Judicial Review: Political Reality and Legislative Purpose: The Supreme Court's Supervision of Congressional Investigations

*Martin Shapiro**

Mr. Shapiro takes to task the Supreme Court's requirement of "legislative purpose" of congressional investigating committees and the correlative presumption in favor of such purpose. Besides being based on the false view that the three branches of our Government are totally separate in function, these doctrines distort the Court's traditional role as the balancing power between individual freedom and the interests of society. After analyzing pertinent decisions, the author advances several methods by which the Court can free itself of these limitations.

I. Introduction

The Supreme Court has long claimed the power to exercise judicial review over the investigatory activities of Congress. The most severe limitation the Court has imposed is the requirement of legislative purpose. Investigations must be conducted for the purpose of aiding Congress in making the laws. But the Court has also introduced the doctrine of presumption of legislative purpose. The Justices will presume that the investigating committee and the Congress which authorized it had a legislative purpose in pursuing the inquiry.

It will be argued here that these two doctrines are completely interdependent; once legislative purpose was required, presumption was bound to follow. It will also be argued that the two taken together are so in conflict with political reality that they cut the Court off from any effective supervision of actual investigative practice. Therefore, a new approach is suggested which would abandon the purpose and presumption doctrines in favor of a judicial acknowledgment of the real purposes and functions of congressional inquiries. Such an approach would allow the Supreme Court to regain contact with the practical world of politics and thus permit it to impose more than theoretical constitutional limitations on investigations, particularly on those which infringe upon first amendment freedoms.

II. The Presumption of Legislative Purpose

The notion of legislative purpose first became significant in *Kilbourn v. Thompson*.[1] The investigation in question was aimed at determining the

*Instructor, Department of Government, Harvard University.

1. 103 U.S. 168 (1880).

causes of the failure of Jay Cooke's financial house. The Court's reasoning was simple, or rather simplistic, enough. The Constitution "has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative and judicial departments . . . ."[2] Inquiry into the propriety of private business transactions was clearly judicial since it was designed to establish wrongdoing by individuals.[3] And such investigations "could result in no valid legislation on the subject to which the inquiry referred."[4] Thus the investigation was judicial rather than legislative in character and, therefore, exceeded the powers of the House of Representatives. By insisting that Congress did not have "the general power of making inquiry into the private affairs of the citizen,"[5] examining the committee's authorizing resolution for signs of congressional intent, and disapproving an investigation which lacked legislative purpose, *Kilbourn* set the tone for the whole subsequent body of constitutional litigation on congressional inquiries.

But if we are to speak of legislative purpose with some hope of actual communication, it is vital to know whether "legislative" means pertaining to lawmaking or pertaining to the legislature, *i.e.*, Congress. In the one instance "legislative purpose" means for the purpose of making law, in the other, for any purpose of Congress, lawmaking or otherwise. But according to Justice Miller, all Washington is divided into three parts, a legislative which makes laws, an executive which administers them and a judiciary which decides individual cases under them. The three are clearly defined and mutually exclusive. Thus, if the *Kilbourn* investigation is judicial, ipso facto, it is not legislative, and if not legislative, not for Congress. Or, looked at another way, if the investigation is not concerned with making laws, it is not legislative, if it is not legislative it must be executive or judicial. Therefore, it must be for the President or the courts, not for Congress. Justice Miller's constitutional theories made it unnecessary for him to define precisely the word "legislative" because for him the only legitimate purpose of Congress was the purpose of making law. Thus *Kilbourn v. Thompson* tended to obscure the problem of legislative purpose at the same time that it introduced the doctrine.

The next important case was *McGrain v. Daugherty*.[6] While the investigation at issue concerned malfeasance in the Justice Department, Daugherty was a private citizen. The committee had evinced a desire to ask him about private banking transactions.[7] Nor did any mention of intended

2. *Id.* at 191.
3. *Id.* at 193.
4. *Id.* at 195.
5. *Id.* at 190.
6. 273 U.S. 135 (1927).
7. Dimock, *Congressional Investigation Committees,* 47 JOHN HOPKINS UNIV. STUDIES IN HISTORICAL & POLITICAL SCIENCE 9, 138 (1929).

legislation appear in the authorizing resolution which was aimed at verifying the failure of the Attorney General to perform his sworn duties. Obviously strict observance of the *Kilbourn* precedent might have put the investigation in danger. The Court did not want to do that. There had been a barrage of criticism directed against the restraints which *Kilbourn* had placed on congressional inquiries.[8] This particular investigation concerned Teapot Dome and had aroused tremendous public reaction. And it primarily involved not one part of government examining private citizen Daugherty, but one part of government examining another.

The simplest road for the Court would have been to admit that Congress had always investigated not only for the purpose of making laws, but for many other purposes, among them the exposure of governmental wrongdoings of concern to the nation. Unfortunately, the Court debarred itself from this politically realistic approach. For, in constructing an affirmative answer to the question of whether Congress had any investigatory power at all,[9] it adopted the simplistic constitutional rhetoric of *Kilbourn.* Congress had the power to investigate because 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 . . . ."[10] By relying on this notion of Congress as creating the law, the whole law and nothing but the law, Justice Van Devanter made it impossible to approve the investigation on the grounds that it was in support of a legitimate administrative, rather than lawmaking, function of Congress.

But Justice Van Devanter was unable to find any declaration of legislative purpose (*i.e.,* lawmaking purpose) in the authorizing resolution, not surprising since none was intended. Therefore, he was driven to argue that if the subject matter was appropriate for investigation, a presumption of legislative purpose was established even though no such purpose was stated in the authorizing resolution. "An express avowal of the object would have been better; but in view of the *particular subject matter* was not indispensable."[11] In short, where no legislative purpose was evident, the Court would by presumption inject the purpose necessary to meet its self-invented requirement. Then the "particular subject matter," *i.e.,* that Congress might have passed laws in this area if it had had a mind to, is dragged in to support the presumption which was necessary in the first place because the Congress obviously had not had a mind to. The

8. See Landis, *Constitutional Limitations on the Congressional Powers of Investigation,* 40 HARV. L. REV. 153 (1926); Potts, *Power of Legislative Bodies To Punish for Contempt,* 74 U. PA. L. REV. 691 (1926); Frankfurter, *Hands Off the Investigations,* 38 NEW REPUBLIC 329 (1924).

9. The issue had been deliberately left open in *Kilbourn.*

10. McGrain v. Daugherty, 273 U.S. 135, 174-75 (1927).

11. *Id.* at 178. (Emphasis added.)

presumption doctrine represents an admission by Van Devanter that if he really applied the requirement of legislative purpose suggested in *Kilbourn*, and confirmed in his own opinion, he would be forced to strike down an investigation which seemed legitimate to the Congress, the public and somehow to the Court itself.

