is violative of the separation of powers. It assumes that, since investigatory authority is not patently legislative or executive in nature, it must be judicial. Such an approach is, however, unwarranted. The power of investigation is not so clearly judicial in nature that its exercise by another branch infringes upon the separation of powers. It is instead the type of power which does not necessarily fall within the exclusive competence of one of the three branches. As such, it is for the legislature to determine by whom it may be exercised. And in fact, as is well known, investigatory powers have been delegated by the legislature to officials within each of the three branches of government.

If the separation-of-powers argument is eliminated, there is no difficulty at all in answering the question of whether powers of investigation are possessed by legislative bodies. Under American constitutions, the legislature possesses not only such powers as are expressly granted to it, but also such auxiliary powers as are necessary and proper to make the express powers effective. The question then comes down to one of whether the power to investigate is so far incidental to the informed and effective exercise of the legislative function as to be implied.

This question was answered with a categorical affirmative in the leading case of *McGrain v. Daugherty*,<sup>19</sup> where the existence of legislative investigatory authority was clearly recognized for the first time by the Supreme Court.

"We are of opinion," reads the lengthy opinion of Mr. Justice Van Devanter, "that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. . . . Thus, there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised."<sup>20</sup>

### *Limits of the Power*

In *McGrain v. Daugherty*, the Court recognized the existence in the legislature of investigatory authority as a necessary incident of the legislative function of enacting the laws. The power to investigate, affirmed Justice Van Devanter, is a necessary and proper auxiliary of the power to legislate, for it enables the legislature to obtain the information needed for the proper exercise of its primary function. Implicit in the Court's decision, however, is the holding that legislative investigatory power can be validly exercised only if it is, in fact, intended to be in aid of the function of legislation itself. If the inquiry at issue is not connected with possible exercise of the power of enacting laws, it is *ultra vires*.

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<sup>19</sup> 273 U.S. 135 (1927).

<sup>20</sup> *Id.* at 174-75.

It is thus clear that the Court in *McGrain v. Daugherty*, in upholding the existence of legislative investigatory authority, did not intend to go as far as did Lord Coleridge in a famous English case and assert that such power was unlimited. "That the Commons are, in the words of Lord Coke, the general inquisitors of the realm, I fully admit," said his Lordship, in the case alluded to, "it would be difficult to define any limits by which the subject matter of their inquiry can be bounded. . . . I would be content to state that they may inquire into everything which it concerns the public weal for them to know; and they themselves I think, are entrusted with the determination of what falls within that category."<sup>21</sup>

American courts have rejected the notion that our legislatures are the "general inquisitors of the realm." Though they have acknowledged the existence of legislative investigatory authority, they have consistently asserted that such authority could properly be exercised only "in aid of the legislative function."<sup>22</sup> The leading case on this point is *Kilbourn v. Thompson*, which has already been referred to.<sup>23</sup>

The question at issue there was whether the House of Representatives had exceeded its power in directing one of its committees to make a particular investigation. The inquiry related to a private real estate pool or partnership in District of Columbia. Jay Cooke and Company had had an interest in the pool, but had become bankrupts, and their estate was in course of administration in a federal court. The United States was one of their creditors. The trustee in the bankruptcy proceeding had effected a settlement of the bankrupts' interest in the pool. Some of the creditors, including the United States, were dissatisfied with the settlement. In these circumstances, the House resolution directed the committee "to inquire into the matter and history of said real estate pool and the character of said settlement, with the amount of property involved in which Jay Cooke and Company were interested, and the amount paid or to be paid in said settlement, with power to send for persons and papers and report to the House."

The Court held that such an investigation was beyond the legislative power. Mr. Justice Miller pointed out that the resolution authorizing the inquiry contained no suggestion of contemplated legislation; that the matter was one in respect to which no valid legislation could be enacted; and that the United States and other creditors were free to press their claims in the bankruptcy proceeding. And, for these reasons, the Court concluded, "we are of opinion that the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial."<sup>24</sup> As it was explained

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<sup>21</sup> *Howard v. Gossett*, 10 Q.B. 359, 379 (1845).

<sup>22</sup> The term used in *Kilbourn v. Thompson*, 103 U.S. 168, 189 (1880).

<sup>23</sup> N. 7.

