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# Constitutional Law -- Congressional Investigations -- Contempt of Congress

Joel L. Fleishman

jury, to settle whether a future application of the regulations that may never occur would be valid."[38] This statement seems to be an accurate appraisal of the decision.

The great difference in the position of the plaintiffs in the several cases becomes obvious when one considers the possible harm that might result to each while waiting for the regulations to be applied. The *CBS* decision was based on the irreparable injury that plaintiff would suffer by reason of contracts lost on account of the regulation.[39] The *Storer* case seemed to require no threat of irreparable injury in order to justify judicial review of a regulation, but merely that the regulation control the business affairs of the party seeking review. Thus the Supreme Court has become increasingly liberal in allowing direct review of administrative regulations without waiting for them to be applied.

The cases from the other states reveal that some of the successful plaintiffs asked for an injunction or a declaratory judgment. No North Carolina case was found in which the plaintiff asked for either of these remedies in seeking review of an administrative regulation. The New Jersey court granted relief to the Sperry & Hutchinson Company[40] under the New Jersey Declaratory Judgment Act.[41] The Minneapolis Federation of Men Teachers[42] also got relief under the Minnesota act.[43] The North Carolina Declaratory Judgment Act[44] does not differ in any material particular from the acts of those states. It might be that a contrary decision would have been reached if the plaintiff in the *Duke* case had sought a declaratory judgment under the North Carolina act.

WILLIAM G. RANSDELL, JR.

**Constitutional Law—Congressional Investigations—Contempt of Congress**

Defendant, an instructor at Vassar College, was subpoenaed to appear before the House Un-American Activities Committee and was asked by the Committee a series of questions tending to elicit from him whether he was or had been a member of the Communist Party and whether he knew that one Crowley, who had identified defendant as a member of a communist group while the latter was a student and instructor at the University of Michigan, had been a member of the

[38] 351 U.S. at 212.
[39] See Justice Harlan's dissent in the *Storer* case, 351 U.S. at 211.
[40] Sperry & Hutchinson Co. v. Margetts, 25 N.J. Super. 568, 96 A.2d 706 (Ch. 1953), *aff'd*, 15 N.J. 203, 104 A.2d 310 (1954).
[41] N.J. STAT. ANN. § 2A:16-52 (1952).
[42] Minneapolis Federation of Men Teachers v. Board of Educ., 238 Minn. 154, 56 N.W.2d 203 (1953).
[43] MINN. STAT. ANN. §§ 555.01-.15 (1947).
[44] N.C. GEN. STAT. §§ 1-253 and 1-256 (1953).

Communist Party. Defendant refused to answer these questions on the grounds that such interrogation violated the first[1] and fifth[2] amendments. He was convicted[3] of contempt of Congress[4] and the court of appeals affirmed.[5] The Supreme Court granted certiorari, vacated the judgment of the court of appeals,[6] and remanded the case "for consideration in light of *Watkins v. United States.*"[7] On remand, in the case of *Barenblatt v. United States,*[8] the court of appeals again affirmed the conviction.

In the *Watkins* case, the Supreme Court reversed the contempt conviction of Watkins, a labor organizer, who had testified freely and fully about his own past Communist activities, but who refused to answer questions as to whether he had known certain other persons to be members of the Communist Party. The Court found that Watkins was not given sufficient information as to the pertinency of the questions to the subject under inquiry and held that he "was thus not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment."[9]

The *Barenblatt* case is one of several recent cases involving prosecutions for refusal to answer questions propounded by congressional investigating committees which were pending in the federal courts when the *Watkins* decision was rendered. Some of these cases have since been decided.[10] It seemed apparent, in view of the strong language[11]

[1] Defendant maintained that the first amendment prohibition against congressional lawmaking involving the freedoms of speech, press, and assembly includes a like prohibition against any form of congressional intrusion in these areas. The Court in Watkins v. United States, 354 U.S. 178, 197 (1957), seems to approve this contention when it says, "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 lawmaking."

[2] Defendant maintained that an indictment under 52 STAT. 942 (1938), 2 U.S.C. § 192 (1953), the contempt statute, was void because the contempt statute, when applied to the Committee's authorizing resolution, is void for vagueness and thus in violation of the due process clause of the fifth amendment. Defendant did not rely on the provision against self-incrimination.

[3] United States v. Barenblatt, Criminal No. 1154-54, D.C.D.C., March 15, 1956.

[4] 52 STAT. 942 (1938), 2 U.S.C. § 192 (1953).

[5] Barenblatt v. United States, 240 F.2d 875 (D.C. Cir. 1957).