Kilbourn and *McGrain* had only dealt with the question of whether Congress as a whole had a legislative purpose in authorizing a given investigation. In *Sinclair v. United States*[12] a contumacious witness challenged the legislative purpose, not of Congress in establishing an investigating committee, but of the committee in asking certain questions. Since this investigation was also part of the Teapot Dome affair, like *McGrain* its most obvious features were oversight of administrative activity and public exposure of malfeasance. Therefore, in order to fit it in neatly under the legislative purpose concept, the Court was forced to resort again to the presumption approach. Justice Butler picked up the hint in *McGrain* that an express avowal of purpose in the authorizing resolution was desirable. He held that if the subject matter was appropriate, and the resolution stated a legislative purpose, a presumption of purpose would be established.

Indeed it would, *for Congress*, which had met the *McGrain* test perfectly by picking a subject matter already declared appropriate by Justice Van Devanter and specifically stating a legislative purpose in its authorizing resolution. But why should these two factors establish a presumption *for a committee* of Congress. *Sinclair* really fails to distinguish between Congress and its committees and borrows for the latter a doctrine of presumption established for the former. We are now two steps removed from reality. And the second step, like the first, is taken because the Court, faced with investigatory activity which it feels legitimate but which does not meet its nothing but the law vision of Congress, must somehow drag lawmaking in by the back door.

United States v. Bryan[13] took a third step by presuming the appropriateness of the subject matter and thus requiring only a declaration of purpose in the authorizing resolution. *Bryan* makes a nice one-two combination with *McGrain*. If the subject matter in any way suggests lawmaking but the resolution does not, play subject matter. If the subject matter does not but the resolution does, play resolution. The final step was taken in *United States v. Josephson*[14] where the presumption of committee purpose was made almost completely irrebuttable. A declaration of purpose in the

12. 279 U.S. 263 (1929).

13. 72 F. Supp. 58 (D.D.C. 1947), *rev'd per curiam on other grounds*, 174 F.2d 525 (D.C. Cir. 1949), *rev'd on other grounds*, 339 U.S. 323 (1950). The court of appeals did not consider the issue and the Supreme Court specifically refused to decide this and other questions not passed on by the court of appeals.

14. 165 F.2d 82, 89 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948).

authorizing resolution was held to establish conclusively such purpose "regardless of any statement by the Committee or its members intimating to the contrary." Here the combination is with *Sinclair*. Disregard any distinction between Congress and committee so that the presumption worn by one will clothe the other. And when the defendant bumptiously calls your attention to the distinction, castigate his rudeness by refusing to give any weight to evidence countering the presumption.

A weakening in the presumption doctrine was heralded by Judge Edgerton's dissenting opinion in *Barsky v. United States*[15] which suggested that the courts should examine the actual purposes of Congress and its committees.[16] A further sign that the courts might be abandoning their uncritical acceptance of legislative purpose was the failure of Justice Frankfurter in *United States v. Rumely*[17] to accept the government's contention that an investigation of certain book sales had a valid legislative purpose because it was necessary to determine whether such sales constituted a device for avoiding the provisions of the Lobbying Act of 1946.[18] And *United States v. Icardi*[19] was the first case since *Kilbourn* which directly held that an investigation lacked legislative purpose. It ruled that the presumption of innocence due the defendant outweighed the presumption of legislative purpose. Therefore, the government had to prove legislative purpose. Much dissatisfaction with the presumption of legislative purpose was also evidenced in Justice Warren's opinion in *Watkins v. United States*.[20] Nevertheless, the cycle of cases from *Watkins* through *Barenblatt v. United States*[21] to *Wilkinson v. United States*[22] and *Braden v. United States*,[23] which will be discussed at some length below, continued not only to demand legislative purpose, but returned to the presumption that it existed in the face of an increasingly general conviction that the investigating committees concerned are not primarily motivated by the desire to make law.

Although the presumption doctrine seems to have been occasionally weakened, the courts continue to cling to the requirement of legislative purpose. They are then driven back willy-nilly to the presumption doctrine in one form or another in order to overcome the difficulties most investigations have in living up to that requirement. Since these difficulties constantly arise, it seems obvious that there must be some deviation between

15. 167 F.2d 241 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948).
16. *Id.* at 252.
17. 345 U.S. 41 (1953).
18. 60 Stat. 839, 2 U.S.C. §§ 261-70 (1958).
19. 140 F. Supp. 383 (D.D.C. 1956).
20. 354 U.S. 178 (1957). But the Chief Justice does support the requirement of legislative purpose. *Id.* at 199; Quinn v. United States, 349 U.S. 155, 161 (1955).
21. 360 U.S. 109 (1959).
22. 365 U.S. 399 (1961).
23. 365 U.S. 431 (1961).

the Supreme Court's constitutional theory and the realities of American political practice. It is to those realities that we now turn.

III. THE REALITY

A. The Division of Powers

We have seen that underlying the doctrine of legislative purpose is the vision of a tripartite government in which each branch does one thing and one thing only; the Congress makes law, the executive administers it, and the courts judge individual cases under it. That this vision is fundamentally incorrect is hardly a new or startling revelation. The judicial function is, for instance, certainly not the monopoly of the judicial branch. Even leaving aside the independent regulatory commissions and their mixed bag of quasi-powers, it has been recognized for many years that executive agencies constantly perform judicial tasks.[24] And it is congressional investigations themselves which, when realistically examined, show the judicial functions of Congress.[25]

Nor is the administrative process left entirely in the hands of the executive. In spite of a long train of self-limiting ordinances, the federal courts still exercise a wide supervision over federal administration if for no other reason than that judicial and administrative functions are so inextricably mixed in the executive branch that the courts cannot supervise one without supervising the other.[26] The Congress has always participated intimately in the administrative process through its power to specify the minutest details of administrative organization and expenditure.[27] The increasingly popular legislative veto device has allowed Congress to reserve to itself the final say on such administrative questions as where a specific barracks will be built or to whom a given piece of surplus property will be sold.[28] And through the committee-bureau relationship, one of the most intimate in Washington, congressional committees are constantly involved in the everyday business of the executive departments.[29] Here again investigations themselves have been one of Congress' major administrative tools.[30]

---

24. See CHAMBERLAIN, DOWLING & HAYS, THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES (1942).

25. See pp. 545-46 *infra*.

26. See the series of articles by Jaffe: 67 HARV. L. REV. 1105 (1954); 69 HARV. L. REV. 239 (1955); 69 HARV. L. REV. 1020 (1956); 70 HARV. L. REV. 953 (1957).

27. See WILLOUGHBY, PRINCIPLES OF PUBLIC ADMINISTRATION 9-35 (1927).

28. See Cooper, *The Legislative Veto: Its Promise and Its Perils*, 7 PUBLIC POLICY 128 (1957); Schauffer, *The Legislative Veto Revisited*, 8 PUBLIC POLICY 296 (1958).