<sup>24</sup> 103 U.S. at 192.

by the Court in a later case, *Kilbourn v. Thompson* stands for the proposition "that neither house of Congress possesses 'a general power of making inquiry into the private affairs of the citizen;' that the power actually possessed is limited to inquiries relating to matters of which the particular house 'has jurisdiction' and in respect of which it may rightfully take other action."<sup>25</sup>

In *McGrain v. Daugherty*,<sup>26</sup> a resolution of the Senate had authorized a select committee to investigate concerning the alleged neglect and failure of the ex-Attorney General, Harry M. Daugherty, to arrest and prosecute alleged violators of certain federal laws. Various charges of misfeasance and nonfeasance in the Department of Justice had been brought to the attention of the Senate by individual senators and made the basis of an insistent demand that the department be investigated. The Supreme Court held that such an investigation did not violate the rule laid down in *Kilbourn v. Thompson*. "It sufficiently appears," stated Justice Van Devanter, "when the proceedings are rightly interpreted, that the object of the investigation and of the effort to secure the witness's testimony was to obtain information for legislative purposes."<sup>27</sup>

What was the legitimate function in aid of which this investigation was carried on? The subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or not. "Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year."<sup>28</sup>

It is important to bear in mind that, in *McGrain v. Daugherty*, the Court was careful not to overrule the limitation upon legislative investigatory authority that was laid down in *Kilbourn v. Thompson*. In upholding the existence of the power of inquiry, Justice Van Devanter did, it is true, decline to follow the separation-of-powers approach which had dominated the opinion of Justice Miller in the *Kilbourn* case. But he was most meticulous in finding that the investigation at issue was in aid of a legitimate legislative function, and hence within the rule of *Kilbourn v. Thompson*. The only legitimate object," reads Justice Van Devanter's opinion on this point, "the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject matter was such that the presumption should be indulged that this was the real object."<sup>29</sup>

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<sup>25</sup> *McGrain v. Daugherty*, 273 U.S. 135, 170 (1927).

<sup>26</sup> 273 U.S. 135 (1927).

<sup>27</sup> *Id.* at 177.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Id.* at 178.

*Un-American Activities Committee*

In recent years, the rule laid down in *Kilbourn v. Thompson* has been applied most frequently in cases involving the Committee on Un-American Activities of the House of Representatives. That Committee was authorized under the Legislative Reorganization Act of 1946 to investigate "(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."<sup>30</sup>

In *United States v. Josephson*,<sup>31</sup> it was argued that any investigation made by the committee under this authorization would necessarily have as its subject the "private affairs of private citizens" and that such investigation was invalid under *Kilbourn v. Thompson*. The court held, however, that the doctrine of the *Kilbourn* case was not involved here. Under its authorization, the committee was directed to inquire into propaganda which may strike at the very existence of the government. "Surely matters which potentially affect the very survival of our government are by no means the purely personal concern of any one. And investigations into such matters are inquiries relating to the personal affairs of private individuals only to the extent that those individuals are a part of the government as a whole."<sup>32</sup> Nor could it be claimed that the committee's investigations were not made for any legislative purpose but only in order to expose political beliefs and affiliations. "It is sufficient," said the court, "that the authorizing statute contains the declaration of Congress that the information sought is for a legislative purpose and that fact is thus established for us. . . . Information gained by a committee of this nature, provided its search for the truth may not be frustrated by such obstructive tactics as those employed by the appellant, might well aid Congress in performing its legislative duties, viz., in deciding that the public welfare required the passage of new statutes or changes in existing ones or that it did not."<sup>33</sup>

An argument like that rejected in the *Josephson* case was made and similarly spurned by the Court of Appeals for the District of Columbia in *Barsky v. United States*.<sup>34</sup> "The power of inquiry by the legislature," declared Judge Prettyman, "is coextensive with the power of legislation and is not limited to the scope or the content of contemplated legislation. Constitutional legislation might ensue from information derived by an inquiry upon the subject described in the quotation from House of Representatives Resolution No. 5. That potentiality is the measure of the

<sup>30</sup> 60 Stat. 812, 828 (1946). The committee was originally set up under House Resolution 5 of the 79th Congress. 90 Cong. Rec. 10, 15 (1945).

<sup>31</sup> 165 F.2d 82 (2d Cir., 1947) cer. den. 333 U.S. 838 (1948).

