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THE INVESTIGATING POWER OF CONGRESS, ITS SCOPE AND LIMITATIONS

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> The accumulated weight of repetition behind such a phrase as "inherent powers" . . . is a constant invitation to think words instead of things. It is imperative, therefore, to subject it to critical scrutiny. This we have ventured to do by refusing to regard the word "inherent" as a barrier to further inquiry. Whence and why do the powers "inhere" which are claimed to "inhere" . . .? Do they "inhere" in nature . . .? Do they "inhere" in our history, so that the formulated experience of the past embodies them?

FRANKFURTER AND LANDIS[1]

An anomaly in the American scene is the defenseless position of a witness before a congressional committee. And often he is there, not for informational but denunciatory purposes, while the safeguards ordinarily available to one denounced are only afforded by such courtesy as the member can muster to veil his purpose. The defenses of pertinency and self-incrimination are unsatisfactory, for one or the other is rarely acceptable to the courts or to the public. The authority of a House of Congress, however, to make any general inquiry is a forgotten defense, successful once in the celebrated case of *Kilbourn v. Thompson*[2]; and although that opinion is often cited by the courts, particularly in its aspect of a certain "right of privacy" residual in the individual, its recital is merely introductory to the consolation delivered a victim as he is administered the *coup de grace.*

Is not what the courts are saying that there exist congressional tribunals with the power to punish any one for concealing information, tribunals free from procedural restraint? And *a priori*, the power, while deplored, is conceded as being legal; Walter Lippmann has summed up this concession as "that legalized atrocity."[3] But is the blame for abuse that of Congress or of the courts? Has not the citizenry been mesmerized by some vague reassurance that "rights" will arise, that all things shall come to those who wait, and that the flowers will crush out the weed? Possibly, however, the "problem is not a question of the 'rights' of a witness but rather of a lack of power in the House of Congress. If there are limitations . . ., they would seem to stem primarily from the nature

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[1] Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior Federal Courts—A Study in Separation of Powers,* 37 HARV. LAW REV. 1010, 1022-23 (1924).

[2] 103 U. S. 168, 26 L. Ed. 377 (1880).

[3] LIPPMANN, PUBLIC OPINION, 289 (1922).

of the power itself and from the functions for which it may be properly used."[4]

It is suggested that power is often viewed in the rosy hue of its purpose, whether it be the equitable rule of justice or the enactment of informed legislation. And while, of course, effective authority is often necessary to achieve great ends, provided in a democracy there are adequate checks upon the process, it would appear that Congress, on the ground of "inherency", has worked loose of the fabric and structure of our democratic system and stands apart, wielding such authority arbitrarily. Some reexamination would therefore seem necessary, in order to discover the missing link that has fathered the abnormality.

There has been no little reaction to the use of such power. In 1788 the assertion by Pennsylvania judges in *Respublica v. Oswald*[5] of their right to attach for a contempt committed out of the presence of the Court, provoked the General Assembly of that state to convene with the view of impeachment. The impeachment was defeated by an appeal of a member as to social purposes which summary power with proper self-restraint is used, and that "without this power the legislature itself would be exposed to wanton insult and interruption."[6] And thus were the judges spared impeachment. This acknowledgement of the similarity of the power as used by the legislature and the courts, however, blushed unseen in Pennsylvania, for Congress, while vesting the courts, by the Judiciary Act of September 24, 1789,[7] with jurisdiction to punish all contempts of their authority, did not see fit to legislate as for its own power. It was provided merely, in the Act of May 3, 1798, that oaths or affirmations might be administered to witnesses by certain legislative officials "in any case under their examination."[8] It thus seems odd that Congress felt it necessary to enact legislation granting the courts such judicial power, but apparently did not perceive the necessity of granting similar privilege to either of its Houses. This is even more extraordinary in view of the comment of Chief Justice Marshall in Ex parte *Bollman*,[9] decided in 1807, on the necessity of the enactment of habeas corpus legislation by Congress:

> . . . they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost . . . [10]

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[4] Liacos, *Rights of Witnesses Before Congressional Committees*, 33 Boston U. Law Rev. 337, 347 (1953).

[5] 1 U. S. 319, 1 Dall. 319, 1 L. Ed. 155.

[6] Id. at 329c.

[7] 1 Stat. at L. 83.

[8] Id. at 554.

[9] 8 U. S. 75, 4 Cranch 75, 2 L. Ed. 554.

[10] Id. at 95.