29. See GRIFFITH, CONGRESS, ITS CONTEMPORARY ROLE 50, 59, 158 (3d ed. 1961); FREEMAN, THE POLITICAL PROCESS: EXECUTIVE BUREAU–LEGISLATIVE COMMITTEE RELATIONS (1955).

30. see pp. 542-44 *infra*.

Finally, the executive branch has for many years been the source of the bulk of legislation eventually passed by Congress. No modern President is without *his* legislative program for whose passage the electorate increasingly holds him, not Congress, responsible. A recent commentator awards the President the title of "Chief Legislator."[31] Writings on the Presidency continually stress the role of the executive in the lawmaking process.[32] And the debate over "judicial modesty" and the democractic propriety of judicial review rests on the realization that the Supreme Court's power to declare acts of Congress unconstitutional projects the judiciary as well as the Presidency into the lawmaking sphere.[33]

Indeed the increasing tendency of legislative bodies to lose parts of their lawmaking functions, particularly to the executive, has led one of the most respected students of constitutional government to argue that

> the political function of representative assemblies today is not so much the initiation of legislation as the carrying on of popular education and propaganda and the integration and co-ordination of conflicting interests and viewpoints.[34]

But this emphasis on the propaganda and public education functions of legislative chambers is not simply a reflection of the decline in the other powers of such bodies. Indeed, emphasis on direct congressional contact with the public is part of Congress' struggle to maintain its other powers against executive encroachment. Perhaps the greatest power of the modern President is his position in the public eye. His capacity for making news, his access to the mass media and consequent opportunity to claim for himself the role of "Voice of the People,"[35] have constantly enhanced his power over Congress in both legislative and administrative matters. In this context, Congress' ability to exercise any of its traditional functions becomes increasingly dependent on its own ability to attract the public eye and build up a stock of public attention to counterbalance that of the President.

In a nation in which mass public support has increasingly become the coin of the political market place, the constitutional balance of power between the three great divisions of government is more and more dependent on the ability of each to recruit general support. No matter how one visualizes the parceling out of the lawmaking, administrative and judicial functions, it is obvious that the Constitution intended that each branch have a self-preservation function, for the government of the founding fathers was predicated on the continuous existence and at least semi-

31. See ROSSITER, THE AMERICAN PRESIDENCY 28 (rev. ed. 1960).

32. See BINKLEY, THE MAN IN THE WHITE HOUSE 161-84 (1958); CORWIN, THE PRESIDENT, OFFICE AND POWERS 263 (1957); NEUSTADT, PRESIDENTIAL POWER 5-6, 103 (1960).

33. See HAND, THE BILL OF RIGHTS 39 (1958).

34. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 297 (rev. ed. 1950).

35. Rossiter, *op. cit. supra* note 31, at 32.

independence of the three component parts. Today, therefore, all three branches, whatever their other functions, have the constitutionally legitimate function of attracting public attention and gaining public support.

The actual division of powers in Washington today, then, is not one in which each branch is solely concerned with the exercise of a monopoly in one governmental commodity. All three branches legislate, administer and judge. And all three, as the price of continued effectiveness, must strive to sell themselves to the electorate.

B. Congressional Investigations

The Supreme Court has argued that since the sole purpose of the legislature is lawmaking, the function of legislative investigations must be to gather information for the purpose of making law. Once it has been shown that Congress has several purposes other than lawmaking, it should be evident by the same reasoning that investigations may also have several functions. In fact, investigation is a multi-purpose congressional tool. The aims of any given investigation are usually so interwoven that the examination of various distinct purposes is more analytically convenient than politically realistic.[36]

A catalogue of such purposes may begin with the widely recognized role of investigations as a means of congressional participation in and supervision of the administrative process. Nearly all commentators on Congress have emphasized the importance of investigations for Congress' oversight of the executive branch and its enormous bureaucracy.[37] Indeed the Supreme Court seemed to recognize the administrative purpose of investigations even as it established the doctrine of legislative purpose.[38] Moreover it specifically approved that administrative role in *United States v. Watkins*.[39]

It might then appear unnecessary to urge the Supreme Court to do something that it seems already to have done; that is, admit that investigations may legitimately have administrative as well as legislative (lawmaking) purposes. The difficulty is, as Marshall Dimock long ago pointed out,[40] that the Court did not recognize oversight of the executive branch

36. See BECK, CONTEMPT OF CONGRESS 66, 181 (1959); GRIFFITH, *op. cit. supra* note 29, at 100-01, 108; WHITE, CITADEL 232-33 (1956).

37. See BAILEY & SAMUEL, CONGRESS AT WORK 305 (1952); BURNHAM, CONGRESS AND THE AMERICAN TRADITION 233-34, 247 (1959); BURNS, CONGRESS ON TRIAL 101 (1949); Dimock, *supra* note 7, at 85-116; EBERLING, CONGRESSIONAL INVESTIGATIONS 277 (1928); Griffith, *op. cit. supra* note 29, at 42-44, 49, 101-02, 114-15; GROSS, THE LEGISLATIVE STRUGGLE 136-39 (1953); RIDDICK, THE UNITED STATES CONGRESS, ORGANIZATION AND PROCEDURE 25 (1949); YOUNG, THE AMERICAN CONGRESS 187-88 (1958).

38. Both *McGrain* and *Sinclair* involved investigations of the executive branch.

39. 354 U.S. 178, 187 (1957).

40. Dimock, *supra* note 7, at 27-29.

as a distinct purpose of investigation but subsumed that activity under the lawmaking category.

Now it is perfectly true that investigations of the behavior of administrators may on occasion have for their purpose and/or their result the revision of the statutes under which the administrators operate. But to concentrate on this aspect of administrative investigations would be to miss their most important and for our purposes most significant functions. Bureaucracy is the core of modern government.[41] Both the President and Congress recognize this fact of political life and are constantly struggling for control of this key group. Since the bureaucratic chain of command at least theoretically runs up to the President, the Congress is at some disadvantage in the struggle. Investigations of administrative activity are one congressional means of offsetting Presidential possession of the high ground. In short, congressional investigations of administrators are not so much reflections of Congress' responsibility for passing laws as of its concern for keeping its share in the administrative, as opposed to the legislative, process.[42]

And Congress' principal bid for influence over the bureaucrats is not legislative correction of administrative wrongdoing subsequent to its exposure, but the exposure itself, or more frequently the threat of exposure. For the administrator such exposure means punishment in the form of loss of prestige for both himself and his organization and, in extreme cases, even loss of his position and criminal prosecution. When Congressmen attempt to impose their individual or collective wills on the bureaucrats, one of the principal factors working for their success is the administrator's knowledge that the activities of his organization may at some future time be subject to searching and public inquisition by the men seeking to influence him.[43]

By subsuming administrative investigations under the heading of investigations for a legislative purpose, the Supreme Court has obscured two factors which go to the heart of its own demands for a lawmaking and nothing but a lawmaking purpose. First of all, a category of investigations which do not have as their sole or even principal purpose the making of laws has from the very beginning of our government been

41. See FRIEDRICH, *op. cit. supra* note 34, at 37-58; HYNEMAN, BUREAUCRACY IN A DEMOCRACY (1951).

42. The extended and bitter polemic over surrender of executive papers to Congress in which so many Presidents have played a leading part indicates the recognition by both sides that administrative investigations are a key factor in the continuing struggle between Congress and the President.