<sup>32</sup> Id. at 89.

<sup>33</sup> Id. at 89-90.

<sup>34</sup> 167 F.2d 241 (App. D.C., 1947) cer. den. 334 U.S. 843 (1948).

power of inquiry. The fact is that at least eight legislative proposals have been submitted to the Congress by this committee as the result of its investigations."<sup>85</sup>

In both the *Josephson* and *Barsky* cases, it was urged that the exposure of of the private political beliefs of those ordered to appear before the House committee was in violation of the rights guaranteed in the First Amendment. The court in the *Barsky* case was referred to the famous "clear and present danger" test articulated by Mr. Justice Holmes,<sup>86</sup> as restricting the legislative power of inquiry into speech and beliefs. But that test, said the court, applies only to cases where laws impose an actual restriction upon speech or publication. "In our view, it would be sheer folly as a matter of governmental policy for an existing government to refrain from inquiry into potential threats to its existence of security until danger was clear and present. . . . How, except upon inquiry, would the Congress know whether the danger is clear and present?"<sup>87</sup> In view of the recent eclipse of the "clear and present danger" test, even in cases involving statutory restrictions upon speech<sup>88</sup> it is, indeed, difficult to assert today that that test does limit the legislative investigatory power.

The contention that the First Amendment, in protecting freedom of speech, prohibits the violation of the privacy of political belief, such as is incidental to investigation by the Un-American Activities Committee, was specifically rejected in the *Josephson* case. According to Judge Chase, "there is no restraint resulting from the gathering of information by Congress in aid of its power and duty to legislate which does not flow wholly from the fact that the speaker is unwilling to advocate openly what he would like to urge under cover. Until there is a valid law to the contrary, he may with impunity say what he pleases so far as legal process is concerned and, that is the extent of the freedom of speech guaranteed any one by the Constitution."<sup>89</sup>

It should, of course, be recognized that the information which a particular witness may be required to divulge may indicate that he is engaged in an unlawful act. Thus, his testimony may disclose that he is a member of an organization which teaches, advocates, or encourages the overthrow or destruction of any government in the United States by force or violence. Adherence to such a group, with knowledge of the purposes thereof, is made unlawful by the Smith Act of 1940.<sup>40</sup> Yet, even in such a case, as Judge Chase's opinion indicates, investigation by the legislative committee is not precluded by the First Amendment. The witness can, it is true, decline to answer questions which may reveal his violation of the Smith Act, on the ground that his privilege against self-incrimination is

<sup>85</sup> *Id.* at 245. See, similarly, *Marshall v. United States*, 176 F.2d 473 (App. D.C., 1949); *Morford v. United States*, 176 F.2d 54 (App. D.C., 1949); *Lawson v. United States*, 176 F.2d 49 (App. D.C., 1949).

<sup>86</sup> In *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>87</sup> 167 F.2d at 246-47.

<sup>88</sup> See *Dennis v. United States*, 341 U.S. 494 (1951).

<sup>89</sup> 165 F.2d at 92.

<sup>40</sup> 54 Stat. 670, 671 (1940).

being violated.<sup>41</sup> But this is a privilege, which is personal to the witness, and its basis is the Fifth, and not the First, Amendment.<sup>42</sup>

### *Present Status of Kilbourn Rule*

In the dissenting opinion which he delivered in the *Josephson* case Judge Clark asserted that "the somewhat general popular assumption that the congressional power of investigation has no apparent limit is quite contrary to settled precedents."<sup>43</sup>

The most important limitations which may exist are, of course, those upon the power of the legislature to authorize a particular inquiry, rather than those upon the manner in which the given inquiry may be conducted. As Judge Chase, himself, pointed out, "whenever the initial validity of the investigation is properly set forth, the investigation can then proceed in a workmanlike way to accomplish its express purpose, subject only to particular problems as to the pertinency of particular questions and the conduct of the hearings,<sup>44</sup> with particular reference to the procedural safeguards to be accorded the individuals under investigation."<sup>45</sup>

