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DEFAMATION DURING CONGRESSIONAL INVESTIGATIONS: A PROPOSED STATUTE

J. DENNIS HYNES*

On Thursday, October 14, 1965, the Internal Security Subcommittee of the United States Senate Committee on the Judiciary, pursuant to a resolution purportedly adopted by all members of the Subcommittee,¹ released to the public a staff study entitled "The Anti-Vietnam Agitation and the Teach-In Movement—The Problem of Communist Infiltration and Exploitation."² On page twenty-six of the Subcommittee study an

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1. Page III of the Study contains the following resolution: "*Resolved by the Internal Security Subcommittee of the Senate Committee on the Judiciary, That a staff study entitled 'The Anti-Vietnam Agitation and the Teach-In Movement' be printed and made public.*" This was followed by the names of James O. Eastland, Chairman, Thomas J. Dodd, Vice Chairman, the seven other subcommittee members, and the statement: "Approved October 13, 1965."

2. The tone of the Subcommittee study is set not only by its sub-title but also by an introduction by Senator Thomas J. Dodd, which contains on pages XIV-XV of the Study the broadly quoted statement that "The control of the anti-Vietnam movement has clearly passed from the hands of the moderate elements who may have controlled it at one time, into the hands of Communists and extremist elements. . . ."

It is clear from a reading of the text that the Study includes teach-ins as part of "the anti-Vietnam movement." The terminology frequently overlaps, with the anti-Vietnam movement referred to as "anti-Vietnam agitation" and the teach-ins as "the teach-in movement."

In addressing itself to the teach-ins specifically, the Study in its conclusions states in part that the proceedings of the great majority of teach-ins "were characterized by extremist statements and the open distribution of Communist literature." (p. XV).

The Study is a compilation of newspaper clippings, pamphlets, letters, citations and quotes from the House Committee on Un-American Activities, and so forth. Nowhere in the Study does it indicate that hearings were held or testimony taken.

The scope and coverage of the Study can perhaps best be demonstrated by quoting its table of contents:

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anonymous letter entitled "The Teach-Ins at the University of Colorado" was published without comment, criticism or rebuttal.

The letter contained a number of damaging statements and innuendoes about certain members of the University of Colorado faculty and the intellectual climate at the University, like the statements that four named members of the University faculty, who were described as organizing the first two teach-ins at the University, were "close friends" of two other named members of the faculty who were "both former members of the Communist Party;"³ that the same faculty group controls the student

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The material covering the origins of the teach-in movement (Chapter IV) consists largely of quotes from reports on four teach-ins. For a description of one of these reports, see note 5 *infra*.

The biographical notes (Chapter VIII) cover twenty-six individuals described on page 45 as "some of the sponsors and speakers for the teach-in movement." The introduction to this lengthy (forty-five pages) chapter notes in part that:

... a significant number of the sponsors [of the Inter-University Committee for Public Hearings on Vietnam] and an even more significant percentage of the activists in the movement have persistent records of Communist sympathies and/or of association with known Communists and known Communist movement and front organizations.

In the pages that follow we present the facts relating to some of the sponsors and speakers for the teach-in movement, taken from publicly available sources, as to their Communist affiliations and sympathies. One or two Communist front associations may be joined in innocence. But a record of 20 or 30 or 40 such associations over a period of years cannot, even with the most liberal interpretation, be explained on the basis of innocence. (p. 45).

The reader is thus left with the unmistakable impression that the individuals named in the biographical section are hard-core Communists or Communist sympathizers. This evidence doubtless is intended to lend substantial support for the conclusion that "the anti-Vietnam movement has clearly passed ... into the hands of Communists and extremist elements. . . ." (p. XIV-XV).

The introduction to the biographical section can partially be evaluated by reference to the biographical note on pages 51 and 52 of one Oliver Edmund Clubb, listed as a member of the political science faculty of Columbia University and described as a former member of the State Department, having held a number of positions in the Far East. The past acts cited against Mr. Clubb consist solely of a visit—apparently motivated from curiosity—he made in 1932 to the office of the New Masses. The Subcommittee study points out that each of the people whom Mr. Clubb met were Communists—surely not a surprising conclusion—and that the individual from whom he had obtained a letter of introduction was at least highly suspected to be a Communist. No evidence other than this one visit is cited to substantiate the Subcommittee staff's inclusion of Mr. Clubb in the biographical section.