43. Woodrow Wilson somewhat overstated the case: "Congress cannot control the officers of the executive without disgracing them. Its only whip is investigation, semi-judicial examination into corners suspected to be dirty." WILSON, CONGRESSIONAL GOVERNMENT 183 (Meridian ed. 1956). Bailey's case study of the Truman Committee is particularly enlightening in this regard. See BAILEY & SAMUEL, *op. cit. supra* note 37, at 294-321. See also YOUNG, *op. cit. supra* note 37, at 187-88.

recognized as legitimate.[44] Secondly, exposure of individual misconduct, not in the pursuit of information necessary for making laws, but for its own sake, has always been an integral and essential part of this category of investigation.

Exposure is also a principal element of another type of investigation which has traditionally been undertaken by Congress. Whether or not Congress has a legitimate claim to the title "Grand Inquest of the Nation"[45] or possesses the "informing function" awarded it by Woodrow Wilson,[46] it has in fact always sought to make the public aware of important national problems through investigations.[47] Congress has investigated every major branch of the economy, a whole series of riots, scandals, and disasters, and all of our wars except the Spanish-American.[48] It has spotlighted the allegedly bloodthirsty practices of the merchants of death,[49] the concentration of economic power,[50] organized crime, juvenile delinquency[51] and subversion.[52]

It is true that the gathering of information for the purpose of making law is often an element in the "problem" investigation and indeed sometimes the problem is identified by the amount of proposed legislation on a given subject.[53] But only the most opaque pair of legalistic dark glasses will blot out the obvious exposure or general informing function of many such investigations.[54] Unfortunately, the public is not always interested in problems that affect the public interest. Congress seeks to arouse that

44. The first congressional investigation, that of the St. Clair fiasco, served to uncover the administrative failures of the War Department. EBERLING, *op. cit. supra* note 37, at 36-37. The *McGrain* case resulted from an investigation of suspected malfeasance in the Justice Department. Two of the most famous investigating groups, the Committee on the Conduct of the War and the Truman Committee, were primarily concerned with discovering short-comings in executive direction of the war effort.

45. TAYLOR, GRAND INQUEST (1955).

46. WILSON, *op. cit. supra* note 43, at 198.

47. Wilson, like the original American users of the "Grand Inquest" tag, was probably referring only to control of administration and not a general investigative power over all public affairs. Furthermore, both were undoubtedly leaning heavily on British practice with all the attendant risks of borrowing one country's experience for use in another. Nevertheless these tags have survived and grown familiar precisely because Congress has in fact always carried on this general information type of investigation.

48. BURNHAM, *op. cit. supra* note 37, at 223-24.

49. The Nye Committee. See MCGEARY, DEVELOPMENTS OF CONGRESSIONAL INVESTIGATIVE POWER 57-60, 83-84 (1940).

50. The O'Mahoney Committee (T.N.E.C.). See MCGEARY, *op. cit. supra* note 49, at 41-42, 146-48.

51. The Kefauver Crime and Juvenile Delinquency Committees.

52. The investigation of subversion is not new. Spanish bribery of General Wilkerson (1810), the Burr conspiracy (1808) and John Brown's raid (1859) have all been investigated.

53. GRIFFITH, *op. cit. supra* note 29, at 102-03.

54. GALLOWAY, THE LEGISLATIVE PROCESS IN CONGRESS 316 (1953); BURNHAM, *op. cit. supra* note 37, at 234.

interest through the publicity of investigation. The vast parade of repetitive witnesses before the various committees investigating subversion and Kefauver's who's who of gangsterdom were surely meant to expose "menaces" as well as produce legislation. Otherwise, the congressional mountain has labored to bring forth a legislative mouse. The very investigation which led to the introduction of the legislative purpose doctrine was designed to educate the public about a new problem, the growth of an economic and financial structure in which the failure of a single firm seemingly could precipitate a national depression. The "problem" investigation intimately combines lawmaking and educational or exposure purposes, and it is unrealistic to allow one to blind us to the other.

Indced exposure is not always directed at public education. In fact either administrative or problem investigations may become, at least in part, still a third kind of nonlawmaking investigation because of the exposure factor. We have already seen that exposure as punishment is an element in administrative investigations. Similarly the exposure of wrongdoing in the course of problem investigations may lead to the punishment of individuals through public condemnation, the loss of employment and various other social sanctions. In such instances, investigating committees are determining whether individuals, private citizens as well as public employees, have been guilty of misconduct, and the result of such determination is punishment of those adjudged guilty. Investigations of this kind certainly deserve the title of judicial investigations.[55]

A second type of judicial investigation is that in which the committee's work serves as a preliminary to or integral part of actual criminal prosecution. We are not referring here to those instances in which witnesses are later tried for contempt or perjury, although such prosecutions may in fact be punishment for the wrongdoing which is being investigated rather than a penalty for recalcitrance or lying. The series of investigations concerning the Teapot Dome scandal best illustrates this second kind of judicial phenomena. In this instance investigations were used to uncover evidence which became the basis for criminal prosecution. The trials were followed by more investigations based in part on matters exposed in court. These investigations were in turn followed by more trials and finally by further

55. The proceedings of the House Un-American Activities Committee provide the most obvious example of one kind of judicial investigation. What particular individuals are or are not, or were or were not, communists is a key question in the committee hearings, and those labeled communist are subject to social sanctions, sanctions whose severity is at least in part due to the success of the committee's own public education campaign. The first congressional investigation, that of General St. Clair, illnstrates the same phenomena. Although the investigation in part concerned itself with administrative failings, it also examined charges of incompetence, insubordination and conduct unbecoming an officer on the part of the General. As such the committee acted in lieu of a military court and substituted the sanction of public condemnation for the normal sanctions of military law.

investigations. The investigations were used not only to provide the factual raw materials for prosecutions, but often to supplement the sanctions of law. In several instances where prosecutions failed, additional investigations were undertaken to obtain punishment by public condemnation where punishment by fine and imprisonment had been avoided.[56] Here it is not only impossible to separate trial from investigation, it is equally impossible to separate the various purposes of the investigations themselves. They provide a striking example of the combination of administrative, problem or public education, and judicial purposes.