Possibly an explanation of why the legislators felt their own contempt legislation unnecessary is the force of English precedent. In *Burdett v. Abbott*,[11] decided in 1811 and involving the discipline of a member of Commons, Lord Ellenborough, Chief Justice, acknowledged this assemblage to be a part of a High Court: "The privileges which belong to them seem at all times to have been, and necessarily must be, inherent in them, independent of any precedent."[12] Justice Bayley concurred, apparently perceiving that this did not perhaps explain the independent authority of that branch of Parliament, and cited the *Institutes* of Lord Coke that Commons was also a court with attendant judicial powers.[13] The statement of the Chief Justice, however, was from an age of natural law, and this doctrine in America at the time had its strong proponents. Indeed the Supreme Court apparently thought certain powers adhered by necessity to the courts, even though Congress had enacted the Judiciary Act, for in 1812 Justice Johnson said in *United States v. Hudson*:

> . . . To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others: and so far our courts, no doubt, possess powers not immediately derived from statute . . .[14]

The only action which the legislators took with regard to their own similarly assumed powers was to enlarge in 1817 the legislation of 1798 to include the chairman of a standing committee.[15] Apparently Congress felt, as did the courts of law, that it had implied powers not immediately derived from statute, despite Article I, Section 8, Clause 18 of the Constitution, which gives Congress authority: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." True, Marshall in *McCulloch v. Maryland* noted in 1819 that this is placed among the constitutional powers and not among the limitations,[16] and that the "result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress . . ."[17] This famous statement, in view of Ex parte *Bollman, supra,* cannot stand for the proposition that constitutional powers are self-executing.

The first great case, however, sustaining the inherency of the power in a branch of Congress was *Anderson v. Dunn,* decided in

[11] 14 East's Rep. 1.
[12] Id. at 136.
[13] Id. at 159.
[14] 11 U. S. 32, 34, 7 Cranch 32, 3 L. Ed. 259.
[15] 3 Stat. at L. 345 (February 8, 1817).
[16] 17 U. S. 316, 419, 4 Wheat. 316, 4 L. Ed. 579.
[17] Id. at 420.

1821. Here again Justice Johnson, in support of his opinion, reiterated his position taken in *United States v. Hudson, supra*:

> It is true, that the courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power, without the aid of the statute . . .; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered, only as an instance of abundant caution . . . [18]

The Court declared that of necessity similar power existed as to contempts outside the presence of the House of Representatives as well as before it; but, since American legislative bodies never possessed the omnipotence of the legislative assembly of Great Britain, it was "the least possible power adequate to the end proposed."[19]

Despite, however, the assertions of Justice Johnson as to inherency of the power of contempt to a grant of judicial power, District Judge Peck, ten years later, almost got impeached in Congress for an unpopular use of such authority, although sustained by English precedent.[20] While impeachment failed, Congress, by the Act of March 2, 1831, changed the Judiciary Act to provide that the power of the federal courts "shall not be construed to extend to any cases except the misbehavior of any person . . . in the presence of the said court; or so near thereto as to obstruct the administration of justice . . ."[21] Thus Congress enacted rather definitive legislation for the courts, but not for its own use of the power, unless, of course, a branch of the legislature is itself a court.

The English cases of the time are not very clear on this. In *Stockdale v. Hansard*, a libel case decided in 1839, the defense was that the libel was included in House of Commons proceedings, the publication of which had been privileged by resolution.[22] The plaintiff urged that privilege correctly applied to the whole Parliament and not to each separate branch, for each House might make contradictory declarations of law, and each declaration would equally be the *lex parliamenti*.[23] The Attorney General urged privilege established by necessity, usage, and acquiescence.[24] Lord Denham, C. J., however, accepted the plaintiff's argument[25]; but in doing so he was faced with the previous decision of the Court in *Burdette v. Abbott, supra*. The method of avoiding that decision was to treat

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[18] 19 U. S. 204, 227, 6 Wheat. 204, 5 L. Ed. 242.

[19] Id. at 231. Thus, the punishment of a private citizen, who had attempted to bribe a member, was affirmed.

[20] STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833).

[21] 4 Stat. at L. 487.

[22] 112 Eng. Rep. F. R. 1112, 1115, 9 Ad. & Ell. 1.

[23] Ibid.

[24] Id. at 1145.

[25] Id. at 1153.

the contempt power as being a very special privilege, a creature of necessity apparently, rather than of statute:

> The decision manifestly rests on the privilege to punish for contempt, inherent no doubt in Parliament and in each House . . . but which it only possesses in common with the Courts of Justice . . .[26]

He denounced as a "notion", nevertheless, the argument that if the House alone were not a superior court answerable to none other, then it was a special court whose adjudications were final; and said, even if this were the case, the question of jurisdiction would still arise.[27] Thus the Court did not quite follow the Coke-Bayley thesis[28] that the House of Commons also was a court; but, even so, gave the contempt power of Commons an unexplained position of inherency, supported by a further concession, again for which no authority is cited:

> The Commons of England are not invested with more of power and dignity by their legislative character than by that which they bear as the *grand inquest* of the nation.[29] (Italics supplied.)