As the table of contents makes clear, the remaining 145 pages of the 235 page document constitute an elaborate appendix, with a heavy emphasis on Communist documentation lending support to the teach-ins and the anti-Vietnam movement. One document was even underlined at critical junctures (see pp. 133-37).

3. There are serious doubts about the factual accuracy of this statement.

A public letter of three of the four professors (the fourth was out of town at the time) who were described as organizing the teach-ins and as being close friends of the other two stated that one of the four had never even met the two, two others were only casual acquaintances, and only one of them could be described as a close friend of the two. *Colorado Daily*, Oct. 22, 1965, (the *Gadfly* section), p. 1.

These factual doubts are of course significant. But the striking part of the statement is the approval by the Subcommittee of the use of the guilt by association technique. It seems clear that this was the intent of the Subcommittee, since there was no other conceivable purpose for including that statement in the Subcommittee study. It adds nothing to the discussion of teach-ins except as it relates to "Communist infiltration and exploitation." And it adds to that subject only if one reasons via guilt by association. This conclusion is reinforced when one recalls that the purpose of the report, as evidenced by its sub-title, was to expose "The Problem of Communist Infiltration and Exploitation" of the teach-in movement; in addition, the staff had to back up its conclusion that the anti-Vietnam movement "has clearly passed... into the hands of Communists and extremist elements..." (pp. XIV-XV).

The invalidity of the use of guilt by association can factually and logically be demonstrated by reference to the material contained in the letter. Nowhere does it state that the two professors who were cited as former Communists took any part in the teach-ins. (Newspaper reports indicate that one of the two was out of the country at the time of the teach-ins and the other took no part in and did not even attend them. *Colorado Daily*, *supra* at p. 1. See also, *Rocky Mountain News*, Oct. 21, 1965, p. 8, col. 3.) To most reasonable people this makes remote the possibility of the other four being influenced (even had they all been "close friends") and of the teach-ins thereby being "infiltrated." To hold otherwise, and take the position that the alleged friendship alone demonstrates that the Colorado teach-ins were infiltrated by Communists, must mean that one concludes that an individual's close friends—even if he is an adult—always dominate his position on public issues, with the result that any group that he may join or speak in front of in airing the public issue becomes "infiltrated." Rational people do not take such a logical leap.

To compound the absurdity, the report itself admits that these two professors are *former* Communists. (It is reported elsewhere that both of them had quit the Communist Party over twenty years prior to the teach-ins. See the *Denver Post*, Oct. 21, 1965, p. 30, editorial col.). Not only must one take the leap from close friendship to political domination, therefore, but one is also asked to accept the wholly untenable proposition that once a Communist, always a Communist (or a Republican, or a Socialist, etc.). Common experience refutes this. People do change their minds. For an excellent account of a change of mind, see Wechsler, *The Age of Suspicion* (1953). One might also note that a book frequently cited as a chilling account of the horrors of Communism (Koestler, *Darkness at Noon* (1941)), was written by an ex-Communist. One might further note that to accept the contrary thesis involves rejecting the entire free speech and open debate theory underlying our society, since individual immutability of political philosophy is conclusively presumed.

The use of guilt by association in the study is much broader than the anonymous letter, of course. It is obvious that the Subcommittee was attempting to impugn the entire teach-in and anti-Vietnam movement by pointing out examples of "Communist infiltration and exploitation." If this was not their objective, why did they authorize the publication of the study, which does not attempt to deal with the substantive arguments made by the critics of the administration, but rather confines itself to endlessly (see table of contents, note 2 *supra*) pointing out Communist enthusiasm for the protests.

An excellent rebuttal of this type of reasoning (*i.e.*, that a position on a public issue is bad because of the disreputability of some of the individuals who support it) is contained in Commager, *Guilt—and Innocence—by Association*, *N.Y. Times*, Nov. 8, 1953, § 6 (Magazine), p. 13. Mr. Commager urges that positions on public issues be determined on their own merit, not by looking at those—or some of those—who support it. As an example, he wonders if the country would abandon the notion that two plus two equals four if it was discovered that the Communist party supported that concept. (The subsequent emergence of New Math may cause Mr. Commager to abandon his otherwise exceedingly clear example; it also of course raises serious questions about subversive influences).