Finally, there is one purpose of investigations which might be called legislative in the broadest sense because it involves the legislature rather than legislation. We have already noted the President's ability to reach and influence public opinion through such dramatic devices as the press conference and the nationally televised speech. Congress' lawmaking activities do not provide it with any similar capacity. Its investigative activities do. It can hardly be a coincidence that the tempo of investigation has quickened as Presidential activity and prestige have increased.[57] Nor, in this light, is it surprising that Congress has plunged so enthusiastically into investigating the menace of international communism when the nation's preoccupation with Soviet threats has continually strengthened the prestige of that branch of government which claims primacy in the area of international relations. Investigations have served as an important means of bolstering Congress vis-à-vis the President in the continuous political struggle for public attention which the President so often seems to be winning.

Congressional investigations are then multi-purpose tools. Those purposes—lawmaking, administrative, educational, judicial and self-preservative—closely parallel the general functions of Congress. This parallelism indicates that in practice Congress has not conceived of the investigation as simply a scoop for gathering the raw materials of legislation, but as a flexible political device which may be utilized to implement any or all of the aims of Congress.

In this discussion of the realities of congressional investigation, no distinction has so far been made between the purposes of Congress in employing investigations and the purposes of the investigators in pursuing them. Such a distinction is, however, essential. Since Woodrow Wilson warned that Congress was the prisoner of its committees,[58] it has become a truism that the standing committees are independent centers of power

56. See WERNER & STARR, TEAPOT DOME (1959).

57. See BURNHAM, CONGRESS AND THE AMERICAN TRADITION 221, 223 n.3, 230-31, 244; GRIFFITH, CONGRESS, ITS CONTEMPORARY ROLE 12, 108 (2d ed. 1956); YOUNG, THE AMERICAN CONGRESS 245-46 (1958).

58. WILSON, CONGRESSIONAL GOVERNMENT 62-76 (Meridian ed. 1956).

largely free from restraint by Congress as a whole and indeed largely in control of congressional business.[59] Since the Legislative Reorganization Act of 1946[60] assigns the function of investigation to all of the standing committees, the bulk of the investigative power is wielded by semi-sovereign entities whose purposes are their own and have no necessary connection with the purposes of their parent bodies.

It is true that special investigating committees must seek an authorization from their house of Congress and that all committees must go to Congress for funds to carry on investigations. But once begun, investigations tend to generate powerful popular support through their access to the communications media, and that support is used by the committee as a weapon to force renewal of appropriations and authorization by Congress as a whole. Investigating committees clothe themselves in the armor of the evil they investigate. How many congressmen can afford the risk of being branded pro-Communist or pro-gangster as the result of opposing the continuation of an investigation?

Furthermore, we have noted that investigations by nature are multi-purpose and that the purposes are subtly and inextricably mixed. Thus an investigation authorized by Congress for a given purpose may achieve not only that purpose, but also two or three others. Or just enough of Congress' purpose may be mixed in with the actual purposes of the committee to mask the committee's deviation from its parent body's intent. Or the committee may begin by following the congressional purpose and then, after having recruited sufficient popular support to insure its self-preservation, change purposes entirely. Therefore, in reality the purpose of an investigating committee can never be assumed to be that of Congress. Whether the two actually correspond is a matter which must be factually determined in each instance.

Thus it would appear that the whole paraphernalia of legislative purpose and its presumption is in fact at odds with the realities of congressional inquiry. The problems resulting from the creation of such a judicial never-never land are reflected in the recent investigation cases.

IV. The Vicious Circle: Watkins to Wilkinson

At the height of the furor over communism, and at a time when the dangers of investigations were being widely recognized, the Supreme Court issued an opinion in *Watkins v. United States*[61] which seemed to challenge

59. See Burns, Congress on Trial 54-55 (1949); Griffith, Congress, Its Contemporary Role 50, 158 (2d ed. 1956); Gross, The Legislative Struggle: A Study in Social Combat (1953); Mathews, The U.S. Senator and His World 147-76 (1960).

60. 60 Stat. 831-32; 2 U.S.C. § 190b (1958).

61. 354 U.S. 178 (1957).

many of the protections which the Court had previously constructed for the investigators. The Chief Justice emphasized the potential danger of exposure by investigation to Bill of Rights freedoms[62] and stated that "the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights."[63] The opinion noted the "possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress"[64] and concluded that "the preliminary control of the [House Un-American Activities] Committee exercised by the House of Representatives is slight or non-existent."[65] Justice Warren spoke of the "wide gulf between the responsibility for the use of investigative power and the actual exercise of that power"[66] and of committee activity which "can lead to ruthless exposure of private lives in order to gather data that is neither desired by the Congress nor useful to it."[67]

Furthermore, when speaking of the necessary balance between public purpose and private right, Warren insists that the Court cannot automatically assume that every investigation fulfills a public need which overbalances any private right affected.[68] And there is a rejection, albeit a rather vague one, of the government's contention "that if there is any legislative purpose which might have been furthered by the kind of disclosure sought, the wituess must be punished for withholding it."[69]

In short, the Chief Justice strikes at both the committee and general presumption of legislative purpose. Nevertheless, much of the old approach is left. The investigatory power is traced to Congress' lawmaking function.[70] The separation of powers doctrine in the usual guise of Congress makes law, the Executive and judiciary enforce it, is invoked to forbid investigations which seek to "punish" those investigated.[71] No real challenge to the legislative purpose of Congress as a whole is made since the Court can reach desired conclusions simply by making the committee the villain of the piece. "The motives of committee members" are held not to vitiate the Congress' legislative purpose.[72] The result of this continued judicial conservatism can be seen in the last part of the *Watkins* opinion, which is quite distinct from that which precedes it and contains the actual holding in case. In this final section the Court retreats from all the grand

62. *Id.* at 197-98.
63. *Id.* at 198 (citing United States v. Rumely, 345 U.S. 41 (1953)).
64. *Id.* at 201.
65. *Id.* at 203-04.
66. *Id.* at 205.
67. *Ibid.*
68. *Id.* at 198.
69. *Id.* at 204.
70. *Id.* at 187.
71. *Ibid.*
72. *Id.* at 200. But unlike *Josephson*, there is a hint that they might vitiate the committee's legislative purpose.

challenges issued earlier and simply requires that a witness be given some indication of why a given question is pertinent before he risks imprisonment by refusing to answer.[73] This reduces his protection and the Court's role of supervision to an insistence that the authorizing resolution or some facet of the hearing itself indicate the investigation's purpose with sufficient clarity to allow a judgment about the pertinency of specific questions. Watkins is freed not because the investigation threatens his basic constitutional rights or lacks a legitimate purpose, but because certain procedural niceties were not observed.[74]

