vestigative 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 reports, 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-

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).

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.

ments,[19] a mistake of law, if deliberate and intentional, will not excuse such a refusal[20] even if based on advice of counsel.[1]

In determining whether orders from a superior would justify a refusal to comply with a subpena, or whether such refusal constitutes willful behavior, courts have distinguished between a "command to assume a position," which would shield the subordinate, and a mere ratification of a subordinate's "continuous position of noncompliance," which would not.[2] In such a case, the validity of a defense that a person acted on orders of a superior would depend on whether the superior's order preceded the subordinate's refusal or the converse.

The element of willfulness has been discussed in two contexts, refusal to produce papers and refusal to answer questions. The Supreme Court held in one case that the government established a prima facie case of willful noncompliance by introducing evidence that the witness had been validly served with a lawful subpena duces tecum to produce organizational records under her custody and control and that she had intentionally refused to present them on the appointed day.[3] In a later case, the court found that a subcommittee's reasonable basis for believing that a witness could produce certain records, coupled with evidence of his failure to suggest his inability to produce them, supported an inference that he could have produced them and shifted the burden to the witness to explain or justify his refusal.[4]

It has been further held that:

> . . . anything short of a clear-cut default on the part of the witness will not sustain a conviction for contempt of Congress. . . . The witness is not required to enter into a guessing game when called upon to appear before a committee. The burden is upon the presiding officer to make clear the directions of the committee, to consider any reasonable explanations given by the witness, and then rule on the witness' response.[5]

19. *Townsend* v *United States*, 95 F2d 352, 358 (D.C. Cir. 1938).

20. *Watkins* v *United States*, 354 U.S. 178, 208 (1957); *Townsend* v *United States*, 95 F2d 352, 358 (D.C. Cir. 1938).

1. *Sinclair* v *United States*, 279 U.S. 263, 299 (1929).

2. *United States* v *Tobin*, 195 F Supp 588, 615 (D.D.C. 1961); reversed on other grounds, 306 F2d 270 (D.C. Cir. 1962); cert. denied 371 U.S. 902 (1962).

3. *United States* v *Bryan*, 339 U.S. 323, 330 (1950).

4. *McPhaul* v *United States*, 364 U.S. 372, 379 (1960).

5. *United States* v *Kamp*, 102 F Supp 757, 759, 760 (D.D.C. 1952).

A court of appeals, adopting the above reasoning, established a procedure which requires a committee to propound a question, hear the refusal, rule that the refusal to answer is not satisfactory, and then, in time to allow an opportunity for answering, repeat the question to enable the witness either to purge himself and answer or stand on his original refusal to answer.[6] A contempt conviction, it has been said, cannot stand if a committee leaves a witness to speculate about the risk of possible prosecution and does not give him a clear choice between standing on his objection or complying with a committee ruling.[7] However, it has been further indicated that a conclusive presumption of intent to violate the statute might attach to a refusal even where that refusal was made without a statement at the time of the reason therefor.[8]

§ 8. —Procedural Regularity of Hearings

A committee's failure to observe House rules or its own committee rules has been held to constitute a ground to reverse convictions for contempt or perjury. Whether a committee has complied with such rules became easier to ascertain after the House, on Mar. 23, 1955, adopted the Code of Fair Procedures which established certain procedural rights for witnesses and provided that "the Rules of the House are the rules of its committees and subcommittees so far as applicable. . . ."[9]

As an example of the requirement of compliance with procedural rules, a witness' conviction under a District of Columbia statute[10] which defined perjury as making false statements before a competent tribunal was reversed by the Supreme Court because the government at trial did not adduce evidence showing that a quorum of a committee was present when the statements alleged to be false were made.[11]

6. *Quinn* v *United States*, 203 F2d 20, 33 (D.C. Cir. 1952), aff'd., 349 U.S. 155 (1955).

7. *Bart* v *United States, 349 U.S. 219, 223 (1955); Emspak* v *United States*, 349 U.S. 190, 202 (1955).

8. *Quinn* v *United States*, 203 F2d 20, 33 (D.C. Cir. 1952), aff'd., 349 U.S. 155 (1955).

9. The quotation is taken from Rule XI clause 27(a), *House Rules and Manual* § 735 (1973). See § 13.1, infra, for a discussion of adoption of the Code of Fair Procedures. See also § 15, infra, dealing with a related topic, the procedure for determining whether information may tend to defame, degrade, or incriminate a person.

10. 22 D.C.C. 2501 (Mar. 3, 1901).

11. *Christoffel* v *United States*, 338 U.S. 84 (1949).