[6] Barenblatt v. United States, 354 U.S. 930 (1957).

[7] 354 U.S. 178 (1957).

[8] 252 F.2d 129 (D.C. Cir. 1958).

[9] 354 U.S. at 215.

[10] Sacher v. United States, 252 F.2d 828 (D.C. Cir. 1958), *affirming* 240 F.2d 46 (D.C. Cir. 1957) *on remand in* 354 U.S. 930 (1957) (refusal by lawyer to tell the Senate Internal Security Subcommittee whether he was or had been a member of the Communist Party); Singer v. United States, 247 F.2d 535 (D.C. Cir. 1957) *reversing on rehearing* 244 F.2d 349 (D.C. Cir. 1957) (refusal by teacher to

used by the Court in *Watkins* concerning the House Un-American Activities Committee Charter,[12] that the decision therein would have an important effect on all pending and subsequent prosecutions for contempt of Congress. Apparently the Court itself considered *Watkins* to have such an effect for the Court granted certiorari, vacated the judgments of the court of appeals, and remanded, for consideration in light of *Watkins,* the *Barenblatt,*[13] *Sacher,*[14] and *Flaxer,*[15] cases, the only three contempt cases then pending before the Supreme Court. Two of these three cases have been reheard and decided after remand, yet in both rehearings the court of appeals affirmed its earlier decisions supporting conviction.[16]

In *Barenblatt,* the court was asked to acknowledge that "the Supreme Court in *Watkins* struck down the resolution creating the Standing Committee on Un-American Activities . . . and that prosecution based on refusal to answer questions asked by the Committee or a Subcommittee questioning thereunder must necessarily fall in that the resolution on which the indictment is based fails to meet the requirements of due process; and second, assuming this was not the case, that part of the opinion in *Watkins* relating to pertinency is dispositive of the present

identify for the House Un-American Activities Committee the names of others with whom he had participated in Communist activities); United States v. Peck, 154 F. Supp. 603 (D.C.D.C. 1957) (refusal by newspaperman to identify for the Senate Internal Security Subcommittee the names of others with whom he had participated in Communist activities); United States v. Lorch, — F. Supp. — (S.D. Ohio 1957) (refusal by teacher to tell the House Un-American Activities Committee whether he had been a Communist at a certain time in the past).

[11] "An excessively broad charter, like that of the House Un-American Activities Committee, places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference. It is impossible in such a situation to ascertain whether any legislative purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function. The reason no court can make this critical judgment is that the House of Representatives has never made it. Only the legislative assembly initiating an investigation can assay the relative necessity of specific disclosures." 354 U.S. at 205-06.

[12] "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." H.R. RES. 5, 83d Cong., 1st Sess., 99 CONG. REC. 18, 24 (1953).

[13] Barenblatt v. United States, 354 U.S. 930 (1957).

[14] Sacher v. United States, 354 U.S. 930 (1957).

[15] Flaxer v. United States, 354 U.S. 929 (1957) (refusal by union president to produce union records, including a membership list, for the Senate Internal Security Subcommittee).

[16] Flaxer v. United States, — F.2d — (D.C. Cir. 1958), *affirming* 235 F.2d 821 (D.C. Cir. 1956); Barenblatt v. United States, 252 F.2d 129 (D.C. Cir. 1958), *affirming* 240 F.2d 875 (D.C Cir. 1957).

case."[17] The court held that *Watkins* did not strike down the resolution[18] because 1) the Court would have said so explicitly if it had intended to do so; 2) the Court would have *reversed* on the authority of *Watkins* rather than *remanded* for consideration in light of *Watkins;* and 3) the Court did not repudiate other convictions under the same charter to which it referred in *Watkins.* The court then goes on to hold that Barenblatt had been made fully aware of the subject under inquiry and was thus able to see the pertinency of the questions thereto, the court considering the questions to be pertinent. By rejecting the argument as to the effect of *Watkins* on the resolutions and by deciding the case on the basis of pertinency to subject matter, the court implies that all *Watkins* requires is that the questions be pertinent to the subject matter under inquiry and that the witness be informed of the subject matter in one of five ways[19] so that he can gauge the pertinency of the questions thereto. But a careful reading of the *Watkins* opinion seems to indicate that the Supreme Court is saying a good deal more than this.