In 1845 Lord Coleridge, in *Howard v. Gosset,* repeated this dicta, identifying the source, as follows:

> That the Commons are, in the words of Lord Coke, the general inquisitors of the realm, I fully admit: it would be difficult to define any limits by which the subject matter of their injury can be bounded . . . [30]

Thus, the House of Representatives, although admonished that it had not inherited the power of Commons by *Anderson v. Dunn, supra,* was reassured that it had inherited at least some of this "inherent" power, a power that was inherent, according to the several English judges, because the House of Commons was: a part of a High Court, a court, or the grand inquest of the realm. Congress, however, in 1857 did grant the courts jurisdiction over the offense of contumacy to its committees.[31] It was provided that a witness, who should wilfully default or should refuse to answer any pertinent question, would, in addition to existing penalties, be subject to indictment; and secondly, that no person should be excused on the ground that to answer might tend to incriminate or disgrace him, but that such witness would not be subjected to any penalty,

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[26] Id. at 1162.
[27] Id. at 1168.
[28] See Bayley, in Burdett v. Abbott, 14 East's Rep. 1, 159.
[29] Denham, *Stockdale v. Hansard,* 112 Eng. Rep. F. R. 1112, at 1156. The Court held, nevertheless, that privileges could not be created by resolution, and the following year, Parliament enacted remedial legislation, 3 & 4 Vict., c. 9.
[30] 10 Q.B. 359, 379-80. See also Gosset v. Howard, 10 Q.B. 411, 450-51 (1847).
[31] 11 Stat. at L. 155 (January 24, 1857).

excepting perjury committed while testifying.[32] There followed two trials in the Senate, in which that body given an inch by *Anderson v. Dunn, supra,* took a mile.

The first was the trial of a "Contumacious Witness" in 1860, with Senator Sumner asking to consider the nature of the power:

> . . . The inquiry which it institutes is clearly judicial in character; without, however, any judicial purpose, or looking to any judicial end. The committee is essentially a tribunal, with power of denunciation . . .[33]

Senator Crittenden, however, not without interruption, defended the power:

> . . . The Constitution says . . . all powers that are necessary and proper for carrying these specified powers into effect are hereby granted.
>
> Mr. HALE. I beg pardon. There is no such clause in the Constitution.
>
> Mr. FESSENDEN. Power is given to pass laws for that purpose.
>
> Mr. CRITTENDEN. You may pass all laws that are necessary and proper for carrying the specified powers into execution.
>
> Mr. HALE. Exactly.
>
> Mr. SUMNER. That, I understand, is the point here —that there is no law.

Senator Crittenden answered with a question:

> . . . I come now to a question where the cooperation of the two branches is not necessary. There are some things that the Senate may do. How? According to a mode of its own. Are we to ask the other branch of the Legislature to concede by law to us the power of making such an inquiry . . . ?

but then, he conceded rather abruptly:

> The Constitution has given us no right to institute this particular inquiry. Some say it has not, by any fair interpretation, given us the power. The Senate has decided that point . . .[34]

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[32] Id. at 156. This immunity, however, was partially withdrawn, 12 Stat. at L. 333 (January 24, 1862); and, thus probably afforded the defense of self-incrimination. See Counselman v. Hitchcock, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110 (1892). The statutory provision is now 18 U.S.C.A. 3486.

[33] Cong. Globe, 36th Cong. 1st Sess., 1100. Sumner listed, in addition to impeachment, judging elections and qualifications of members, and punishing them for disorderly behavior, two other cases of the use of the power under the heading, self-protection: (1) the purloining and publishing of a treaty (see *Ex parte* Nugent, Fed. Case No. 10,375, 18 Fed. Cases 471, C.C.D.C. 1848), and (2) inquiries into the conduct of servants of the legislature.

[34] Id. at 1105. Senator Pearce resolved the argument by suggesting the "recognition" given by existing legislation sufficed, id. at 1106.

Then in 1868, there took place the second trial, the only instructive excerpts from which are, as follows:

The Chief Justice. The Sergeant-at-arms will open the court by proclamation.

* * * * * * *

OPENING ARGUMENT OF MR. BUTLER, OF MASSACHUSETTS, ONE OF THE MANAGERS ON THE IMPEACHMENT OF THE PRESIDENT.