It is perfectly clear that the statement quoted in the text before this note—

newspaper, which "was and is being used to extend the influence of that particular group," with "the net result . . . that 14,000 of our students are subjected to a continuous teach-in-type of brainwashing."⁴ The entire text of the letter is quoted below.⁵

even had it been completely true—should never have been printed and publicly distributed by the Subcommittee. The adverse implications and the public's tendency to draw them (see the newspaper headline in note 8 *infra*) are too strong and the logical basis too weak. Only harm to the individuals affected can result.

These individuals were engaging in the exercise of free speech in the purest Meiklejohnian sense—the discussion of current public issues. Every thinking person realizes that this conduct constitutes one of the essential mainsprings of our system of government, and that our governmental entities should at least remain neutral toward it. The action of the Subcommittee, the membership of which consists of elected representatives of the people, in using the guilt by association technique and publicly releasing an anonymous and obviously hostile letter disregards the basic concepts of the government which created the Subcommittee and gave it its authority to operate.

4. It seems self-evident that such statements, if taken seriously by the public, can be damaging to the reputation of a professional academician. The tone of the entire Study, plus the specific allegations of "close friends" and "brainwashing" contained in the letter, facilitates the drawing of an inference of Communist affiliation or sympathy with respect to the named professors. As Prosser, Torts § 106, at 761 (3d ed. 1964), points out in discussing what constitutes legal defamation:

The state of mind of the particular community must of course be taken into account, as well as its fluctuations over a period of time; and the accusation of membership in the Communist party, or of Communist affiliation or sympathy, which has led to varying conclusions over the last two decades, is at present all but universally regarded as clearly defamatory.

In addition to the adverse consequences which may emanate from an implication of Communist sympathy or affiliation, it is submitted that many academicians would object strongly to a statement that they were engaged in "brainwashing." Brainwashing surely is the antithesis of the search for truth via critical inquiry, which is the very foundation of academic institutions and of teaching.

5. The letter, on page 26 of the Committee Print of the Subcommittee study, is under the heading "ANTI-VIETNAM AGITATION AND THE TEACH-IN MOVEMENT" and reads as follows:

THE TEACH-INS AT THE UNIVERSITY OF COLORADO
[From a correspondent]

According to the published accounts of these teach-ins, Associate Professor of Political Science Richard B. Wilson was the chairman of the faculty committee which organized both affairs. He was assisted by Professor of Economics Leslie Fishman, Assistant Professor of Economics Gary Bickel, and Assistant Professor of History William L. O'Neill. All four are close friends of Professor of Philosophy David Hawkins, Professor of Physics Frank Oppenheimer (both former members of the Communist Party) and Professor of Philosophy Bertram Morris.

There were others involved as well who acted as satellites of the above.

The first teach-in was relatively harmless mostly because its organizers announced that it would be an objective examination of the pros and cons of our role in Vietnam. Two or three men who supported President Johnson's policy, as well as the young Republicans, agreed to participate in the debate provided that equal time was given to both sides. Two days before the debate they were told that out of a total of 8 hours, they were to have only 45 minutes.

That decision forced them to withdraw from the debate but the publicity which followed their criticism of the program tempered, somewhat, the tone of the attacks on L.B.J.

The most bitter criticism was delivered between 4 and 6 a.m., when reporters had departed. It was during that period that Richard Wilson condemned President Johnson, Secretary Rusk, and Ambassador Steven-

Because of its source,⁶ its sensational character and, no doubt, because of the high pitch of intensity the anti-war movement was experiencing in this country at that time,⁷ the Subcommittee study and its implications received tremendous publicity in the Rocky Mountain region, initially of a tone highly adverse to the faculty members and to the University.⁸

In an effort to rebut the widespread adverse implications of the Subcommittee study and to present his side of the matter, at least one of the faculty members named offered to testify on his own behalf under oath before the Subcommittee, claiming that there were numerous falsehoods in the letter and that the Subcommittee study was highly unfair and one-sided in its treatment of the teach-ins at the University of Colorado.⁹ The author was informed by this faculty member that the Subcommittee did not indicate a willingness to hear him.

The law affords no recourse to an individual publicly defamed under the circumstances described above. He cannot sue the Congressmen who

son as international outlaws and the real violators of international law.