First, the Supreme Court seems to say that the congressional instructions to a committee, which are embodied in the authorizing resolution,[20] must spell out that group's jurisdiction with sufficient particularity[21] to enable the courts to ascertain clearly that Congress ordered the specific investigation and desires the particular information which the witness refuses to divulge.[22] This point is especially crucial because if it were decided that Congress had authorized the committees to compel answers to such questions as are involved in these cases, the courts might find it necessary as a last resort to declare unconstitutional the authorizing resolutions as being violative of the first amendment[23] as, indeed, several Justices have implied.[24] To avoid this extremity, the

[17] 252 F.2d at 130.

[18] "We are of clear opinion that *Watkins* did not void [the resolution]." 252 F.2d at 132.

[19] (1) The authorizing resolution; (2) the opening remarks of the chairman, members, or counsel of the committee; (3) the nature of the proceedings; (4) the questions themselves; and (5) the chairman's response to an objection on pertinency. 354 U.S. at 209-14.

[20] "Those instructions are embodied in the authorizing resolution." 354 U.S. at 201.

[21] *Ibid.*

[22] The importance of this prerequisite to a valid committee use of the subpoena power is emphasized by Justice Frankfurter in his concurring opinion in *Watkins,* 354 U.S. at 217. The authorizing resolution in *Barenblatt* and United States v. Lorch, — F. Supp. — (S.D. Ohio 1957), is the same as that in *Watkins.* As Judge Youngdahl lucidly shows in United States v. Peck, 154 F. Supp. 603 (D.C.D.C. 1957), the authorizing resolution of the Senate Committee on the Judiciary, through which the Internal Security Subcommittee derives its authority, is rife with the same vagueness and ambiguity which the Court vigorously condemned in *Watkins,* 354 U.S. at 201-06. This is the same authorizing resolution as is involved in *Sacher* and *Flaxer,* which the Court remanded for consideration in light of *Watkins.*

[23] See note 1 *supra.*

[24] Watkins v. United States, 354 U.S. at 196-98; See also Sweezy v. New

Court has announced that "whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits."[25] If the Court in *Watkins* did not expressly say that it struck down the resolution there involved for vagueness, it went to great lengths in citing vaguenesses for naught. It is possible that the reason the Court did not hold so explicitly is that the Court was obeying the doctrine that required it to decide a case on the constitutional issue only as a last resort. In the *Watkins* case the Court was able to show that the witness had not been apprised even of what the Committee considered to be the subject under inquiry and was thus not accorded due process. Another explanation is offered by Chief Judge Edgerton in his *Barenblatt* dissent when he argues that when "there are two grounds, upon either of which an Appellate court may rest its decision and it adopts both, the ruling on neither is obiter, but each is the judgment of the court and of equal validity with the other. And even if the Supreme Court's demonstration that the Committee on Un-American Activities had no authority to compel testimony were obiter, this court should defer to it."[26] But the clear meaning of the Court's words in *Watkins* is that the resolution is void for vagueness whenever a criminal prosecution is based upon it. In *remanding* instead of *reversing* the *Barenblatt, Sacher,* and *Flaxer* cases, the Court was following the practice of allowing lower courts to rectify their own mistakes, as Chief Judge Edgerton points out in his vigorous dissent in *Barenblatt.*[27]

Secondly, the Supreme Court has indicated that the subject matter of the investigation must be clearly within the congressionally authorized scope of inquiry.[28]

Thirdly, the Court says that the questions asked by the committee must be pertinent to the validly authorized subject of inquiry.[29] Finally, the Court requires that the witness be given such information as will indicate "what is the topic under inquiry" and must have explained to him "the connective reasoning whereby the precise questions asked relate to it."[30] In the *Barenblatt* case, the court found that the statement of committee counsel had informed the defendant of the subject of the hearings and that, therefore, the defendant could see the obvious pertinency of the questions to the announced subject.[31] The court did not discuss at

Hampshire, 354 U.S. 234, 251 (1957); *id.* at 261 (concurring opinion); United States v. Rumely, 345 U.S. 41, 58 (1953) (concurring opinion).

[25] United States v. Rumely, 345 U.S. 41, 46 (1953).
[26] 252 F.2d at 138.
[27] *Ibid.*
[28] United States v. Rumely, 345 U.S. 41 (1953).
[29] 354 U.S. at 208.
[30] *Id.* at 215.
[31] 252 F.2d at 136.

all the question of whether the committee-determined subject falls within the scope of the authorization given the committee by the House of Representatives. By thus placing the entire emphasis of the *Watkins* decision on the application of the pertinency of questions to subject matter requirement, the court of appeals makes it possible for a committee to define its investigation in whatever terms it wishes and then to ask questions pertinent to this self-established subject. This is precisely the evil practice the Court proscribes in *Watkins*.[32]