Mr. President and Gentlemen of the Senate:

* * * * * * *

> All investigations of fact are in some sense trials, but not in the sense in which the word is used by courts . . . If this body here is a Court in any manner . . ., then we agree that many if not all the analogies of the procedures of courts must obtain . . .[35]

Mr. Butler concluded, however:

> . . . we are in the presence of the Senate of the United States . . . You are a law unto yourselves . . .[36]

It was after these events that Justice Miller rendered his opinion of 1880 in *Kilbourn v. Thompson, supra.* This opinion discusses English cases, saying that, while they are in very little agreement as to the extent of the power, there is little difference as to its origin, that is to say, when authority centered in a single court of Parliament.[37] Whether or not it was necessary, however, for Congress to have inherited such power in aid of legislation, Justice Miller found, for the immediate case, no occasion to decide.[38] He enumerated, nevertheless, certain extra-legislative functions granted in the Constitution to a House of Congress: to discipline its members, to judge their qualifications, the particular role of either House in impeachment; and, as to these, he conceded, answers might be compelled to proper questions in the same manner and by the same means as courts. Beyond this, Justice Miller coldly remarked that he was sure that neither House possessed the general power of making inquiry into the private affairs of citizens. The reason assigned was the doctrine of separation of powers.[39] The Court, however, was faced with the decision of *Anderson v. Dunn, supra.* "Some of the reasoning" (presumably not that to the effect that courts inherently possess the contempt power) of Justice Johnson was overruled, principally the implication that there is, in each House of Congress, a general power of

[35] TRIAL OF ANDREW JOHNSON, 3 vols. (Gov't Printing Office 1868), Vol. 1, 87, 89.

[36] Id. at 90.

[37] Kilbourn v. Thompson, 103 U. S. 168, 183. Also cited, id. at 187-9: Kielley v. Carson, 4 Moo. P. C. 63 (1841), that the investigatory power was not necessarily incident to the legislative function.

[38] Id. at 189.

[39] Id. at 190.

punishing for contempt.[40] That *Stockdale v. Hansard, supra,* was used to overrule this implication is somewhat amazing, but perhaps Justice Johnson was misled by the headnotes. In any event, he refused to conceive of members of Congress in the role of grand inquisitors.[41]

That Congress had not the general power of inquiry was unfavorably received, however. Woodrow Wilson wrote in 1884:

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees . . . The informing function . . . should be preferred even to its legislative function.[42]

The difficulty with this is, that there is more in the Constitution to sustain the existence of this function in the executive, rather than in the legislative department. The informing function is provided for in Article II, Section 3 of the Constitution, to wit, that the President "shall from time to time give to the Congress information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." The precedent and necessity arguments might therefore be used as an apologia for executive use of judicial powers, sufficiently broad as the informing function implies. Perhaps, however, the Supreme Court would find occasion to interfere, despite the power of that department, as it has occasionally interfered with the legislative, despite the power of that body.

This is not to say that Congress is unable to create an adequately staffed executive commission to aid in its joint function of legislation. This was established in *Interstate Commerce Commission v. Brimson,* wherein it was said in 1894:

> . . . All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time . . . cannot be obtained, . . . other-

[40] Id. at 196-200. And see headnote 10, id. at 169. Justice Miller subsequently had occasion in *United States v. Ambrose,* 108 U. S. 336, 341, 2 S. Ct. 682, 27 L. Ed. 746 (1883), to avoid an attack on the courts' use of implied powers; *United States v. Ambrose* (Cir. Ct. S.D., Ohio, 1880), 2 Fed. 556, 557.

[41] "The public has been much abused, the time of legislative bodies uselessly consumed and the rights of the citizen ruthlessly invaded under that now familiar pretext of legislative investigation . . . Courts and grand juries are the only inquisitions into crime in this country. I do not recognize that Congress is the *grand inquest* of the nation." Justice Miller as cited by TOURTELLOT, THE ANATOMY OF AMERICAN POLITICS, 103 (1950).

[42] WILSON, CONGRESSIONAL GOVERNMENT, 303 (1885). In 1941 the Attorney General rendered an opinion, 40 Op. A.G. 45, which, in view of the reluctance of the courts to interfere in political matters, partially closed the doors of the Government to inquiry, if the executive feels such information would be against the public interest, id. at 49. Impeachment, of course, remains a weapon of Congress.

> wise than through the instrumentality of an administrative body . . .[43]

The Court goes on to say that such an agency could not, under the American system, be vested with authority to compel obedience to its orders by fine or imprisonment. The decision, however, recognizes that the House of Congress, in those *exceptional* instances enumerated in *Kilbourn v. Thompson* "and in cases that may involve the existence of those bodies," does have such power.[44] Thus the power of congressional committees, as created by resolution, was again somewhat narrowly confined, at least for the moment.

In re *Chapman,* however, was decided in 1897. In that case the Supreme Court upheld as constitutional the legislation of 1857;[45] and while it involved an investigation by the Senate of certain of its members, the Court used some rather general language:

> . . . We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, . . .

but adds:

> in cases to which the power of either House properly extended . . .[46]

Obviously, this latter phrase was intended by the Court to mean the instances enumerated in *Interstate Commerce Commission v. Brimson, supra.* The Court was concerned with the specific exercise of the power by a single House and not with the abstract proposition of the implied power of Congress to investigate in aid of its legislative function.