The second teach-in was much worse. I am enclosing several clippings which will speak for themselves. A large number of propaganda leaflets were distributed at that time. Subsequently a Communist film was shown twice.

Finally, the same faculty group which staged both teach-ins controls the student newspaper, the Colorado Daily, which is subsidized by the compulsory fees of all students and is distributed free. The paper was and is being used to extend the influence of that particular group.

The net result is that 14,000 of our students are subjected to a continuous teach-in-type of brainwashing.

The organizers of the teach-ins, under the leadership of Prof. Howard Higman, have decided to hold meetings on a continuing basis. The continuing teach-in series has, with remarkable candor, been called "bitch-ins" by the sponsors.

6. Although knowledgeable people may disagree as to the exact status and reputation of the particular subcommittee involved, there is no question that a publication emanating generally from the United States Senate commands attention and, for many, respect. This fact can be evidenced by the substantial publicity that the specific reference to the University of Colorado received in the Rocky Mountain region, even though it was technically only a staff study which was published. (See note 8 *infra*.) A more humble example is that drawn from the reaction of an above-average student in a third year class of the author the day of the headline coverage mentioned in note 8 *infra*. The student, in response to the expressions of incredulity of some to the highly adverse implications in the headline and the news story, stated: "After all, it came from the United States Senate." If an above-average law student fails to observe the staff study-subcommittee-United States Senate distinctions, one can conjecture with dismay as to how the general public reacts.

7. The Subcommittee study was released to the public just prior to the widely spread protest demonstrations held throughout this country and in some foreign countries on Friday and Saturday, October 15 and 16, 1965. The protests were reported to involve more than 10,000 people in New York City alone. See N.Y. Times, Oct. 17, 1965, p. 1, col. 6.

8. The Rocky Mountain News, a major regional morning newspaper with a daily circulation of 190,765 (ABC Publisher's statement for the Rocky Mountain News, Audit Bureau of Circulation, March 31, 1966), upon discovering that the Subcommittee study contained a specific reference to the University of Colorado, published its October 20, 1965 daily issue with a ninety point headline stating "SENATORS EXPOSE TEACH-INS AT C.U."

9. This request was made by letter dated October 21, 1965. A Xerox copy of the letter is in the author's possession. It was written by Mr. Richard B. Wilson.

authorized the release of the report due to their Constitutional immunity.¹⁰ He cannot sue the anonymous "correspondent," not only for the obvious reason that he does not know who he (or she) is¹¹ but also because it is quite likely that he (or she) is immune from litigation.¹² The individual is left to his own resources, whatever they may be. If he is associated with a large and effective¹³ institution, and particularly if the institution itself is included in the attack,¹⁴ then possibly he will at least enjoy some newspaper publicity when he gives his rebuttal.¹⁵ If he is not, or if the self-

10. U.S. Const. art. I, § 6. For a recent example of how far the United States Supreme Court is willing to go in upholding this immunity, see *United States v. Johnson*, 383 U.S. 169 (1966).

11. The Subcommittee is reported as having refused to disclose the correspondent's identity. *Denver Post*, Oct. 21, 1965, p. 1, col. 3.

12. See Prosser, *Torts* § 109, at 797, 801 (3d ed. 1964). The immunity is established by analogy from the immunity accorded witnesses in judicial proceedings, not by extension of the immunity enjoyed by the legislators themselves.

A persuasive argument has been made in Note, *Protection From Defamation In Congressional Hearings*, 16 U. Chi. L. Rev. 544 (1949), that the privilege accorded legislative witnesses should be only a qualified privilege, conditioned on a good faith state of mind and a belief that what the witness is saying is true, as contrasted with the absolute privilege granted judicial witnesses. This distinction is drawn upon the grounds that during a judicial trial the rules of evidence are in force, cross-examination allowed, there is more probability that an impartial hearing will be held and a greater likelihood that all controverting evidence will be presented. In addition, the final verdict is often given publicity at least as wide as that enjoyed by the testimony at trial.

13. If the institution is ineffective in drawing publicity and persuasive political support to it, then neither it nor the individual has any recourse. This point was well stated by the *New York Times* in an editorial on November 3, 1965, p. 38, referring to the Subcommittee study and the University of Colorado:

The question raised by such investigative abuses is how much damage may be done to colleges and universities whose academic leadership and whose friends in the state capitol are less courageous or less influential than those of the University of Colorado.