If the latter part of *Watkins* ignores the several challenges to Congress offered in its introductory sections, *Barenblatt v. United States*[75] signals a step by step retreat to the pre-*Watkins* position of the Court. Justice Harlan imports the "gloss of legislative history"[76] to cover over the vagueness of the House Un-American Activities Committee's authorizing resolution[77] which had been attacked in *Watkins*. For Warren's hints that the Court might look to what was really going on in security investigations, Harlan substitutes the standard patriotic condemnation of the dangers of communism.[78] A fairy story of St. Congress and the Red Dragon coupled with the standard plea of judicial obtuseness in the face of congressional power[79] puts the realities of investigations entirely beyond the reach of the Court. Then from the *Watkins* suggestion of a real balancing of interests we return to the usual semi-automatic balancing act of the judicially modest. The whole weight of Congress' general power to legislate on internal security is thrown into one side of the scale, the particular loss of personal rights to the one individual being investigated is placed on the other, and the result is a foregone conclusion.[80]

The case is actually decided by reference to the latter portion of *Watkins*. Justice Harlan suddenly becomes the political realist and goes over the

73. The criminal contempt statute specifies punishment for failure to answer pertinent questions. To avoid unconstitutional vagueness in the application of a criminal statute, the witness must be able to judge whether he is refusing to answer a pertinent or nonpertinent question.

74. On the Court's general tendency to decide cases on procedural rather than constitutional grounds see PRITCHETT, THE POLITICAL OFFENDER AND THE WARREN COURT (1958) and the series of articles by McCloskey: 42 VA. L. REV. 735 (1956); 43 VA. L. REV. 803 (1957); 44 VA. L. REV. 1029 (1958). Kalven, *Mr. Alexander Meiklejohn and the Barenblatt Opinion*, 27 U. CHI. L. REV. 315, 329 (1960) speculates that the two parts of the *Watkins* decision when read together constitute a plea to Congress to rein in its committees and a threat to act if Congress does not. But he concludes that Congress paid no attention to the plea and the Court has backed down on the threat.

75. 360 U.S. 109 (1959).

76. *Id.* at 109, 117-20.

77. Standing Rule XI of the House of Representatives.

78. *Id.* at 127-29.

79. *Id.* at 132-33.

80. *Id.* at 134. See also Black's dissent at 144-45.

committee sessions with a fine tooth comb finding sufficient statements, questions, and testimony to show that the witness must have known enough of the purpose of the investigation to make a reasonable judgment as to the pertinency of the questions asked him.

The foundation of this decision is a further revitalization of pre-*Watkins* doctrines. *Barenblatt* reasserts the need for legislative purpose in terms of lawmaking purpose[81] and makes the required bow to the traditional version of the separation of powers doctrine.[82] Thus its major premises are precisely the same as those of *Watkins*. But Justice Harlan's principal task is to bolster up the doctrine of presumption weakened in *Watkins*. The formal doctrine of presumption which frankly refused to look at reality is abandoned. *Barenblatt* introduces the doctrine of presumption, new style. The foundation of the new style is an elaborate play on words. The Court first requires Congress to have a legislative purpose for investigation. It then argues that investigations are a useful and often essential means to the end of lawmaking. Thus investigation is within the scope of Congress' constitutional powers.[83] Then "so long as Congress acts in pursuance of its constitutional power, the judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." The Court will not look at the actual motives behind a given inquiry.[84]

Now since it is the motive of Congress, *i.e.*, whether it had a legislative purpose, which determines whether the investigation is actually within its constitutional powers, how can judicial examination of its motives be barred by an assertion of its constitutional powers? In fact what the Court is doing is asserting as a general proposition that Congress investigates for a legislative purpose, and then on the basis of this assertion refusing to examine whether such a purpose actually exists in specific investigations. In other words, so long as Congress *might possibly* have some legislative purpose for a given investigation, and it always might, the Court will presume that it *does in fact* have such a purpose in the particular investigation being examined.

This approach takes care of the presumption for Congress as a whole. It remains to repair the presumption for the committee. That is done by refusing to examine the real purpose of the committee on the basis of the language in *Watkins*. "[M]otives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served."[85] Used in this way, without the repeated suggestions in *Watkins* that committees may go astray and Congress

81. *Id.* at 111, 127.
82. *Id.* at 111-12.
83. *Id.* at 127.
84. *Id.* at 132.
85. *Id.* at 133.

must guide them, such reasoning is just *Sinclair* all over again. First you presume the "assembly's legislative purpose" and then you lean the committee carefully against this presumption in order to build it one of its own. If the witness pleads the motives of the committee, reply with the purpose of Congress; if he pleads the motives of Congress, reply with the purpose, powers, motives-don't-count gambit.

The most striking feature of *Barenblatt* is its combination of the old presumption game with the pretense of actually looking at the specific investigation. "Having scrutinized this record we cannot say that the unanimous panel of the court of appeals which first considered this case was wrong in concluding that 'the primary purposes of the inquiry were in aid of legislative processes.'" Since this statement appears immediately after Justice Harlan's refusal to look at either Congress' or the committee's motives, *i.e.* purposes, it seems obvious that he "cannot say" because he cannot really "scrutinize." The record seen through the doubly dark glasses of congressional and committee presumption is hardly likely to yield anything but a legitimate purpose. Thus the presumption doctrine when combined with the facts simply yields the presumption doctrine all over again.[86]

The cases of *Wilkinson v. United States*[87] and *Braden v. United States*[88] repeat and confirm all of the *Barenblatt* retreats from the tentative advances of *Watkins*.[89] Again the latter part of *Watkins* is employed to send the recalcitrant witness to jail. The Court finds that statements by the committee chairman and staff director and the committee resolution authorizing the sub-committee are sufficient to have informed the witness of the pertinency of the questions asked.[90] In both cases first amendment claims are cavalierly rejected with a reference to the balancing arguments in *Barenblatt*. Both look to the record only to the extent that it verifies legislative purpose. *Wilkinson* cites the committee resolution and statements by the chairman and staff director all of which

86. Indeed it is worth pausing briefly to examine just how the circuit court in this case examined the record. The court first stated the presumption doctrine. Then it examined activity of Congress in the area of subversion legislation, the committee authorization, its annual reports which make legislative recommendations, the statements of the chairman, etc. From these it concluded that the primary purpose of the investigation was legislative. Then it refused to give weight to any contrary evidence because once a legislative purpose was established other purposes could not vitiate the investigation's legitimacy. Thus having rigorously excluded any evidence which could rebut it, the court could triumphantly conclude that the presumption had not been successfully rebutted. Since some pretense of legislative purpose could be dreamed up by any committee member who is not an absolute fool, this approach in fact establishes an irrebuttable presumption.

87. 365 U.S. 399 (1961).

88. 365 U.S. 431 (1961).

