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THE LIMITS OF CONGRESSIONAL INVESTIGATING POWER

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I

Of recent years much publicity has been given to the activities of congressional investigating committees At the present time such a committee is engaged in examining witnesses and taking evidence concerning the operations of munitions manufacturers. About a year ago a similar investigation of much public interest was held concerning the matter of air mail contracts. In the decade immediately preceding, the scandals arising out of the Harding administration formed the subject of similiar inquiries. Many like incidents within present-day memory might be cited, but the mention of any single recent investigation should not create the impression that congressional activity of this character is a matter of recent development. Such investigations have been held at frequent intervals ever since the origin of the Federal Government.[1] Before that time, their counterparts existed in the colonial legislatures, which in turn doubtless adopted this practice from the British Parliament.

Despite this long history, it was not until recent years that the extent of congressional power received comprehensive definition in the Supreme Court of the United States. It is true that some phases of the problem had been passed upon prior to that time, but in its more important aspects the problem remained a subject of practical legal controversy until the decision of *McGrain v. Daugherty*[2] in 1927. Since then the scrutiny of the courts has been directed chiefly to a clarification of details—a process which in fact is still going on.

At the outset it may be observed that the matter is one which essentially invites controversy, both from the standpoint of policy and law. Even now that the legal limitations are for the most part well prescribed, charges and countercharges are hurled back and

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[1] For comprehensive historical reviews, see Landis, Constitutional Limitations on the Congressional Investigating Power (1926), 40 Harv. L. Rev. 153; also, Potts, Power of Legislative Bodies to Punish for Contempt (1926), 74 U. Pa. L. Rev. 691, *McGrain v. Daugherty*, 273 U. S. 135, 71 L. Ed. 580, 47 Sup. Ct. 319 (1927).

[2] 273 U. S. 135, 71 L. Ed. 580, 47 Sup. Ct. 319 (1927).

forth between advocates and opponents of each investigation, directed to the wisdom or the utility or good policy of their conduct. The sincere advocates see only an effort toward better government and a resulting benefit to society from using the investigating process to inform the legislative branch of government upon existing conditions, so that it may better discharge its functions[3] The opponents of the process, on the other hand, see only an attempt to try the persons or businesses involved at the bar of public opinion before an unfair and politically prejudiced tribunal.[4] As a matter of fact, the whole question is so closely identified with political conflict as to make any agreement upon the question of policy impossible. It probably most nearly approximates truth to say that the advocates of congressional investigations have theory upon their side, and that in practice there is much to substantiate the charges of the opposition. However, even this statement is open to challenge, and it is the function of this article to approach the question from an entirely dispassionate standpoint and to consider only what limits, if any, have been imposed upon the power by the courts.

Controversy has extended as well to the legal aspects of the matter, and the treatment of the subject by various writers for legal periodicals has, in the last analysis, been largely devoted to advocacy for or against the existence of broad congressional power.[5] Insofar as it is possible to do so, this discussion will avoid the legal as well as practical phases of dispute.

II

The investigating power of Congress as discussed in this article is automatically limited to determining the power of Congress to compel attendance and testimony of witnesses and the production of books, records and papers and the punishment of persons refusing to testify or produce such documents after demand. Of course, Congress or a committee appointed by either of its houses has the unquestioned power to receive information voluntarily given. It is only when some person believed to possess information refuses to appear or testify or to furnish the particular information requested

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[3] See case note 15 Georgetown L. Rev. 344, a sample of optimistic endorsement.

[4] Stebbins, Limitations of the Powers of Congressional Investigating Committees (1930), 16 A. B. A. 425.

[5] See notes 1, 3 and 4, *supra*, also, in a more moderate vein: For the power, Coudert, Congressional Inquisition v. Individual Liberty (1929), 15 Va. L. Rev. 537 against, Loring, Powers of Congressional Investigating Committees (1924), 8 Minn. L. Rev. 595, generally impartial note by Wigmore (1925), 19 Ill. L. Rev. 452; Shull, Congress and Its Witnesses (1931) 5 Temple L. Q. 425.

that the matter becomes of any legal interest. The threat or use of punitive methods to compel obedience is then met with a challege of congressional power, and a justiciable problem is presented.