14. This was true in the situation described at the beginning of this paper. The University of Colorado was implicated by the Subcommittee study, not only because the teach-ins had taken place on its premises, but also because, as noted above, several statements in the study denigrated the intellectual climate at the University. The University thus became directly involved, as was evidenced by the news conference and television address made by Joseph R. Smiley, President of the University, challenging the accuracy of the study and defending the faculty members specifically named in the study. See *Denver Post*, Oct. 21, 1965, p. 3, col. 3. It is obvious that this did not hurt the faculty members' cause. Indeed, the anonymous letter was deleted from subsequent reprints of the study. It was replaced by the following notice:

Material originally appearing in this space, having been found erroneous in certain respects, has been deleted. All remaining material in this volume has been rechecked and found accurate; and none of it has been a subject of complaint.

S. Doc. No. 72, 89th Cong., 1st Sess. 26 (1965).

This does not, however, completely undo the damage done earlier. It was reported that 3000 copies of the Committee Print containing the letter on page 26 were publicly distributed or available for purchase. *Rocky Mountain News*, Oct. 23, 1965, p. 5, col. 4. In addition, the phrase "in certain respects" leaves ambiguity and uncertainty as the final resolution of the Subcommittee's self-generated controversy.

15. The faculty members named in the report did indeed enjoy publicity in making their rebuttal. The coverage of the local news media, particularly the *Rocky Mountain News*, was quite thorough. The faculty members were fortunate in that the institution with which they were associated was itself attacked, at least by implication, and vigorously responded.

interest of the institution is not sufficiently involved to bring a counter-charge from it (which probably would receive news coverage), and if he is not of his own right newsworthy, then the individual is powerless to protect himself.

Most people would concede that the above state of the law is unsatisfactory. It is clear that our society from its beginning has respected the individual's concern for his reputation, primarily by providing a means by which an aggrieved person can litigate his claim that he was falsely defamed.¹⁶ Yet no protection is given a person publicly defamed during investigations by the Senate, and very limited protection is given by the House of Representatives,¹⁷ despite the fact that he may need protection

16. Historical sources trace the origins of legal redress for defamation back to pre-Norman times in England and to the tribal stage of Germany's development. See Veeder, *The History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546, 548-49 (1903) (pointing out that "It is a mistaken idea, therefore, to suppose that the primitive Teuton could feel only blows, and treated hard words of no account."); Plucknett, *A Concise History of the Common Law* 483, 488 (1956).

Historically the courts have recognized two main policy grounds for the action of defamation:

(1) reputation can constitute good will and was protected as a valuable economic asset;

(2) a recognition that some persons will seek vindication and will do it privately if redress before law is not provided. See Plucknett, *id.* at 489-91.

Another reason for the law's concern about the reputations of individuals may be that set forth in Gregory & Kalven, *Cases and Materials on Torts* 787-90 (1959), which takes the position that defamation belongs in a separate area of the law of torts, known generally as "harm from insult, indignity, and shock." The authors note that "in many of the cases the plaintiff is complaining that the defendant has caused him (or her) to have an unpleasant experience; . . ." and that "here the pressure is for the law to become more civilized and to recognize more sophisticated and subtle harms—to take a step beyond the nursery rhyme that 'sticks and stones may break my bones, but names will never hurt me.'" *Id.* at 787.

It is submitted that the policy reasons of protection of the economic value of a name and the trend of the law toward a more civilized state both lend support to allowing a person to defend his reputation when it is damaged in the course of Congressional investigations, if that can be done without deleteriously affecting investigations. Certainly the interest of society in protecting a person's interest in maintaining a good reputation does not cease when the source of defamation is a Congressional investigation.

17. Paragraph (m) of Rule XI, § 26, in Deschler, *Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States*, H. R. Doc. No. 374, 88th Cong., 2d Sess. (1965), relates to the problem of defamation of persons, providing as follows:

(m) If the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall—

(1) receive such evidence or testimony in executive session;

(2) afford such person an opportunity voluntarily to appear as a witness; and

(3) receive and dispose of requests from such person to subpoena additional witnesses.

