

timony or other information compelled under the order, but also any information directly or indirectly derived from such testimony or information.

A witness may intervene in a proceeding to grant immunity to contest the issuance of the order on the ground that the procedure prescribed by the statute has not been followed. Nonetheless, a witness may not challenge the committee's scope of inquiry, pertinence of questions propounded, or constitutionality of the statute, because the discretion of the district court in an immunity hearing does not encompass these issues.⁽⁴⁾

The present immunity statute⁽⁵⁾ has been interpreted to require the court to make sure of compliance with established procedures, but does not authorize discretion to determine the advisability of granting immunity or impose conditions on such a grant.⁽⁶⁾

§ 10. —First Amendment

Claims involving freedom of association, belief, expression, and

4. *In re McElrath*, 248 F2d 612 (D.C. Cir. 1957); this case arose under 18 USC § 3486, which has been repealed.

5. 18 USC § 6005.

6. Application of U.S. Senate Select Committee on Presidential Campaign Activities, 361 F Supp 1270 (D.C. 1973).

petition under the first amendment have sometimes been asserted in cases arising out of congressional investigations, though such claims are less frequent than those involving the privilege against self-incrimination.⁽⁷⁾ The Supreme Court has recognized the applicability of the first amendment to investigations:

Clearly an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by rule-making.⁽⁸⁾

7. See, for example, Moreland, Allen B., *Congressional Investigations and Private Persons*, 40 So. Cal. L. Rev. 189, 260–265 (1967), and Bendich, A. M., *First Amendment Standards for Congressional Investigations*, 51 Calif. L. Rev. 267 (1963), for discussion of the First Amendment.

8. *Watkins v United States*, 354 U.S. 178, 197 (1957); see note 31, inserted at this point in the *Watkins* opinion, which listed other cases supporting this principle, including *United States v Rumely*, 345 U.S. 41, 43 (1953); *Lawson v United States* 176 F2d 49, 51, 52 (D.C. Cir. 1949); *Barsky v United States*, 167 F2d 241, 244–250 (D.C. Cir. 1948), cert. denied 334 U.S. 843 (1948); and *United*

In determining whether to accept a first amendment claim in a particular instance, courts balance the witness' right of privacy against the government's need to obtain the information:

Accommodation of the congressional need for particular information with the individual and personal interest in privacy is an arduous and delicate task for any court. . . . It is manifest that despite the adverse effects which follow upon compelled disclosure of private matters, not all such inquiries are barred. . . . The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness.⁽⁹⁾

Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.⁽¹⁰⁾

States v Josephson, 165 F2d 82, 90-92 (2d Cir. 1947), cert. denied 333 U.S. 858 (1948).

9. *Watkins v United States*, 354 U.S. 178, 198 (1957).
10. *Barenblatt v United States*, 360 U.S. 109, 126 (1959).

The decision to use a balancing test followed several developments in earlier cases. For example, courts refused to apply the "clear and present danger" rule, the traditional first amendment test, to congressional inquiries because such inquiries help determine the existence of a danger to national security and possible responses to such a danger;⁽¹¹⁾ not allowing Congress to investigate a potential danger until it had become "clear and present" would be "absurd" and impair the ability to respond.⁽¹²⁾ Thus, for example, the power to inquire into whether a subpoenaed witness was a member of the Communist Party or a believer in its principles received judicial approval.⁽¹³⁾

11. *United States v Josephson*, 165 F2d 82 (2d Cir. 1947), cert. denied 333 U.S. 858 (1948).
12. *Barsky v United States*, 167 F2d 241, 246, 247 (D.C. Cir. 1948), cert. denied 334 U.S. 843 (1948); reh. denied 339 U.S. 971, 972 (1950).
13. *Lawson v United States*, 176 F2d 49, 52 D.C. Cir. 1949).

In a later case, the right to petition and freedom of persons who had actively criticized the actions of the Committee on Un-American Activities were not deemed to have been infringed when the committee subpoenaed them to testify about their activities in the Communist Party. *Braden v United States*, 365 U.S. 431 (1961); *Wilkinson v United States*, 365 U.S. 399 (1961).

The revision of the doctrine of presumption of legislative purpose and the recognition of the need for a lucid expression of authorization,⁽¹⁴⁾ as well as imposition of the requirement that the delegation of power to investigate must be clearly revealed in the committee's authorizing resolution whenever first amendment rights are threatened, contributed to adoption of the balancing test.⁽¹⁵⁾

One formulation of the test to be applied by courts is the following, from a case which found an infringement of first amendment rights:

[I]t is an essential prerequisite of the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association, and petition that the State convincingly show a substantial relation between the information sought and a subject of overruling and compelling state interest.⁽¹⁶⁾

But it should be remembered that one consequence of the balancing test is a general reluctance to interfere with pending congressional investigations on the ground that the witness may present first amendment claims

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

15. *Watkins v United States*, 354 U.S. 178 (1937).

16. *Gibson v Florida Legislative Committee*, 372 U.S. 539, 546 (1963).

before the committee or subcommittee, before the House or Senate, at trial, and on appeal.⁽¹⁷⁾ Accordingly, courts will not interfere with legislative investigations unless the threat posed thereby to first amendment freedoms is sufficiently compelling and concrete, and the witness would be denied a remedy in the absence of such intervention.⁽¹⁸⁾

17. See, for example, *Sanders v McClellan*, 463 F2d 894 (D.C. Cir. 1972); *Ansara v Eastland*, 442 F2d 751 (D.C. Cir. 1971); *Shelton v United States*, 404 F2d 1292 (D.C. Cir. 1968) cert. denied 393 U.S. 1024 (1969) and *Pauling v Eastland*, 288 F2d 126 (D.C. Cir. 1960). But see *Stamler v Willis*, 415 F2d 1365 (7th Cir. 1969), cert. denied sub. nom. *Ichord v Stamler*, 399 U.S. 929 (1970), which held that witnesses against whom criminal charges for contempt were pending could, nonetheless, challenge alleged committee infringements on free expression in a civil action.

18. See, for example, *Pollard v Roberts*, 393 U.S. 14 (1968), per curiam affirmance of the three judge District Court for the Eastern District of Arkansas, 283 F Supp 248 (1968); *Gibson v Florida Legislative Committee*, 373 U.S. 539 (1963); *Louisiana ex rel. Germillion v NAACP*, 366 U.S. 293 (1961); *Bates v Little Rock*, 361 U.S. 516 (1960); *NAACP v Alabama*, 357 U.S. 449 (1958); *Sweezy v New Hampshire*, 354 U.S. 234 (1957), which involve infringements of the right of association by states; they