In searching for the source of the asserted power the first inquiry must be directed to the Federal Constitution. Respecting the powers of Congress the Constitution provides.

> "All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives." Art. I, §1.
>
> " The house of representatives shall choose their speaker and other officers, and shall have the sole power of impreachment." Art. I, §2.
>
> " The senate shall have the sole power to try all impeachments. " Art. I, §2.
>
> "Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.
>
> "Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. " Art. I, §5.

In addition, the Constitution, of course, contains a statement of the subjects upon which Congress is authorized to legislate, which are further amplified under the doctrine of implied powers.[6]

There is, then, no specific constitutional provision authorizing compulsory production of testimony by either house of Congress, and that power, so far as it exists, must of necessity arise by implication.

It will be noted from the sections quoted from the Constitution that the powers of Congress, generally speaking, fall into three classes. First, legislative powers, second, the power to control the internal affairs of each house and to discipline its members and pass upon their qualifications, third, the power to impeach, vested in the House of Representatives, and the power vested in the Senate to try such impeachment. The question therefore is Does the power to compel the attendance of witnesses and the production of testimony follow as an implied incident to the constitutional grant of any or all of the above general powers?

Let us examine the decisions to ascertain the views expressed by the courts upon these matters.

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[6] *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

III

The first decision of the Supreme Court of the United States generally considered to bear upon the question is *Anderson v. Dunn*,[7] This was an action for assault and battery and false imprisonment, brought against the sergeant-at-arms of the House of Representatives. The defendant pleaded justification of his conduct, in that he acted under a properly issued warrant of the House. The pleadings in the common law form are set out at length in the report of the case, but do not inform as to the actual cause for which the plaintiff was arrested. This matter likewise does not appear specifically from the opinion itself, but apparently the plaintiff was charged with attempting to bribe a member of the House, and that body was engaged in punishing him for contempt.[8] Thus the only matter actually under consideration was the power of the House of Representatives to punish for contempt a person guilty of a grave breach of decorum toward it. The opinion is for the most part a generalization of the law respecting this matter. The conclusion reached is that, on principles of self-preservation necessary for the proper maintenance of government and the dignity of one of its foremost instrumentalities, the power to commit for such contempt is unquestionable. Obviously this case has only an indirect bearing upon the matter considered by this article. However, in concluding, the court makes the following statement

> "As to the minor points made in this case, it is only necessary to observe, that there is nothing on the face of this record from which it can appear on what evidence this warrant was issued. And we are not to presume that the house of representatives would have issued it without duly establishing the fact charged on the individual."

Out of this and other general language, the notion seems to have arisen that the case stood for the proposition that the determina- of a house of Congress that a person was guilty of contempt was conclusive, and that the courts would not attempt to go behind the decision of the legislature upon the matter of guilt. It requires, to say the least, a most liberal construction of the opinion to attribute such a meaning to it, and, in any event, such a construction has been definitely discarded in the later cases.[9]

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[7] 6 Wheat. 204 (1821).

[8] *Kilbourn v. Thompson*, 103 U. S. 168, 196 (1880) Landis, Constitutional Limitations on Congressional Investigating Power (1926) 40 Harv. L. Rev. 153, 213.

[9] *Kilbourn v. Thompson*, 103 U. S. 168 (1880).

IV

The direct question of the investigating power of Congress and the incidental power to punish for contempt first came before the Supreme Court of the United States in *Kilbourn v. Thompson*[10] in 1880. It is surprising that more than ninety years elapsed between the adoption of the Constitution and the first actual test of this question before the nation's highest tribunal, especially since numerous investigations of one kind or another had taken place in the intervening period[11] The case arose out of the bankruptcy of the firm of Jay Cooke & Co. As the basis for the investigation, the House of Representatives passed a resolution reciting that the United States Government was a creditor of Jay Cooke & Co., resulting from improvident deposits made by the Secretary of the Navy with the London branch of that concern. The resolution further recited that a matter known as the real-estate pool had only been partially inquired into by a previous general committee of Congress, that the trustee in bankruptcy of Jay Cooke & Co. had made a settlement with the associates of the firm to the disadvantage and loss, as it was alleged, of numerous creditors of the estate, including the United States Government, and that the courts by reason of such settlement were powerless to give adequate redress to the creditors. On the strength of these recitals the resolution directed the appointment by the speaker of a committee of five members to inquire into "the matter and history of said real-estate pool and the character of said settlement, with the amount of property involved in which Jay Cooke & Co. were interested, and the amount paid or to be paid in settlement, with power to send for persons and papers and report to the House."