The initial validity of any legislative investigation depends upon the application to the particular case of the rule of *Kilbourn v. Thompson*, that legislative investigatory authority can be exercised validly only in aid of a legitimate legislative function. Even under a strict application of that rule, as we have seen, the exercise of investigatory power by the House Committee on Un-American Activities is not invalid. Since the Congress can legislate, and has, in fact, legislated, in order to regulate activities which are deemed to be subversive, for it to exercise its power of inquiry in that field does not violate the rule of the *Kilbourn* case. "That the subject of un-American and subversive activities is within the investigating power of Congress is obvious. Conceivably, information in this field may aid the Congress in legislating concerning any one of many matters, such as correspondence with foreign governments (U.S.C.A., Title 18, §5); seditious conspiracy (Id., §6); prohibition of undermining the morale of the armed forces (Id., §9); suppression of advocacy of overthrow of the government (Id., §10); the registration of organizations carrying on certain types of propaganda (Id., §§14 and 15); qualifications for entering and remaining in government service; the authorization of governmental radio broadcasts to foreign countries,

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<sup>41</sup> Insofar as the Barsky case holds that a witness cannot refuse to answer a question which will reveal whether he is a member of the Communist Party on the ground of self-incrimination, it is incorrect, in view of *Blau v. United States*, 340 U.S. 159 (1950).

<sup>42</sup> Whether a witness can claim other privileges in legislative investigative proceedings is a more difficult point. In *Jurney v. MacCracken*, 294 U.S. 125 (1935), an attorney was punished for contempt for failing to produce papers which were claimed to contain privileged communications with his clients. The privilege point appears not to have been fully considered by the court.

<sup>43</sup> 165 F.2d at 94.

<sup>44</sup> A witness need not answer a question not pertinent to the subject matter of the inquiry. *Sinclair v. United States*, 279 U.S. 263 (1929).

<sup>45</sup> 165 F.2d at 99.

and other innumerable topics. Similarly such information may be helpful in appropriating funds."<sup>46</sup>

A more difficult question, however, is whether a strict application of the rule of *Kilbourn v. Thompson* is justified at the present time. In the *Kilbourn* case it will be recalled, the House resolution at issue directed an investigation into the settlement of a bankrupt company's interest in a real estate pool. The United States was one of the creditors of the bankrupt and had been dissatisfied with the settlement. The Court held that this was an investigation into the private affairs of a citizen beyond the powers of the Congress. "Can the rights of the pool, or of its members, and the rights of the debtor, and of the creditor of the debtor, be determined by a report of a committee or by an act of Congress?" asked Justice Miller. "If they cannot, what authority has the House to enter upon this investigation into the private affairs of individuals who hold no office under the government."<sup>47</sup>

This approach is based upon what is, in effect, an *a priori* assumption that inquiry into the affairs of a private citizen cannot be in aid of a legitimate legislative function. It ignores the fact that, as in the *Kilbourn* case, the individual concerned may have had dealings with the government and that, in such cases, investigation may disclose maladministration by public officers. And the legislature may surely investigate in such a case, for one of its primary functions is that of overseer of the administration.

More recent cases reject the rigid approach of the *Kilbourn* case to the question of whether the investigation was authorized with a legislative purpose in mind. They tend, first of all, to emphasize the principle that legislative proceedings are presumed to be valid, unless their invalidity is clearly shown. "The presumption in favor of regularity," Mr. Justice Sutherland has asserted, "which applies to the proceedings of courts, cannot be denied to the proceedings of the Houses of Congress."<sup>48</sup> The courts are bound to assume that the action of the legislative body was with a legitimate object if it is capable of being so construed, and have no right to assume that the contrary was intended.<sup>49</sup> In the *Josephson* case, indeed, the court went so far as to declare, "It is sufficient to say that the authorizing statute contains the declaration of Congress that the information sought is for a legislative purpose and that fact is thus established for us."<sup>50</sup>

Under this view, there is an almost conclusive presumption in favor of the validity of legislative exercises of investigatory power. One need not go to this extreme. But a liberal application of the rule of *Kilbourn v. Thompson* will certainly lead to the upholding of legislative investigations in almost every case. As it has been expressed by one federal judge, "If the subject under scrutiny may

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<sup>46</sup> *Bryan v. United States*, 72 F. Supp. 58, 62 (D.C., 1947).

<sup>47</sup> 103 U.S. at 195.

<sup>48</sup> *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 619 (1929).

<sup>49</sup> *McGrain v. Daugherty*, 273 U.S. at 178.

