

refusal to permit the Secretary of Commerce to respond to a resolution of inquiry requesting a letter from the Director of the Federal Bureau of Investigation to the

Secretary regarding the loyalty file on Dr. Edward U. Condon, Director of the National Bureau of Standards.⁽¹⁸⁾

C. PROCEDURE; HEARINGS

§ 6. Limitations on Authority to Investigate—Pertinence of Inquiry

Limitations on the authority to investigate are expressed in the Constitution and statutes, and judicial interpretation thereof, as well as in congressional and committee rules as interpreted and applied by presiding officers and the courts.

The authority of Congress to investigate has been interpreted to derive from article I, section 1, stating that, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a

Senate and a House of Representatives." Consequently, the authority to investigate is necessarily limited by the authority to legislate.⁽¹⁹⁾

A review of criminal contempt proceedings provides a comprehensive overview of limits of authority to investigate including legislative purpose,⁽²⁰⁾ pertinence of investigation thereto, procedural regularity of hearings,⁽¹⁾ and rights of witnesses.⁽²⁾

The statute which makes failure to testify a crime, 2 USC §192, provides that the question must be "pertinent to the subject under inquiry." Pertinence is a matter of law⁽³⁾ and does not depend upon

18. See §2.20, *supra*, for a discussion of the resolution of inquiry.

19. See, for example, *Barenblatt v U.S.*, 360 U.S. 109, 111 (1959) in which Mr. Justice Harlan stated, "The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." See also Lovell, G. B., *Scope of the Legislative Investiga-*

tional Power and Redress for Its Abuse, 9 *Hastings L. J.* 276 (1957).

20. See § 1, *supra*, for a discussion of authority to investigate and legislative purpose.

1. See § 8, *infra*.

2. See §§ 9 through 14, *infra*.

3. *Braden v United States*, 365 U.S. 431 (1961); and *Sinclair v United States*, 279 U.S. 263 (1929).

the probative value of the evidence.⁽⁴⁾ It means pertinent to the subject under inquiry, rather than pertinent to the person under interrogation,⁽⁵⁾ and relates to the particular question asked, not to unasked possibilities.⁽⁶⁾

Because a legislative inquiry, unlike a judicial inquiry, must anticipate all possible cases which may arise rather than determine facts in a single case, the concept of pertinence in a congressional investigation is broader than that of relevance in the law of evidence.⁽⁷⁾ The elements of pertinence are: (1) the material sought or answers requested must relate to a legislative purpose which Congress may constitutionally entertain, and (2) such material or answers must fall within the grant of authority actually made by Congress to the investigating committee. The question must be pertinent; if it is pertinent, an in-

nocent true answer does not destroy such pertinence. Although the statute mentions pertinence only in relation to answers to questions, it applies equally to demands to produce papers.⁽⁸⁾

Because a witness at an investigative hearing exposes himself to criminal prosecution for contempt under 2 USO §192 by refusing to answer questions, he is entitled to knowledge of the subject to which the interrogation is deemed pertinent with the same degree of explicitness that the due process clause requires in the expression of any element of a criminal offense.⁽⁹⁾ An indictment which fails to identify the subject under inquiry at the time the witness was interrogated is fatally defective because the subject is central to prosecution under the statute.⁽¹⁰⁾

Rule XI clause 28(h)⁽¹¹⁾ imposes a duty on the chairman at an in-

4. *Sinclair v United States*, 279 U.S. 263 (1929). See 6 Cannon's Precedents §§ 336-338, for a discussion of this case.
5. *Rumely v United States*, 197 F2d 166, 177 (D. C. Cir. 1953); aff'd. 345 U.S. 41 (1953).
6. *Barsky v United States*, 167 F2d 241, 248 (D.C. Cir. 1948); cert. denied 334 U.S. 843 (1948).
7. *Townsend v United States*, 95 F2d 352 (D.C. Cir. 1938); cert. denied 30.3 U.S. 664 (1938).

8. *United States v Orman*, 207 F2d 148, 153, 154, 156 (3d Cir. 1953). See also, *Bowers v United States*, 202 F2d 447 (D.C. Cir. 1953) and Moreland, Allen B., *Congressional Investigations and Private Persons*, 40 So. Cal. L. Rev. 189, 236-239 (1967) for discussions of pertinence.
9. *Watkins v United States*, 354 U.S. 178, 209, 210 (1957).
10. *Russell v United States*, 369 U.S. 749, 764 (1962).
11. *House Rules and Manual* §735(i) (1973). See §13.4, *infra*, for a discussion of approval of this rule.

investigative hearing to announce the subject of the investigation in an opening statement. When a witness refuses to answer a question on the ground of pertinence, the committee must repeat the "question under investigation" and show specifically where the question is pertinent thereto.⁽¹²⁾

To ascertain the subject under inquiry, the court in deciding the validity of a challenge to pertinence may look at (1) the authorizing resolution, (2) the remarks of the chairman and other members, (3) the nature of the proceedings, (4) the action of the committee by which a subcommittee investigation was authorized, and (5) the chairman's response to the witness, refusal to answer.⁽¹³⁾ A court may also consider the historical usage of a particular procedure or inquiry:

Just as legislation is often given meaning by the gloss of legislative re-

12. *Deutch v United States*, 367 U.S. 456 (1961); this case reversed a contempt conviction arising from an investigation of communist party activities "in the Albany area." The witness had refused to answer certain questions relating to his communist activities in Ithaca and at Cornell University, but, the court noted, such locations are 165 miles from Albany and thus were outside the scope of the committee's legitimate inquiry.
13. *Watkins v United States*, 354 U.S. 178, 212, 213 (1957).

ports, administrative interpretation, and long usage, so the proper meaning of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite content furnished them by the course of congressional actions.⁽¹⁴⁾

§ 7. —Intent of Witness

A witness cannot be convicted for refusal to testify or produce documents unless his refusal is willful,⁽¹⁵⁾ that is, a deliberate and intentional act,⁽¹⁶⁾ which need not, however, involve moral turpitude⁽¹⁷⁾ or a bad or evil purpose or motive.⁽¹⁸⁾

Although a mistake of fact may in some cases justify a refusal to submit testimony or docu-

14. *Barenblatt v United States*, 360 U.S. 109, 117 (1959). See also *Wilkinson v. United States*, 365 U.S. 399, 410 (1961).
15. 2 USC §192; *Quinn v United States*, 349 U.S. 155, 165 (1955).
16. *United States v Bryan*, 339 U.S. 323 (1950).
17. *Braden v United States*, 365 U.S. 431 (1961).
18. *Wheeldin v United States*, 283 F2d 535 (9th Cir. 1960); cert. denied 366 U.S. 958 (1961); *Fields v United States*, 164 F2d 97, 100 (D.C. Cir. 1947). See Moreland, Allen B., *Congressional Investigations and Private Persons*, 40 So. Cal. L. Rev. 189, 239-242, for a discussion of willfulness.