Such a committee was appointed and it subpoenaed Kilbourn to appear and testify Kilbourn appeared, but refused to answer the following question.

> "Will you state where each of the five members reside, and will you please state their names?"

He likewise refused to produce records which the committee had demanded under a subpoena *duces tecum*. The committee then reported these refusals to the House, stating that it was of the opinion that obedience on the part of the witness was essential to the proper conduct of the inquiry, and that there was no sufficient reason for his refusal to comply with the demands made. The House then passed a resolution ordering the speaker to issue a warrant requiring Kilbourn to appear before the House itself.

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[10] Note 9, *supra*.
[11] Note 1, supra.

In the execution of this warrant Kilbourn was arrested by the sergeant-at-arms, brought before the House, and, still refusing to answer the question or produce the requested papers, was committed for contempt and placed in the custody of the sergeant-at-arms in the common jail of the District of Columbia until he might see fit to submit to the demands of the investigating committee. He was later released from custody upon a writ of *habeas corpus*, and then brought suit against the sergeant-at-arms and all of the members of the investigating committee, seeking damages for false imprisonment. The defendants by way of defense pleaded all the circumstances above stated.[12] The plaintiff demurred to the plea, and, the demurrer having been overruled, plaintiff appealed to the Supreme Court.

The importance of this decision, standing as it does as the earliest authority upon the scope of congressional investigating power, cannot be over emphasized. The case has in later times been examined and re-examined, frequently with the surprising result that persons representing directly conflicting views have construed the case as authority for equally conflicting propositions.[13] In fact, upon close examination, the decision does not admit of any serious debate, but it is essential to an understanding of the later decisions to determine just what the court actually decided.

In entering upon the discussion, Mr. Justice Miller, the author of the decision, states

> "The argument before us has assumed a very wide range, and includes the discussion of almost every suggestion that can well be conceived on the subject. The two extremes of the controversy are, the proposition on the part of the plaintiff, that the House of Representatives has no power whatever to punish for a contempt of its authority, and on the part of the defendants, that such power undoubtedly exists, and when that body has formally exercised it, it must be presumed that it was rightfully exercised."

He then, in the following language, disposes of the idea that the congressional power over witnesses is unlimited.

> "Conceding for the sake of the argument that there are cases in which one of the two bodies, that constitute the Congress of the United States, may punish for con-

[12] The defendant members of Congress also pleaded immunity under Art. I, §6, of the Constitution, providing that senators and representatives "shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place."

[13] For example, *Ex parte Daugherty*, 299 Fed. 620 (1924).

> tempt of its authority, or disregard of its orders, it will scarcely be contended by the most ardent advocate of their power in that respect that it is unlimited."

The court then notes the absence of express constitutional authority empowering Congress to employ compulsory process for investigating purposes, and launches into an inquiry as to the existence and extent of implied power of such a character. In aid of the power, the defendants had urged that it existed as an incident to the "legislative powers" granted by the Constitution. More specifically it was contended that the phrase "legislative powers" included the prerogatives of the House of Commons of England, from which it was asserted that the American system of parliamentary law was derived. Admittedly the House of Commons had long held and employed the power to compel attendance and testimony of witnesses.[14] The value of the English practice as a precedent was examined in great detail, and rejected. The court said

> "We are of the opinion that the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two Houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices."

This conclusion is reached upon the view that the power of the House of Commons in this respect is a consequence of the peculiar historical development of that body derived from the fact that originally the Parliament of England, before separation into the two Houses of Lords and Commons, exercised many judicial functions and was, in fact, known as the High Court of Parliament, having in consequence many judicial as well as legislative powers. At this point it is only proper to state that historians and legal commentators have challenged the accuracy of argument.[15] So far, however, as the Supreme Court of the United States is concerned, *Kilbourn v. Thompson* seems to have been accepted as a conclusive determination upon this point.[16]

The court did not, however, reject the broader contention that the power existed as a necessary incident to the grant of "legislative powers." Instead, it expressly declined to pass upon this question, saying·

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[14] Note 1, *supra.*
[15] Note 1, *supra.*
[16] Followed in *Marshall v. Gordon*, 243 U. S. 521, 61 L. Ed. 881, 37 Sup. Ct. 448 (1917).