<sup>50</sup> 165 F.2d at 89.

have any possible relevancy and materiality, no matter how remote, to some possible legislation, it is within the power of the Congress to investigate the matter."<sup>51</sup> Since almost any inquiry, even that at issue in the *Kilbourn* case itself, may have some remote relevancy to possible legislation, it is difficult to see how the rule of *Kilbourn v. Thompson*, interpreted in this way, constitutes a real restriction upon the legislative investigatory power.

One may even go further today and wonder whether the *Kilbourn* rule is effective today even as a theoretical restraint. A question on this score is raised by the recent jurisprudence of the Supreme Court concerning administrative powers of investigation. When the Court was first confronted with the issue of the validity of administrative exercises of investigatory power, its approach was at least as narrow as that followed by it in the *Kilbourn* case. In 1908, the Court rigidly construed a statute granting investigatory power to the Interstate Commerce Commission. The "power to require testimony," reads the opinion of Mr. Justice Holmes, "is limited, as it usually is in English-speaking countries, at least, to only the cases where the sacrifice of privacy is necessary,—those where the investigations concern a specific breach of the law."<sup>52</sup> And, in his well-known opinion in the *American Tobacco* case,<sup>53</sup> Justice Holmes articulated the judicial hostility toward unrestricted administrative inquiries into private affairs—so-called "fishing expeditions" into the affairs of citizens conducted with the hope that something discreditable might be disclosed. "It is contrary to the first principles of justice," declared the learned Supreme Court Justice, "to allow a search through all the respondents' records, relevant or irrelevant in the hope that something will turn up."<sup>54</sup>

During the past decade, the attitude of our highest tribunal toward administrative investigatory power appears to have changed completely.<sup>55</sup> In its most recent decision on the subject, indeed, the Court has gone so far as to imply that the restrictions imposed by Justice Holmes, discussed above, no longer serve to limit administrative authority in this field. In the case referred to, *United States v. Morton Salt Co.*,<sup>56</sup> decided in 1950, the Court stated that the investigative function of an agency like the Federal Trade Commission is wholly different from that of a court. And the fact that the agency may be engaged in a "fishing expedition" to see what it can turn up does not render its action invalid. "Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation," asserted Mr. Justice Jackson, "it does not follow that an administrative agency. . . may not have and exercise powers of original inquiry."<sup>57</sup> And, in an analogy fraught with significance, the

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<sup>51</sup> *Bryan v. United States*, 72 F. Supp. 58, 61 (D.C., 1947).

<sup>52</sup> *Harriman v. Interstate Commerce Commission*, 211 U.S. 407, 419 (1908).

<sup>53</sup> *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924).

<sup>54</sup> *Id.* at 306. See, similarly, *Ellis v. Interstate Commerce Commission*, 237 U.S. 434 (1915).

<sup>55</sup> See Davis, ADMINISTRATIVE LAW 92 (1951).

<sup>56</sup> 338 U.S. 632 (1950).

<sup>57</sup> *Id.* at 642.

administrative power of inquisition was likened "to the grand jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."<sup>58</sup>

If this is true today of the administrative power of investigation, is it not necessarily also true of legislative investigatory authority? It is certainly difficult to see how the administrative power of inquiry, which is possessed solely because of legislative delegations, can be any greater than such power exercised directly by the legislature itself. "The power of Congress to investigate by means of a committee of its own can be no less restricted than the power which it may validly confer upon an administrative official."<sup>59</sup> If the principle of the *Morton Salt* case applies, as it manifestly must, to exercises of investigatory authority by the legislature, it is hard to see what scope is left for the rule of *Kilbourn v. Thompson*. If the legislature possesses a power of inquisition like that of the grand jury, if its investigations may like those of that body be justified by "nothing more than official curiosity,"<sup>60</sup> one wonders whether this does not render meaningless the rule in the *Kilbourn* case, as a restriction upon the legislative authority.

### Conclusion

If the above analysis is correct, it follows that there are, as a practical matter, few, if any, limitations today upon the scope of legislative investigations. Nor is the abandonment of the rule of *Kilbourn v. Thompson* a legal development which is necessarily to be deplored. The power of investigation is, as we have seen, a necessary incident of the legislative function. "Ordinarily legislation cannot be intelligently enacted without previously ascertaining facts from which conclusions can be drawn as to whether need for legislation exists and, if so, what form the legislation should assume."<sup>61</sup> But the need for broad powers of inquiry in the legislature rests upon more than the need for information to serve as a basis for enacting laws. Legislatures in this country, like the Parliament in Britain, should be looked upon as great public forums for the ventilation of popular grievances. The elected representatives of the people, more directly responsible to the citizenry than any other organ of government, should not be restricted by the courts in their efforts to bring to light anything which they feel should be subjected to the public scrutiny.