Indeed, to suggest that the House of Representatives could utilize the power even in connection with a possible impeachment, was to the Supreme Court of the time, *lese majesty.* The suggestion was made in *Marshall v. Gordon,* decided in 1917, and Chief Justice White toyed with the idea and opined that such deviation would: (1) for the House, be an Icarian role, (2) overrule In re *Chapman,* (3) be subject to constitutional limitations.[47] That there were no limitations on any exercise of the implied power by the courts, White, however, was equally certain; for the following year in *Toledo Newspaper Co. v. United States,* a contempt of court case, he affirmed, under similar facts, the punishment of a contemnor, despite the Act enacted just after the Peck impeachment trial in

[43] 154 U. S. 447, 474, 14 S. Ct. 1125, 38 L. Ed. 1047. For Commonwealth use see Finer, *Congressional Investigations: The British System,* 18 U. CHI. LAW REV. 421, 521 (1951).

[44] I.C.C. v. Brimson, supra note 43 at 485; see also Sumner's enumeration, Cong. Globe, 36th Cong. 1st Sess., 1100.

[45] Act of January 24, 1857, 11 Stat. at L. 155.

[46] 166 U. S. 661, 671-72, 17 S. Ct. 677, 41 L. Ed. 1154.

[47] 243 U. S. 521, 547-48, 37 S. Ct. 448, 61 L. Ed. 881; these limitations are identifiable as being those found in the Sixth Amendment, cf. *Toledo Newspaper Co. v. United States,* note 48, *post.*

1831.[48] The *Toledo* case evoked criticism in 1924 from Professors Frankfurter and Landis, as to the concept of inherent power in the courts.[49]

Various scholars, however, were myopic to the legislative use of the power, a half-brother, whose same ugliness, although perceived, was felt endurable. Frankfurter justified the ugliness on the Wilsonian ground.[50] C. S. Potts took care after the decision in 1924 of Ex parte *Daugherty*[51] by a federal district court to the effect that the *Teapot Dome* investigation was an extra-judicial attempt by the Senate to try the former Attorney General at the bar of public opinion, not to criticize this decision, but to attack *Kilbourn v. Thompson,* the source of theory that the power of a single House of Congress was in any way limited. Potts urged that Lord Coke and the English decisions which quoted his *Institutes* are doubtful authority for the proposition (which he said was adopted by Justice Miller) that the *House of Commons* was a court, in that the Institutes were yet another means used by Coke to assert the supremacy of Commons.[52] Professor Landis also directed his attack against Justice Miller (Landis mistakenly citing Potts that the "assertion that *Parliament* was a judicial body is in itself one that scholars have vigorously denied"[53]), professing failure to understand how Miller overlooked the conclusion, "not only one of history but also one of law," i.e., Coleridge, in *Howard v. Gosset, supra,* citing Coke that the House of Commons is a grand inquest.[54]

Professor Landis then went on to list examples wherein a single branch of a legislature had exercised investigatory powers. While the position is doubtful that a prescriptive right may be obtained by a House of Congress in a constitutional power, the Supreme Court, nevertheless, in *McGrain v. Daugherty,*[55] the decision that overruled in 1927 Ex parte *Daugherty, supra,* did rely on American legislative precedent. Cited from history was the trial

[48] 247 U. S. 402, 38 S. Ct. 560, 62 L. Ed. 1186; Act of March 2, 1831, 4 Stat. at L. 487.

[49] Frankfurter and Landis, *op. cit.* supra, note 1.

[50] *Hands off the Investigations,* 38 NEW REPUBLIC 329, 330 (1924); and see Wilson, *op. cit.* supra, note 42.

[51] 299 F. 620 (S.D., Ohio, W.D.).

[52] Potts, *Power of Legislative Bodies to Punish for Contempt,* 74 U. PA. LAW REV. 691, 692-95 (1926).

[53] Landis, *Constitutional Limitations on the Congressional Power of Investigation,* 40 HARV. LAW REV. 153, 159 (1926). Cf. HASKINS, ENGLISH REPRESENTATIVE GOVERNMENT (1948), at p. 13: ". . . the king's parliament in the opening days of the fourteenth century is more in the nature of a high court of justice than a deliberative or legisative assembly. For it is the council, with the king as presiding officer, which is the heart and core of the medieval parliament—a council of ministers, judges, and experts in the law."

[54] Landis, *op. cit.* supra, note 53 at 164, and see Howard v. Gosset, 10 Q.B. 411.