89. See 365 U.S. at 431, 432-35; 365 U.S. at 399, 407-10, 413-15.

90. 365 U.S. at 431, 433; 365 U.S. at 399, 413.

refer to pending legislative proposals.[91] *Braden* rather vaguely suggests that *Barenblatt* established the proposition that Congress has a legislative purpose whenever it investigates "Communist infiltration and propaganda."[92]

Neither of these cases mentions the presumption doctrine as such, but both refuse to take any account of the defendants' attempts to prove lack of purpose. The defendants sought to show that whatever the purpose of Congress as a whole or the general purpose of the House Un-American Activities Committee, the specific purpose in calling them as witnesses was not to gain information on pending legislation, but to expose them to public censure because they had criticized the activities of the Committee. In *Wilkinson* the Court replied that the circumstances described by the witness "do not necessarily lead to the conclusion that the subcommittee's intent was personal persecution of the petitioner."[93] Justice Stewart then went on to use the *Watkins-Barenblatt* doctrine that the sub-committee's "motives alone would not vitiate an investigation which had been instituted by a House of Congress if the assembly's legislative purpose is being served."[94] *Braden* simply brushes aside the defendant's argument as to specific purpose on the grounds that investigation of the Communist Party of which the defendant was a member "was surely not constitutionally beyond the reach of the subcommittee's inquiry."[95]

These two opinions are simply the presumption doctrine in new guise. There is no weighing of evidence for and against legislative purpose. Unless evidence "*necessarily*" leads to the conclusion of lack of committee purpose, it will not be given any weight at all. And even if it did necessarily lead to such a conclusion, it apparently still would be given no weight as long as Congress' purpose was legislative, since in such instances, committee motives don't count. *Braden* wraps it all up by suggesting that as long as the subject in general is one which might have been investigated for a legislative purpose, the Court does not care what the committee's actual purpose was in the specific instance.[96]

V. A NEW APPROACH: ABANDONING PURPOSE AND PRESUMPTION

The cycle of cases just discussed has left the House Un-American Activities Committee and its fellows substantially free from any outside

91. 365 U.S. at 399, 408-10.
92. 365 U.S. at 431, 435.
93. 365 U.S. at 399, 411.
94. *Id.* at 412.
95. 365 U.S. at 431, 435.
96. Similar techniques which purport to look at the record have been used in several circuit court cases since *Barenblatt*. See United States v. Yellin, 287 F.2d 292 (7th Cir. 1961), *cert. granted*, 82 Sup. Ct. 84 (1961); Liveright v. United States, 280 F.2d 708 (D.C. Cir. 1960); Gojack v. United States, 280 F.2d 678 (D.C. Cir. 1960); Davis v. United States, 269 F.2d 357 (6th Cir. 1959).

control at the very time when public sympathy for its victims and distrust of its methods has begun to revive.[97] Paradoxically, the Supreme Court has placed itself in the position of protecting investigating committees precisely because it seeks to maintain the theoretically very strict limitations on committees imposed by the legislative purpose requirement. Since this requirement is absolutely out of harmony with political reality, the Court would have to strike down all investigations if it realistically examined them for legislative and nothing but legislative purpose. Instead it must turn to the presumption doctrine in order to inject the legislative purpose which it requires but is not there. Thus, having asked for too much, the Court gets nothing. It cannot use the purpose requirement to overturn investigations it does not like because to do so would lead to a general assault on all investigations including the ones it does like. Therefore, it cannot really use the purpose requirement at all.

But the result is that whenever the Court considers limiting investigations, it faces the prospect of having to limit the most important and wide ranging power of Congress, the power of legislation with which the Court itself has impregnated the investigating committees by strictly artificial insemination. It is, of course, not impossible to impose constitutional limitations on lawmaking activity. But once law is injected into the matter for judicial consideration, whole hosts of the judicially modest arise to protest judicial interference with the sovereign will of the people embodied in the lawmaking of Congress.[98] Thus the requirement of legislative purpose leads to the presumption of legislative purpose. And the presumption of legislative purpose leads to the presumption of constitutionality with which the modest endow congressional lawmaking.[99] As a result, congressional investigations, wrapped in the double armor of these interdependent presumptions, rest safe from most lines of judicial attack.

By doing away with the requirement of legislative purpose, the Court would place itself in a much stronger position. For instance, acknowledgment of the administrative purpose of many committee inquiries would allow the Court to avoid the appearance of acting in defiance of the lawmaking powers of Congress. Instead the Court would be acting as a referee between the Congress and the Executive in an area where their claims of constitutional power conflict. This is surely a role the modest could approve.[100] Similarly, by looking the judicial purposes of certain

97. See DONNER, THE UN-AMERICANS (1961).

98. The bible of the modest has become HAND, THE BILL OF RIGHTS (1958) where the position is clearly and forcefully stated.

99. The preferred position doctrine which would deny this presumption to laws touching on Bill of Rights freedoms is currently in hibernation. It may be found sleeping in the dissents of the "liberal" four, Black, Douglas, Brennan and Warren. See MASON, THE SUPREME COURT FROM TAFT TO WARREN 146-47, 183 (1958).

100. See HAND, THE BILL OF RIGHTS 14-15, 29-30 (1958).

investigations straight in the face, the Court could claim the right to impose strict supervision over those matters in which judges are admitted to have special competence and a special grant of constitutional power.

Most important, by acknowledging that exposure for exposure's sake has always been one of the purposes of investigation, the Court would be in a position to point out the perils of exposure investigations and to limit their invasion of constitutional rights. The Justices could break out of the vicious circle of condemning exposure per se, then having to presume legislative purpose in order to avoid striking down all investigations in which exposure is an element, and thus in the end completely barring themselves from protecting constitutional rights against exposure precisely because they so roundly condemned it in the first place. Having admitted exposure as one of the routine functions of investigation, the Court will be free to actually look at congressional exposure and determine whether, in specific instances, exposure has invaded the constitutionally guaranteed freedoms of specific individuals.

The whole technique of balancing individual freedoms against society's interests in government activities interfering with those freedoms would greatly benefit from the abandonment of the demand for and presumption of legislative purpose. If balancing always begins by throwing the whole lawmaking power of Congress on one side of the scale, particularly the power to legislate in the interest of national security, the individual rights invaded by investigation must almost always come up light. The actual purposes of investigations frequently do not carry nearly so heavy a weight of social interest. Conversely, the exposure purpose of many inquiries presents a particularly grave danger to freedom of speech and association.[101] By recognizing exposure as a normal purpose of investigations, while at the same time stressing its potential danger to individual rights, the Court could begin to act as a real balancer of interests, striking down those inquiries which needlessly destroy constitutional liberties and upholding those in which exposure of some danger or misdeed is essential to our society.