> "Nor, taking what has fallen from the English judges, and especially the latest cases on which we have just commented, is much aid given to the doctrine, that this power exists as one necessary to enable either House of Congress to exercise successfully their function of legislation.
>
> "This latter proposition is one which we do not propose to decide in the present case, because we are unable to decide it without passing on the existence or non-existence of such power in aid of the legislative function."

In the light of the last paragraph above quoted, there can, then, be no doubt that *Kilbourn v. Thompson* did not purport to pass upon the power of Congress to conduct an investigation in aid of its legislative functions. From what immediately precedes this last quoted paragraph, one is, as a matter of fact, given some reason to suspect that the personnel of the court which decided *Kilbourn v. Thompson* would have been inclined to regard such an investigation with disfavor, but that comment is, in the light of what follows, clearly dictum.

This particular phase of the problem disposed of, the court next proceeds, in what also may be regarded as dictum, to recognize the possible power of each house of Congress to require testimony and punish witnesses for disobedience in cases involving the election and qualification of members of Congress and the impeachment of goverenment officers. Although, strictly speaking, this is dictum, there can be no doubt that it expresses the law of the present day [17]

Leaving dictum and coming to the law of the case, we find the following pronouncement

> "Whether the power of punishment in either House by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen."

This is the classic statement of the rule of *Kilbourn v. Thompson.* Applying this rule to the facts before it, the court concluded that the investigation into the affairs of Jay Cooke & Co. was an inquiry into private affairs, and hence, beyond the power of Congress.

Referring to the resolution which formed the basis of the inquiry, the court finds that the only matters to be inquired into were those which already were in the courts. and that the courts

[17] *In re Chapman,* 166 U. S. 661, 41 L. Ed. 1154, 17 Sup. Ct. 677 (1896) *Barry v. United States,* 279 U. S. 597, 73 L. Ed. 867 49 Sup. Ct. 452 (1929).

alone were adequate to redress any wrongs which might exist, or, viewed from the reverse side, Congress was without power to act upon the matters into which it sought to inquire. This discussion is attended by extended comment on the doctrine of separation of powers, in which, as in other parts of the opinion, the court stresses the view that the power to compel production of testimony is a judicial function, and that the judicial powers of the legislative branch of government are limited to a very few matters.

The emphasis thus placed upon separation of powers has been regarded as technically incorrect. It has been said that the process of compelling attendance and testimony of witnesses is not an exclusive judicial function, but rather that within the proper sphere of legislative activity it is as much a legislative as a judicial function, although in truth employed much less frequently by the former branch of government than the latter.[18] The critics upon this point, therefore, contend that the court should rather have decided that the particular inquiry involved was not within the scope of the legislative powers of Congress. From a technical standpoint there is much to be said for this view, but, practically, the matter is not of great importance.[19]

The result achieved in *Kilbourn v. Thompson* is correct. An examination of the original resolution leads to the irresistible conclusion that the House of Representatives had no notion of exercising any legislative function, but rather was proceeding only to take some action looking to redress for the creditors of Jay Cooke & Co. It is true, as will appear in the discussion of the later cases, that the absence of recital of a proper legislative function as the basis for an investigation will not invalidate the proceedings if the subject matter of the inquiry is in fact within the scope of legislative action.[20] But even this does not go so far as to justify an investigation, if the resolution itself positively indicates that the legislative body had an entirely different purpose in mind.

Despite the nature of the resolution, there are, however, commentators who, in advocating the existence of extensive powers of congressional investigating committees, criticize the court for having taken too narrow a view of the purpose of this inquiry, and contend that there were subjects involved in the inquiry which could have formed the subject of legislation.[21] Further, it is very

[18] Note by Wigmore (1925), 19 Ill. L. Rev. 452.