[55] 273 U. S. 135, 47 S. Ct. 319, 71 L. Ed. 580. One Canadian case is cited, *Ex parte* Dansereau (1875) 19 L. C. Jur. 210, id. at 166-67. That decision, in that the North America Act intervened, doesn't conflict with *Kielley v. Carson,* 4 Moo. P. C. 63 (1841).

of the *Contumacious Witness, supra,* the debate over which resolved the fact that congressional "recognition" of the power sufficed,[56] and that James Madison, a constitutional draftsman, voted, as a member of Congress in 1792, for an inquiry into the St. Clair Expedition. Madison, however, also became Secretary of State, and Marshall presumably was not impressed, if the argument was made in *Marbury v. Madison,*[57] that Madison was *arbiter legis constitutionalis.* Cited also were the generalities of *Anderson v. Dunn, supra,* and *Kilbourn v. Thompson,* which was not overruled.[58] The language of In re *Chapman, supra,* as to the "inherency" of the power to aid "constitutional" and "legitimate functions" was also used, even while it was acknowledged that such language was probably not intended to include the legislative function.[59] There followed an analysis of *Marshall v. Gordon, supra,* somewhat inharmonious with the immediate opinion, and of several state cases, somewhat inharmonious with the *Marshall* case.[60]

Despite the insistence of the Court in *McGrain v. Daugherty* that the power of inquiry not only was incident to the legislative function, but also that the incident needed for its sanction apparently, mere recognition by Congress rather than specific legislation therefor, the problem of the powers of a committee and of a single House of Congress continued to haunt the Supreme Court. In 1928 *Reed v. County Commissioners*[61] was decided. There, a Senate committee sought, through district court process, certain ballots and boxes, in connection with a review of the election of a senator. The committee claimed that the court could, under the Judicial Code,

[56] Id. at 162-64. See argument of Senator Pearce, Cong. Globe, 36th Cong. 1st Sess., 1100.

[57] 5 U. S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).

[58] McGrain v. Daugherty, 273 U. S. 135, 168-171, 47 S. Ct. 319, 71 L. Ed. 580.

[59] Id. at 171-73.

[60] Id. at 173. Citing Marshall v. Gordon, 243 U. S. 521, is as complex as failing to overrule Kilbourn v. Thompson. Possibly the Court failed to perceive the inconsistency in that these cases did not conflict with its awareness that the courts were using this same power without authorization. Perhaps also, Justice Miller can be criticized on this ground, and not that which Landis chose: that the Houses of Congress possessed the power "incidentally," while the courts apparently did not. Cf. Morgan, *Congressional Investigations and Judicial Review—Kilbourn v. Thompson Revisited,* 37 CALIF. LAW REV. 556 (1949). State cases cited in *McGrain v. Daugherty,* 273 U. S. 135, 165-66, were: *Burnham v. Morrissey,* 14 Gray 226 (Mass. 1859), wherein it was held that the courts could *review* the proceedings of a single house in that it was merely a branch of the legislature; thus, taking up the "notion" rejected in Stockdale v. Hansard, 112 Eng. Rep. F. R. 1112 at 1168; *Wilckens v. Willet,* 40 N. Y. (1 Keyes) 521 (1864), which contains an admirable summation as to the nature of the power: ". . . In the earlier history of the country from which our institutions, both of law and legislation are principally derived, judicial and legislative functions existed in and were exercised by the same body. And when they were afterwards separated . . ., the legislative body necessarily retained a sufficient amount of the judicial power to enable it to investigate . . ."; and *People v. Keeler,* 99 N. Y. 463, 2 N.E. 615, 624-25 (1885), also to the effect that the power is judicial.

[61] Reed v. County Com'rs. of Delaware County, Pa., 277 U. S. 376, 48 S. Ct. 531, 72 L. Ed. 924.

take jurisdiction in any civil action brought by authorized governmental agents. The Court, however, questioned whether "the Senate alone may give that authority"[62] (even in matter of peculiar concern to it), but was able to avoid the question by finding that the Senate resolution had not authorized the action. The following year in *Barry v. United States,* another Senate election investigation, the Court indicated that the judicial power of the Senate in such matters, at least before its own bar, was very strong, "beyond the authority of any other tribunal to review",[63] adding, however, a postscript:

> . . . if judicial interference can be successfully invoked, it can only be upon a clear showing of . . . a denial of due process . . .[64]

The Supreme Court was not so ambivalent as to the power of the courts, despite statutory interference, for also in 1929, it decided *Sinclair v. United States,* a contempt of court case, and said:

> Toledo Newspaper Co. v. United States . . ., adjudged the company guilty of contempt by publishing, in the city where the court was sitting, articles concerning a pending equity case. Counsel there maintained that it was not . . . found that any of the publications was . . . read by the judge and, therefore, he lacked power to punish under section 268, Judicial Code . . . Replying this court, through Mr. Chief Justice White, said:
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> Clarified by the matters expounded and the ruling made in the Marshall Case [Marshall v. Gordon . . .], there can be no doubt the provision [section 268] conferred no power not already granted and imposed no limitations not already existing . . .[65]