"Great constitutional provisions," reads a celebrated statement by Mr. Justice Holmes, "must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties of the people in quite as great a degree as the

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<sup>58</sup> *Ibid.*

<sup>59</sup> *Barsky v. United States*, 167 F.2d at 245.

<sup>60</sup> *United States v. Morton Salt Co.*, 338 U.S. at 652.

<sup>61</sup> *Loc. cit., supra*, n. 51.

courts."<sup>62</sup> The power to ferret out evil by legislative exercises of investigatory authority is of the greatest consequence in a modern democratic society. "The right of congressional investigation has been so important, so productive, of good in so many instances in our history, that no one would wish to hamper it improperly."<sup>63</sup> Particularly in cases involving investigatory authority, to paraphrase Mr. Justice Frankfurter, every rational trial must be pursued to prevent collision between the legislature and the courts. For the legislature can readily mend its ways, or the people may express disapproval by choosing different representatives. But a decree of unconstitutionality by the courts is fraught with consequences so enduring and far-reaching as to be avoided unless no choice is left in reason.<sup>64</sup>

In this respect, the remarks made almost a century ago by a New Jersey court appear particularly relevant. "The prerogatives, to make, to execute, and to expound the laws, must reside somewhere. Depositories of those great national trusts must be found, though it is certain that such depositories may betray the confidence thus reposed in them. In the frame of our state government, the recipients and organs of this threefold power are the legislature, the executive, and judiciary, and they are co-ordinate—in all things equal and independent; each, within its sphere, is the trusted agent of the public. With what propriety, then, is it claimed that the judicial branch can erect itself into the custodian of the good faith of the legislative department?"<sup>65</sup>

These words are particularly pertinent on the question of possible abuses by the legislature of its investigatory authority. The fact that the power may be misused, in the words of Justice Van Devanter, "affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds."<sup>66</sup> It is common knowledge that the behavior of certain legislative committees has led to widespread criticisms. But such matters are not for the courts in their decisions upon the validity of exercises of the investigatory authority. "The remedy for unseemly conduct, if any, by committees of Congress is for Congress, or for the people; it is political and not judicial. . . . The courts have no authority to speak or act upon the conduct by the legislature of its own business, so long as the bounds of power and pertinency are not exceeded."<sup>67</sup>

It should be emphasized that this paper has sought only to present the applicable rules of law which govern the subject of legislative investigatory author-

<sup>62</sup> *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U.S. 267, 270 (1904).

<sup>63</sup> *Clark, J.*, dissenting, in *United States v. Josephson*, 165 F.2d at 100.

<sup>64</sup> *United States v. Lovett*, 328 U.S. 303, 319 (1946).

<sup>65</sup> *Pangborn v. Young*, 32 N.J.L. 29 (1866). Compare *Hearst v. Black*, 87 F.2d 68, 71-72 (App. D.C., 1936).

<sup>66</sup> *McGrain v. Daugherty*, 273 U.S. at 175.

<sup>67</sup> *Barsky v. United States*, 167 F.2d at 250

ity. Insofar as those rules are concerned, there would seem, and quite properly, as we have seen, to be few, if any, restrictions upon the permissible scope of legislative inquiries. This is not to deny, of course, that there is room for improvement in procedures within the legislative investigatory process. The constant complaints that have been directed against the conduct of certain congressional committees indicate that there is need for legislative self-restraint in this field. "Friends and supporters of the congressional power may well fear its present exercise here," asserted Judge Clark, dissenting, in the *Josephson* case, "and find the application of a proper restraint a source of strength in the long run rather than the reverse."<sup>68</sup> This does not, however, change the legal situation with regard to legislative investigatory authority. As even Judge Clark, himself, admitted, "it is true, as many urge, that the force of public opinion and the expression of the electorate at the polls must remain its main source of control."<sup>69</sup>

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<sup>68</sup> 165 F.2d at 100.

<sup>69</sup> *Ibid.*