Paragraph (m) constitutes a praiseworthy effort by the House to grant some protection to persons defamed during the investigative process. It is submitted, however, that its protection provisions are inadequate. For example, it would not have granted protection to the persons adversely affected by the Subcommittee study, even had the study been published by a committee of the House of Representatives rather than the Senate. This is because an "investigative hearing" was not involved. The study was compiled by the staff of the Senate Internal Security

more under such circumstances than he would under any conceivable instance of private defamation. In addition, publication of obviously defamatory material about a person in the context of a neutral investigation without giving that person a chance to state his side of the case offends nearly everyone's sense of fairness. Finally, the lack of protection and unfairness are thrown into even sharper relief when the defamatory material is published by a subcommittee of the United States Senate, which by its very status is granted respect by the majority of American citizens and normally enjoys widespread publicity, as was true with the Subcommittee study noted above, and at the same time is not accountable to a person injured by this process for what it says or does.¹⁸

Subcommittee from clippings, reports, and so forth. No hearing was held and no witnesses were brought before any committee.

This paper has attempted to demonstrate that protection is needed under such circumstances, as it is generally in the area of reports and other publications (including the release of information) of investigative committees. Extension of protection to this area should not be controversial, since the fear of inhibiting a full and complete investigation is not at all applicable. The investigation has by necessity already taken place at this stage or, as in the case of the Subcommittee study, will not take place at all.

In addition, paragraph (m) does not undertake to protect persons whom the committee fails to provide an opportunity voluntarily to appear as a witness; nor does it protect a person in the event of defamatory remarks by a member or employee of a committee during an investigation; nor restrict the distribution of defamatory material in committee files in the absence of certain precautions for the person defamed; nor are the rights of cross-examination and calling witnesses on behalf of the defamed person included. It is submitted that once a decision has been made to provide some safeguards for persons defamed in the investigative process, then the above-mentioned rights follow as corollaries of that decision. It is absurd to take steps to protect reputations and then not cover the situation where the committee—intentionally or innocently—fails to call the defamatory material to the attention of the person affected, or where a committee member or employee gratuitously defames, or where the defamatory material can be distributed from the committee's files at any time without restriction, or where the aggrieved person cannot make an effective rebuttal due to an inability to confront his defamer.

The House rules relating to witnesses (paras. (h)-(q) of § 26, Rule XI), which were adopted on March 23, 1955, by the House in a laudable effort to establish some general standards for witnesses appearing before House committees (and of which paragraph (m) is part), have no procedure for reporting infractions of the rules nor any penalty, no matter how slight, for committee violations of the rules. This can lead to a situation where the rules are on the books but are ignored by the very committees most likely to do harm to reputations.

That this point is not idle can be demonstrated by reference to the recent hearings in Chicago and Washington, D.C., of subcommittees of the House Committee on Un-American Activities. See the printed and publicly distributed letter from Albert E. Jenner, Jr., counsel for Dr. Jeremiah Stamler, to the Officers and Sponsors of the Jeremiah Stamler, M. D. Legal Aid Fund, March 1, 1966, which concerned certain hearings in the Chicago area on May 25-27, 1965 (one copy of which is in the possession of the author). The letter states that "we repeatedly requested that all testimony by or about Dr. Stamler and Mrs. Hall be taken in executive session. The subcommittee refused these requests, in violation of its own Rule 26 (m)." At recent hearings in Washington, D.C., held during the week of August 15-19, 1966, the subcommittee again did not hold the hearings in executive session according to Rule 26 (m), despite the reported request by one of the lawyers for two of the subpoenaed persons that it do so. See the *Denver Post*, August 18, 1966, p. 6, col. 4. Sections 5 and 6 of the proposed statute (see note 76, *infra*) constitute an effort to resolve this problem.

As mentioned, the Senate has no rules at all on the subject of defamation of persons during investigative proceedings.

18. The inequality of position between the Congressional investigating

Thus, abstractly, at least, it would seem as a policy matter that some form of relief should be available to individuals publicly defamed under the auspices of a Congressional investigative committee. Apparently the main obstacle to this—and the reason why Congress has not acted before in this area, despite numerous requests to do so¹⁹—is the assumption that

committee and a private citizen being investigated is enormous, of course. The committee enjoys subpoena and contempt powers, constitutional immunity toward its members and its publications, the availability of a staff and of information from many sources, including other congressional committees on a cooperative basis, the practical benefit of always enjoying the affirmative, and direct responsibility toward no one; all of which is in addition to its usual enjoyment of widespread attention and publicity.