In short, the Court that handed down *McGrain v. Daugherty, supra,* and *Sinclair v. United States,*[66] also a congressional contempt case arising out of the *Teapot Dome* investigation, felt that there existed in the courts and, to a less degree, in Congress an inherent power to punish for contempt within the limits of common law, but not within the limits of the Constitution, except possibly the necessity of legislation recognizing the power; legislation which, however, could impose no limitations. So also in *Jurney v. MacCracken,* involving an investigation of certain senators and de-

[62] Id. at 388. The statute now reads: "expressly authorized to sue by Act of Congress," 28 U.S.C.A. 1345.

[63] Barry v. United States *ex rel.* Cunningham, 279 U. S. 597, 613, 49 S. Ct. 452, 73 L. Ed. 867.

[64] Id. at 620.

[65] 279 U. S. 749, 763, 49 S. Ct. 471, 73 L. Ed. 938.

[66] 279 U. S. 263, 49 S. Ct. 268, 73 L. Ed. 692 (1929). This case, by its emphasis that the *Teapot Dome* investigation was initiated under joint resolution and involved the public domain, see Article IV, Section 3, Clause 2 of the Constitution, seems to be saying that such might be the sole concern of Congress. Other clauses, however, contain similar wording.

cided in 1935 as to a direct contempt proceeding in the Senate rather than statutory resort to the courts, the Supreme Court reiterated that the 1857 statute did not impair congressional contempt power.[67] And likewise in *Seymour v. United States*, a circuit court held in 1935 that not only was legislation ineffective as to such implied power, but also Congress could not "limit the future exercise of that constitutional power."[68]

If this ruling is correct, the abuses of use of inherent power were beyond the power of Congress to correct by legislation. It must be observed, however, that the matter before the court in *Seymour v. United States* was an investigation by the Senate of the campaign expenses of its members. This would seem to be within the sole jurisdiction of that body and quite obviously, were legislation passed controlling such an investigation, this would conflict with Article I, Section 5, Clause 2 of the Constitution, that "Each House may determine the Rules of its Proceedings." Legislation in this instance, and other similar instances stated in *Kilbourn v. Thompson*, would impose the will of the other House, the President, and the courts upon matters which the Constitution made the sole concern of a single branch of Congress. So also is impeachment a matter for the determination of the Senate. Indeed, in *Ritter v. United States*, a Court of Claims case decided in 1936 and arising out of the impeachment of a federal judge, that court was of the opinion that the Senate should act without any other tribunal having "anything to do with the case."[69] The state cases relied upon by the court did not, however, sustain its conclusion that inquiry as to jurisdiction is forbidden.[70]

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[67] 294 U. S. 125, 55 S. Ct. 375, 79 L. Ed. 802. Justice Brandeis cited, *id.* at 149, Anderson v. Dunn, 19 U. S. 204, in support of his opinion that a House of Congress has an essential privilege to punish a private citizen's attempt to bribe a member and said that the *Marshall* case "must be read in the light of the particular facts." For the facts see Marshall v. Gordon, 243 U. S. 521, 530-32. Under these facts, where the contempt was incurred not only in a newspaper article, but also, as compared to *Toledo Newspaper Co. v. United States*, 247 U. S. 402, before the congressional tribunal, Brandeis apparently felt the slanderous attacks were justified.

[68] 77 F. 2d 577, 579 (C.C.A. 8th).

[69] 84 Ct. Cl. 293, 296, *cert. denied* 300 U. S. 668, 57 S. Ct. 513, 81 L. Ed. 875 (1937).

[70] Id. at 297-98: *State* ex rel. *Trapp v. Chambers*, 96 Okla. 78, 220 Pac. 890 (1923), wherein it was held that, since impeachment was undefined by the state constitution, the legislature might suspend a governor, *pendente lite*, a ruling hardly compatible with Article II, Section 4 of the Federal Constitution that civil officers shall be removed on conviction; *Ferguson v. Maddox*, 114 Texas 85, 263 S.W. 888, 893 (1924), wherein it was said: "The courts, in proper cases, may always inquire whether any department of the government has acted outside of and beyond its constitutional authority. The acts of the Senate, sitting as court of impeachment, are not exempt . . ."; *Ferguson v. Wilcox* 119 Tex. 280, 28 S.W. 2d 526, 533 (1930), to the same effect; and *People ex rel. Robin v. Hayes*, 82 Misc. 165, 143 N. Y. Supp. 325, 330 (1913), where it was said re the duty of a court with reference to collateral inquiry as to impeachment proceedings: "It has no jurisdiction to inquire into the sufficiency of charges . . . nor, I take it, whether the proceedings . . . were properly conducted, unless . . . constitutional guaranties are . . . ignored."