[19] But see *Barry v. U. S.*, note 17, supra, which declares "In exercising the power to judge of the elections returns and qualifications of its members, the Senate acts as a judicial tribunal " The same is doubtless true of impeachment trials. Inquiries in aid of legislative action differ in nature from the foregoing, but the problem is at any rate one of denomination only.

[20] *In re Chapman*, note 17, *supra*.

[21] 40 Harv. L. Rev. 153, note 1, *supra*.

likely that if *Kilbourn v. Thompson* were to arise today, the case would be extensively argued to the court upon this theory, and possibly a different decision would result. Without, however, discussing this matter in further detail, it seems that upon the questions involved, as presented to the court, the case was correctly decided.

Naturally, in considering the case, the court recognized the right of the judicial branch of the government to pass upon the propriety of a congressional investigation. The defendant urged that *Anderson v. Dunn*[22] stood for the proposition that the legislative determination as to the existence of the power to punish for contempt is conclusive. The court, however, declined to accept this view

The decision, of course, concluded with the reversal of the decision of the lower court so as to sustain the demurrer to the plea of the sergeant-at-arms. The defendant members of Congress, however, were dismissed from the cast under the theory of constitutional privilege.

Summarizing this decision, we find an enunciation of the following propositions

1. Congressional power to punish for contempt is not unlimited.
2. Such power as does exist, of necessity arises by implication.
3. The power to punish for contempt of the authority of a house of Congress or a breach of its privileges derives no support from English parliamentary practice, and, by way of dictum, that the English practice likewise does not give much aid to the doctrine of the existence of such a power as one necessary to enable Congress to exercise the legislative function.
4. Recognition, again by way of dictum, of the probable existence of the power to punish a contumacious witness upon hearings involving the qualification or election of members of Congress or impeachment of government officers.
5. That there is no power in either house of Congress or a committee appointed thereby to conduct a general inquiry into the private affairs of a citizen and that such was the nature of the attempted investigation in the case at bar.

V

Following the decision in *Kilbourn v Thompson* sixteen years elapsed before any similar question came before the Supreme Court, in *In re Chapman.*[23] A petition for a writ of *habeas corpus*

[22] Note 7, *supra.*
[23] Note 17, *supra.*

was held in that proceeding, the petitioner seeking to have declared invalid a conviction for contempt of Congress under Sections 102, 103, 104 and 859,[24] Revised Statutes. The facts were that Congress was engaged in the enactment of a tariff bill, which, among other things, involved duties upon the import of sugar, the passage or rejection of which would materially affect the market value of the stock of the American Sugar Refining Company Charges had appeared in the press that members of the Senate were yielding to corrupt influences in the consideration of the tariff bill, and accordingly an investigation was initiated to inquire into the substance of these charges. In the course of that investigation the petitioner, a member of a firm of stock brokers in New York, appeared as a witness and was asked whether his firm had bought or sold any sugar stocks during a part of the year 1894 for the account of any United States senator. Upon his refusal to answer, he was tried under the authority of the statutes mentioned, and convicted. The petitioner had expressly waived his right to refrain from self-incrimination,[25] and Sections 103[26] and 859,[27] which concern the exercise of that privilege, were eliminated from consideration. Only Sections 102 and 104, Revised Statutes, then, were involved, the text of these sections being as follows

> "Sec. 102. Every person who, having been summoned as a witness by either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months."
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> "Sec. 104. Whenever a witness summoned as mentioned in section one hundred and two fails to testify and the facts are reported to either House, the President of the

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[24] Secs. 102 and 104 are set out hereinafter in the text.

Sec. 103. No witness is privileges to refuse to testify to any fact. or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous."

"Sec. 859. No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

[25] Fifth Amendment, Constitution of the United States.

[26] Note 24, *supra.*

[27] Note 24, *supra.*

> Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action."

The court first held that the reference in Section 102 to "any matter under inquiry" required reasonable construction, and that such a construction must limit the scope of the statute to inquiries actually within the jurisdiction of the two houses of Congress and to questions pertinent thereto and to facts or papers bearing thereon. So construed, the court held that the statute was not too broad to be valid.