The private citizen, on the other hand, has very little on his side. The first amendment protections of political and associational privacy have not been extended by the United States Supreme Court to persons questioned by Congressional investigative committees, at least when the investigation involves Communist activities; see *Barenblatt v. United States*, 360 U.S. 109 (1959) (although the Supreme Court did utilize these grounds in striking down a New Hampshire contempt conviction relating to refusal by the defendant to testify concerning his political associations prior to 1957 in an investigation by the Attorney General of the state; *DeGregory v. New Hampshire*, 383 U.S. 825 (1966)). He may plead the privilege against self-incrimination, but only if it is applicable to his situation, and it may not be (see, for example, the dilemma of James Wechsler in not wanting to reveal the names of his past associates in the Young Communist League, which he had quit 16 years prior to the inquiry, and yet feeling that he had no practical alternative; Wechsler, *The Age of Suspicion* 289-306 (1953)). He has, by virtue of *Yellin v. United States*, 374 U.S. 109 (1963), the right to refuse to testify if the committee does not follow its own rules, but this is helpful only where the committee has rules. See also, *Gojack v. United States*, 384 U.S. 702 (1966).

It has been stated by a respected legal authority that,

In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.

Tenney v. Brandhove, 341 U.S. 367, 378 (1951) (Frankfurter, J.). The main difficulty with this approach is that it fails to take into account the probable status of the person being investigated in his community. He is usually a member of an unpopular minority group; indeed, frequently a despised minority group, which is why the committee members are able to build substantial favorable publicity for themselves by "exposing" the minority group member. To state, therefore, that "the only safeguards are those secured by social and moral pressure" (Frankfurter, *Hands Off the Investigations*, 38 *New Republic* 329 (1924)) is wholly unrealistic. Frequently the social and moral pressure is in the opposite direction, as can be evidenced by the fact that a Gallup Poll revealed that 50% of the American people had a "favorable opinion," and 21% had "no opinion," of Senator Joseph McCarthy in January, 1954, when the quality of his investigations and revelations was well-known after four years of pervasive publicity. Rovere, *Senator Joe McCarthy* 23 (1959). For other examples of McCarthy's power during that era, see *id.* at 12-18, 32-39.

Further evidence of the failure of the "social and moral pressure" argument is the following statement in the *New York Times*, Aug. 18, 1966, p. 22, col. 6, concerning Representative Joe R. Pool, chairman of the subcommittee conducting the hearings on Communism and the Anti-Vietnam war movements in Washington, D.C., which were mentioned in note 17, *supra*:

Joe Pool was confident today that his conduct of the hearings this week—which has drawn criticism in sections of the Eastern press—would not hurt him in Dallas.

His office, he said, has been flooded with telegrams of support from home.

19. Maslow, *Fair Procedure in Congressional Investigations: A Proposed Code*, 54 *Colum. L. Rev.* 839, 842-43 (1954), contains an extensive list of the efforts that have been made to establish procedural standards, including the introduction of dozens of bills in Congress.

protective legislation will impede the effectiveness of the Congressional investigative process. It is the purpose of this paper to challenge that assumption.

It is undeniable that the Congressional investigative process is important to the proper functioning of our government. The public obviously has an interest in preserving for its Congressmen the freedom to inform themselves as to the facts surrounding matters of public concern in the interest of new or amendatory legislation.²⁰ The informing function also aids Congress in determining its own membership, investigating charges brought against members, and so forth.²¹ Congressional investigative committees also serve an important function in investigating any malfunctioning of the executive branch, as they have done regularly throughout the history of this country,²² frequently to the great benefit of the country as a whole.²³ No one, therefore, is interested in impeding the valid functions of Congressional investigations.