Hence, it would seem that, given the decision of the Court in *Watkins* and the obvious fact that the Court saw a clear connection between that case and the three remanded cases, the court of appeals might have found one of the following: 1) the witness had not been informed of the subject lawfully under inquiry,[33] 2) the specific questions involved were not pertinent to the lawfully authorized inquiry, 3) the subject under inquiry was not within the Committee's scope of authority,[34] 4) the resolution authorizing the investigation was void for vagueness, this being a criminal prosecution based thereon, as being violative of the fifth amendment, or 5) the resolution authorizing the investigation was void as a violation of the first amendment. Although the Supreme Court in *Watkins* pointed in the direction of the third or fourth choice, the court of appeals, en banc, held in *Sacher* and implied in *Barenblatt* that the resolutions involved were sufficiently definite to authorize the investigations. It would seem that having found in both cases that the questions were pertinent to the subject under inquiry, the court would have been obliged to discuss the question of whether the subject under inquiry was within the committee's authority. The disposition of these two cases seems to be inconsistent with the opinion of the Supreme Court in *Watkins* and, indeed, with the per curiam reversal in light of *Watkins* by the same court of appeals of its decision in the *Singer* case.[35]

In summary, it would seem that *Barenblatt* ignores the *Watkins* requirements for a valid prosecution for contempt: (1) a constitutional grant of authority explicitly inclusive of the investigation rather than simply not exclusive of such investigation;[36] (2) a specific investigation within the grant of authority; (3) questions clearly pertinent to such investigation, the relevance to which must be determined as of the time

[32] 354 U.S. at 205.
[33] This was the express holding in *Watkins*.
[34] This was the holding in the *Rumely* case. 345 U.S. 41 (1953).
[35] Singer v. United States, 247 F.2d 535 (D.C. Cir. 1957), *reversing* 244 F.2d 349 (D.C. Cir. 1957). This case has the identical fact situation as does *Watkins*. The other cases differ in that the information refused was of the defendant's own activities. A careful reading of *Watkins* reveals that the Court did not consider this point sufficiently important to qualify its decision by making such a dichotomy.
[36] 354 U.S. at 204.

when asked and not "looking backwards from the events that transpired";[37] and (4) a witness being fully apprised of the way in which the questions are pertinent. If the main emphasis of *Watkins* is not placed on the requirement of explicit congressional authorization, then that case tells us nothing new other than listing five ways by which a witness may be informed of the subject under inquiry.[38] The requirements of pertinency of questions to subject matter[39] and of pertinency of subject matter to congressional authorization[40] have long been declared to be essential. To read the *Watkins* decision in any other light removes from that case the vital impact the case was expected to have[41] on the entire practice of congressional investigations.[42]

JOEL L. FLEISHMAN

**Constitutional Law—Double Jeopardy—Conviction of Murder in the First Degree After Reversal of Conviction of Murder in the Second Degree**

In *Green v. United States*[1] the petitioner had been indicted in the District of Columbia for first degree murder. Upon a verdict of guilty of murder in the second degree, he appealed and obtained a new trial.[2] On remand he was again tried for first degree murder, and this time convicted of that charge and sentenced to death. The United States Supreme Court held that the second trial for first degree murder put the petitioner in jeopardy twice for the same offense in violation of the Federal Constitution.[3]

The reasoning of the Court was that the petitioner was not required to waive former jeopardy as to the charge of first degree murder in order to have a new trial of his conviction for second degree murder. The effect of this decision is that when an accused is tried for first degree

[37] *Ibid.*
[38] See note 18 *supra.*
[39] McGrain v. Daugherty, 273 U.S. 135, 176 (1927).
[40] United States v. Rumely, 345 U.S. 41 (1953).
[41] As Justice Clark says in his dissent in *Watkins,* "As I see it the chief fault in the majority opinion is its mischievous curbing of the informing function of the Congress." 354 U.S. at 217.
[42] *Cf.* United States v. Brewster, 154 F. Supp. 126 (D.C.D.C. 1957) (in convicting the President of Western Teamsters Conference for refusal to produce union records subpoenaed by the Investigations Subcommittee of the Senate Government Operations Committee, the court sustained the Committee's power to see the records in order to check the truthfulness of reports filed by the union with the Department of Labor); Federal Communications Comm'n v. Cohn, 154 F. Supp. 899 (S.D.N.Y. 1957) (court held that the F.C.C. had been given sufficient power by Congress to subpoena financial records of television finances in an investigation of radio and television networks).

[1] 355 U.S. 184 (1957).
[2] 218 F.2d 856 (D.C. Cir. 1955).
[3] U.S. CONST. amend. V provides in part, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."