Considering next the power of the Senate to conduct the particular inquiry involved, the court notices the various powers granted to Congress by the Constitution, including, among others, that relating to control of its members, and likewise notes the rule of *Kilbourne v Thompson*[28] prohibiting an inquiry into the private affairs of a citizen. In distinguishing that case and establishing the power of the Senate in the instant case, the court states

> "The case at bar is wholly different. Specific charges publicly made against Senators had been brought to the attention of the Senate, and the Senate had determined that investigation was necessary The subject-matter as affecting the Senate was within the jurisdiction of the Senate. The questions were not intrusions into the affairs of the citizen, they did not seek to ascertain any facts as to the conduct, methods, extent or details of the business of the firm in question, but only whether that firm, confessedly engaged in buying and selling stocks, and the particular stock named, was employed by any Senator to buy or sell for him any of that stock, whose market price might be affected by the Senate's action. We cannot regard these questions as amounting to an unreasonable search into the private affairs of the witness simply because he may have been in some degree connected with the alleged transactions, and as investigations of this sort are within the power of either of the two Houses they cannot be defeated on purely sentimental grounds."

The court then found that the questions put were pertinent to the inquiry, saying·

> "The questions were undoubtedly pertinent to the subject-matter of the inquiry The resolutions directed the committee to inquire 'whether any Senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate.' What the Senate might or might not do upon the

[28] Note 9, *supra*.

> facts when ascertained, we cannot say, nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative answers would have cleared that body of what the Senate regarded as offensive imputations, while affirmative answers might have led to further action on the part of the Senate within its constitutional powers."

The resolution upon which the inquiry was based contained no recital indicating the purpose of the investigation, but this was held to be immaterial.

> "Nor will it do to hold that the Senate has no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member. 1 Story on Const., §838.
>
> We cannot assume on this record that the action of the Senate was without a legitimate object, and so encroach upon the province of that body Indeed, we think it affirmatively appears that the Senate was acting within its right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded."

In concluding its opinion, the court disposed of the petitioner's contention that the statute was invalid, since disobedience of a witness is punishable by the Senate itself as contempt. In this proposition the court said.

> "Nevertheless, although the power to punish for contempt still remains in each House, we must decline to decide that this law is invalid because it provides that contumacy in a witness called to testify in a matter properly under consideration by either House, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States, who are interested that the authority of neither of their departments, nor of any branch thereof shall be defied and set at naught. It is improbable that in any case cumulative penalties would be imposed, whether by way of punishment merely, or of eliciting answers desired, but it is quite clear that the contumacious witness is not subjected to

> jeopardy twice for the same offence, since the same act may be an offence against one jurisdiction and also an offence against another, and indictable statutory offences may be punished as such, while the offender may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu* and capable of standing together."

In keeping with the foregoing proposition, the petition for a writ of *habeas corpus* was denied.

Recapitulating the points developed, we find

First. That the Senate has the power to hold an investigation in matters which concern the conduct of its members.[29] As we have already noted, this power was recognized by way of dictum in *Kilbourn v. Thompson.*

Second. That it is unnecessary that the resolution authorizing the investigation recite its purpose, if in fact the subject matter of the inquiry is one within the range of congressional power.

Third. That two methods of punishment are available, the first being commitment for contempt by a house of Congress, and the second being prosecution in the courts under the sections of the Revised Statutes above mentioned.[30]

In re Chapman contains nothing in conflict with the propositions announced in *Kilbourn v. Thompson.*

VI

Following *In re Chapman* twenty-one years elapsed before the next decision, *Marshall v. Gordon,*[31] in 1917 This action, in the form of a petition for a writ of *habeas corpus,* dealt with a rather amusing state of fact. It appeared that a member of the House of Representatives, on the floor of that body charged the petitioner, who was the district attorney of the Southern District of New York, with many acts of misfeasance and nonfeasance. At the time, the grand jury of the Southern District of New York was engaged in investigating alleged illegal conduct of this member of the House with respect to the Sherman Anti-Trust law and other

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[29] Like power was sustained in *Barry v. U. S.*, 229 U. S. 597, 73 L. Ed. 867, 49 Sup. Ct. 452 (1929) upon an inquiry into the qualifications of Vare of Pennsylvania to take his seat in the Senate. One Cunningham, who had declined to testify before a Senate committee as to the source of campaign contributions, was arrested to be brought before the Senate itself to answer "questions pertinent to the matter under inquiry." The validity of the warrant was sustained, and the powers of the Senate stated to be those of a judicial tribunal in such cases. See note 19, *supra.*

[30] The optional courses have both been from time to time without any apparent uniformity of program.