It therefore appears that the Senate and the House are almost beyond the reach of the courts in matters of their express jurisdiction. But the question arises: Is there not jurisdiction in the courts when Congress acts under the implied power of inquiry in aid of legislation? Is not this implied power a matter of some concern to the executive and the judicial branches of government; i.e., if legislation itself is subject to a system of checks and balances, is not an implied power in aid thereof, subject to the same system? Whenever Congress has delegated such power, the courts have always required that the executive agency designated to carry out that inquiry, act within standards and afford fair rules of procedure, although not necessarily judicial.[71] If the investigatory power of Congress on matters, the subject of legislation, is viewed as "inherent," however, albeit implied, it is indeed not only above the requirement of fair play, but also beyond the power of Congress to limit it. So also until 1941, the courts felt that their "inherent" power of contempt was beyond the control of Congress despite the legislation of 1831. One hundred and ten years elapsed between that legislation and *Nye v. United States,* a decision largely based upon the article in which Frankfurter and Landis had questioned the inherency of power.[72] The Supreme Court in that case spoke as follows:

> In 1918 this Court in Toledo Newspaper Co. v. United States, . . . stated that "there can be no doubt" that . . . the Act of March 2, 1831 "conferred no power not already granted and imposed no limitations not already existing"; and that it was "intended to prevent the danger by reminiscense of what had gone before of attempts to exercise a power not possessed which . . . had been sometimes done in the exercise of legislative power." The inaccuracy of that historic observation has been plainly demonstrated.[73]

Thus was overruled the concept of "inherency" of the power of the courts, and thus was removed an obstacle to the courts' obvious inclination to limit the "incidental" power of Houses of Congress in matters beyond their singular jurisdiction. The hero, who was also the villain of the piece, was Dean Landis, who, with Justice Frankfurter, broke the power in the courts with their article

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[71] In *Morgan v. United States*, 304 U. S. 1, 14-15, 58 S. Ct. 773, 82 L. Ed. 1129 (1938), Chief Justice Hughes said: "The first question goes to the very foundation of the action of administrative agencies intrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the Legislature. The vast expansion of this field . . . is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasijudicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play."

[72] Frankfurter and Landis, *op. cit.* supra, note 1.

[73] 313 U. S. 33, 47, 61 S. Ct. 810, 85 L. Ed. 1172.

in 1924,[74] and subsequently enhanced the power in the Congress.[75] While the power of inquiry may exist in Congress as an aid to legislation, it would seem that no committee thereof possesses this power without its delegation from Congress. Mere "recognition" would seem not enough. It became timely, therefore, in 1941 for *McGrain v. Daugherty* to be abandoned, as was *Toledo*.[76]

It became more timely for Congress to legislate into being fair play for its witnesses. And while Article I, Section 5, Clause 2 implies a limitation on a limitation, even here, judicial inquiry is not foreclosed. For ours is not only a government of laws but also of men, whose motives must be scrutinized. And even our great decisions are also literature, subject to review.

SOME CURRENT PROBLEMS IN URANIUM MINING LAW*

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The problems of uranium mining law undoubtedly began to arise on September 13, 1945 when President Truman responded to the explosions at Hiroshima and Nagasaki by an Executive Order which withdrew from entry all public lands which contained what he termed radio active minerals. This order remained in effect until the enactment of the Atomic Energy Act of August 1, 1946. Uranium claims were located during that period but, so far as I know, the Bureau of Land Management has had no occasion to pass upon their validity.

In this area the lawyers are primarily concerned with the legal steps to be taken in locating and acquiring a valid possessory title to a mining claim containing, or thought to contain, deposits of uranium bearing ores which may be mined and sold at a profit.

While it may be said to be academic at the present time, due to the interpretations placed upon the Atomic Energy Act by the Atomic Energy Commission, I imagine a Court would deliberate for some time if the question were properly raised, in whom the legal title rests to uranium ores mined from claims located upon the Public Domain subsequent to August 1, 1946.

Sub Section 5 (b) (7) Atomic Energy Act reads in part:

> All Uranium, thorium and all other metals determined pursuant to paragraph (1) of this subsection to be peculiarly essential to the production of fissionable material contained in whatever concentration in deposits in the

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[74] Frankfurter and Landis, *op. cit.* supra, note 1.

[75] See Landis, *op. cit.* supra, note 53, and Franfurter in United States v. Rumely, 345 U. S. 41, 73 S. Ct. 543, 97 L. Ed. 770 (1953).

[76] Toledo Newspaper Co. v. United States, 247 U. S. 402.

*This is an adaptation of a speech made by Mr. Adams in Grand Junction on June 1, 1954.