Barenblatt et al show how a presumption that the committee's purpose is that of Congress as a whole peculiarly distorts judicial balancing. For this presumption poses a wholly unnecessary dilemma to the modest by confronting them with the whole weight of Congress when in reality it is only the committee they face. The doctrine of judicial modesty is principally based on the belief in democratic responsibility. The Congress is directly responsible to the voters, the Court is not. Thus the Court must yield to Congress as the sovereign voice of the people. But the committees

101. The Court has recognized the danger of exposure in other areas. See Talley v. California, 362 U.S. 60 (1960), 14 VAND L. REV. 392 (1960); NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449 (1958).

are not Congress and *they* do not always yield to the voice of congressional control. As we have already noted the committees act as largely independent domains. When the Court yields to a committee, it pays homage not to the legitimate sovereign, but to one of his unruly barons. It is, I think, significant that one of the few instances in which Justice Frankfurter has been willing to directly challenge congressional activity occurred when he departed from the presumption doctrine sufficiently to find a discrepancy between the purpose of Congress and that of one of its committees.[102]

Furthermore, judicial modesty is based on a calculation of the relative political power of Congress and the Supreme Court. Not only are the committes taken individually less powerful on the national scene than Congress as a whole, but the Court can often count on at least clandestine support from important elements of Congress when it takes on a committee. Many congressmen who initially may not care actively to attack a given investigation would be glad passively to accept or even support a Court decision against the committee based on its failure to abide by the intentions of Congress. This is not to argue that the Justices may attack any investigating committee at any time under any circumstances. But it is to suggest that the Court may on occasion count on a favorable constellation of political forces for the protection of civil liberties against committee action. In short, abandoning the presumption of committee legislative purpose would mean that in certain instances the power of the Court could actually be used not only to defend civil liberties, but to increase democratic responsibility by strengthening congressional control over its own committees.

The very paradox built into the legislative purpose doctrine may prove particularly convenient for a Court trying to get rid of it. Just as the requirement of legislative purpose imposes such a severe limitation on congressional activity that it in fact imposes no limitation, the elimination of the requirement will, on its face, free the Congress from an onerous judicial supervision while actually giving the Court more maneuvering room. For when the demand for legislative purpose goes, the need for presumption of such purpose goes with it. Congress is told that it may investigate for any purpose it sees fit, *i.e.* that it may do with the Court's imprimatur what it has been doing all along without it; and the Court is freed to begin real supervision of an area from which it has previously been barred by its own misreading of the political scene. The grant of additional powers to Congress nicely sugar-coats the extension of Supreme Court activity.[103]

---

102. United States v. Rumely, 345 U.S. 41 (1953).

103. Readers will undoubtedly sense the ghost of Courts past in this passage. The technique suggested here is, of course, modeled on that of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) in which the very large pill of judicial review was sweetened by the Court's self-denial of certain powers which it could uot in terms of

A similar difficulty in the Court's initial approach to the purpose issue can aid the Court in escaping the doctrine without seeming to do so. Of course nothing prevents the Court from flatly overruling both the purpose and presumption doctrines. It has recently provided us with a dramatic example of the reversal of two long-standing but unrealistic rules.[104] But if the Court prefers a more subtle approach, the very ambiguity of the word "legislative" introduced in *Kilbourn* may prove extremely useful. A gradual transition from "lawmaking" purpose to "Congress' purpose" can be accomplished simply by progressively approving more and more non-lawmaking congressional activities under cover of the ambiguity of "legislative."

In fact there is already sufficient careless wording[105] in earlier opinions to start the ball rolling.

> [T]he indispensable "informing function of Congress" is not to be minimized . . . .[106]

> The power of the Congress to conduct investigations is . . . broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system . . . . It comprehends probes . . . of the Federal Government to expose corruption, inefficiency or waste.[107]

By continuing this process, the Court could eventually acknowledge all of the real purposes of investigations while, at least in the transitional stage, holding firm to the comfort of the traditional verbal formula.

Since the Court is likely to continue to get a fairly steady stream of contempt cases, this process of change could be begun at any time. Sentiment in favor of more active judicial supervision of at least some kinds of investigations has existed on the Court for some time.[108] It may be argued that the extremely modest Frankfurter-Harlan wing of the Court will block any such extension of judicial review. But I have tried to show that abandonment of the purpose-presumption rationale can be harmonized with their views.[109] Furthermore, abandonment of the tra-

political reality hope to exercise anyway.

104. See Elkins v. United States, 364 U.S. 206 (1960); Mapp v. Ohio, 81 Sup. Ct. 1684 (1961). The Court could then derive Congress' power of investigation from its power to organize itself and/or from the historically sanctioned inherent powers of legislative bodies transmitted to Congress by the general grant of legislative power in article I.

105. Careless because the opinions themselves are actually grounded on the nothing-but-the-law approach.

106. United States v. Rumely, 345 U.S. 41, 43 (1953).

107. Watkins v. United States, 354 U.S. 178, 187 (1957).

108. See United States v. Rumely, 345 U.S. 41 (1953); the dissents in Barenblatt v. United States, 360 U.S. 109 (1959); Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961); and the majority opinion in Deutch v. United States, 367 U.S. 456 (1961).

109. Note that Frankfurter did go far toward abandoning at least part of the presumption doctrine in the *Rumely* case.

ditional position need not come today or tomorrow and changes in the Court's personnel may create a more favorable market for the arguments offered here. Indeed any current writing about the Court must be done against the background of great uncertainty and, therefore, hope about its collective attitude in the next few years.

There are, of course, two assumptions underlying this article. The first is that congressional investigations have invaded the rights of free speech and association protected by the Constitution. The second is that the Supreme Court should attempt to protect such rights against invasion. Neither proposition is self-evident. And it would take another discussion of this length to offer sufficient evidence in support of either. It would be enough, I think, simply to say that the arguments presented here are meant for those readers who share my assumptions. But it is possible to go one small step further. Most persons who have not been totally blinded by the "red menace" must surely admit that investigations have done some damage to civil rights even if the question of whether they have done more harm than good must remain open. The abandonment of the purpose-presumption rationale is designed to allow the Court sufficient flexibility to continue its general approval of investigations while occasionally, and on a case by case basis, limiting some of their worst abuses.

As to the Court's responsibility for protecting the Bill of Rights, there is surely a hard core of opinion which staunchly demands complete judicial passivism. But the Supreme Court, even in the person of its most modest member, has never gone so far.[110] The position I have advocated does not involve the Court in any of these abstract formulas or rigid rules which are anathema to the modest.[111] Indeed it gets rid of a couple. And it allows the Court to set its own pace and limits in protecting civil rights so that the argnment does not depend on acknowledgment of any specific level of judicial activity.

Finally, whatever one's assumptions about investigations and the civil rights functions of the Supreme Court, it seems desirable that the Court do whatever it does clearly and realistically instead of involving itself in the maze of fantasy and chop-logic which the demand for legislative purpose and the resulting presumption doctrine have created.

110. See, *e.g.*, Sweezy v. New Hampshire, 354 U.S. 234 (1957); United States v. Rumely, 345 U.S. 41 (1953).

111. See Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357 (1949).