[31] Note 16, *supra.*

matters. Upon this investigation the grand jury preferred an indictment against the member of Congress. The latter thereupon retaliated by requesting that the Judiciary Committee of the House inquire into a report concerning the charges which he had made against the district attorney, with a view to possible impeachment. This request was granted by the House, and a committee was appointed, which proceeded to New York to take testimony Friction immediately developed between the office of the district attorney and the committee, the former charging that the latter was seeking to penetrate unlawfully into the proceedings of the grand jury Soon there appeared in the press an article charging that the writer thereof was informed that the committee was endeavoring to investigate and frustrate the action of the grand jury rather than to investigate the conduct of the district attorney The committee asked the writer of the newspaper article to disclose the name of his informant, and he refused to do so. Accordingly, the writer was threatened with punishment for contempt of the House. Thereupon the district attorney wrote a letter to the chairman of the committee, stating that he was the informant referred to in the article, and that the charges there made were true, repeating them in amplified form in language which, according to the court, was "certainly unparliamentary and manifestly ill-tempered and which was well calculated to arouse the indignation not only of the members of the subcommittee but of those of the House generally" Simultaneously, in keeping with the rather common practice of public officials, the district attorney gave a copy of the letter to the press so that it might be published at the same time that it was received by the chairman of the committee. Upon receipt of the letter the committee reported the matter to the House, and a select committee was appointed to consider the subject. The district attorney was called before that committee, and re-asserted the charges made in the letter, stating further that they were justified by the circumstances and under the same conditions would be made again. Thereupon the select committee reported to the House, saying that, in its opinion, the letter contained defamatory and insulting matter tending to bring the House into public contempt and ridicule, and that the district attorney was guilty of contempt of the House because of the violation of its privileges, its honor and its dignity This report was adopted by the House, a warrant issued, and the district attorney arrested by the sergeant-at-arms, which procedure was followed immediately by application for discharge on *habeas corpus*. The application was refused in the lower court, but this decision was reversed by the Supreme Court and the district attorney was released.

In arriving at this result the court re-affirms that portion of *Kilbourn v. Thompson*[32] announcing the doctrine that the power of a house of Congress to punish for contempt is not derivable from any similar practice on the part of the English House of Commons. It further recognizes the fundamental rule that the only punitive power vested in a house of Congress arises by implication from the powers conferred by the Constitution. In passing upon the extent of this implied power as applied to the facts presented, the court says.

> "What does this implied power embrace? is thus the question. In answering, it must be borne in mind that the power rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply It is a means to an end and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted."

The court further quotes from *Anderson v. Dunn*[33] the statement that the power possessed by a house of Congress to punish for contempt is "the least possible power adequate to the end proposed," and follows by laying down a practical test, embodied in the following quotation

> "Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power it is clear that it does not embrace punishment for contempt as punishment, since it rests only on the right of self-preservation, that is, the right to prevent acts which in and of themselves inher ently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed."

In concluding, it was determined that though the conduct of the district attorney might have been irritating to the House nevertheless it was not obstructed in the exercise of any of its proper functions, and therefore the petitioner was immune from punishment as for contempt.

It will be observed that this case does not directly concern the power of investigating committees, rather, like *Anderson v. Dunn,* it deals with the general power of a house of Congress to punish

[32] Note 9, *supra.*
[33] Note 7, *supra.*

for contempt in a matter affecting its dignity No question was presented concerning the power to hold the investigation or the power to compel the attendance and testimony of witnesses. The case has, however, been frequently considered on the strength of the general principles which it announces, and, as will appear in the last case discussed in this article, has been invoked directly in a matter concerning the production of evidence upon a congressional investigation.[34]

Marshall v. Gordon directly determines only that the power of a house of Congress to punish for contempt is limited to instances in which the person charged with contempt has been guilty of some act which in some way prevented or obstructed the house from the exercise of its proper functions.*

[34] *McCracken v. Jurney*, 72 F (2d) 560 (1934) *Jurney v. McCracken*, 55 S. Ct. 385, (1935).

* To Be Continued.