There is, nevertheless, no compelling reason why the policy of allowing effective investigations must totally conflict with a policy of granting persons publicly defamed certain rights to act on their own behalf. It is submitted that the proposed statute contained in the Appendix to this paper which, in section 3b, grants a person under certain circumstances the right effectively to present his own side of the matter, strikes a balance between these two policies.²⁴ This balance is reached, it is submitted, by

20. For a description of some of these "economic and social" investigations, see Taylor, *Grand Inquest—The Story of Congressional Investigations*, 34, 51, 62-67 (1955). The first such investigation was an inquiry into tariff problems in 1827, when the South and North were in bitter dispute over free trade versus protectionism and apparently the power to summon persons and papers was essential to a full disclosure of the facts. (p. 34). The 1930's saw a great mushrooming of this type of investigation. Apparently, however, the purpose of these investigations was not only to fulfill their function of informing Congress. Professor Taylor notes on p. 67 that "... the leaders of the Roosevelt administration rightly concluded that investigations were unsurpassed as a means of formulating and awakening popular support for the governmental measures they had in mind." This function of persuading the public that a problem exists and needs correction is, of course, distinct from the informing function. This does not mean that it cannot also serve a legitimate purpose, as was evidenced by the investigations in the 1930's. One might note, however, that Senator Joseph McCarthy undoubtedly felt that his type of investigation also eminently qualified for the function of persuading the public that a problem exists.

21. *Id.* at 33.

22. *Id.* at 33-34, 51.

23. The Senate investigations of the Interior and Navy Departments (the Teapot Dome scandal) and the Justice Department during the Harding administration are a good example of this. See *id.* at 54-56.

24. Professor Byron Johnson of the University of Colorado, a former Congressman, deserves full credit for the idea that legislation should be drafted and proposed in an effort to prevent the recurrence of the situation described at the beginning of this paper. He has been most helpful throughout the author's preparation of the statute in suggesting criticisms and improvements.

Advice and helpful criticism has also been given the author by his colleagues at the University of Colorado School of Law, eleven of whom signed a letter to the Colorado delegation to Congress urging that the proposed statute be introduced into legislation. Shortly thereafter Colorado Senators Allott and Dominick introduced the proposed statute as a bill (S. 3799, 89th Cong., 2nd Sess. (1966)) and

narrowly defining the conditions under which an aggrieved person can take action under the statute, by restricting the type of action which he can take, by granting the committee involved broad discretion in order to control the amount of time taken by the exercise of section 3b rights, and upon a realistic assessment of the impact and effect of the statute, all of which are described below.

Limitations Contained in the Proposed Legislation

First, and most importantly, a person is entitled to present his side of the case under section 3b only when material tending to harm his reputation is publicized under the auspices of a Congressional investigative committee. The provisions of the statute thus come into effect only when defamatory material relating to a person is *made public* in some form. No restrictions whatsoever are placed on a committee's power to hear and receive any type of evidence in executive session—unless, of course, the committee plans to publicize the evidence in some manner.²⁵

Thus, if a committee is interested in ascertaining for the purposes of legislation facts in an area of activity particularly sensitive as regards the reputations of persons, such as Communist activities, narcotics distribution, sexually aberrant conduct, and so forth, it can simply proceed via executive session with complete freedom as to the type of evidence it receives. If the information received is kept confidential and released only

have indicated their intention to reintroduce it at the beginning of the 90th Congress.

The excellent code proposed by Mr. Will Maslow in Maslow, *supra* note 19, Appendix, was utilized as a basic framework upon which the proposed statute was drafted. Many changes have been made, however, and the responsibility for the proposed statute remains the author's.

It should be noted that the statute does not purport to be a comprehensive code for witnesses. It concentrates only on the problem of defamation of persons during Congressional investigations. This decision to draft a narrow statute was made in recognition of the fact that, although people with perfectly good intentions can differ over the necessity and scope of various procedural rights and protections of witnesses (and many proposals have been made in the past in this area), it seemed clear that this was not the case with respect to the problem of unsubstantiated defamation publicized during a Congressional investigation. The situation described at the beginning of this paper presents a concrete and genuine example of the need for some protection here. The author therefore made the decision to draft a narrow statute concentrating just on this problem.

25. In this respect the proposed legislation is less restrictive toward investigative committees than the current House Rule XI, § 26, para. (m), which unconditionally requires a committee, if it "determines that evidence or testimony at an investigative hearing may tend to defame, degrade or incriminate any person," to grant such person the right to appear as a witness; this definitionally includes executive sessions, and makes no exception even if the committee never intends to publicize the testimony or other evidence.

The statute, by virtue of its narrow scope (see note 24 *supra*), does not provide protection against abuse of a witness during an executive session by a hostile and unprincipled committee acting in the absence of scrutiny by the press and other facets of the public. This has been a problem in the past, notably during the loyalty investigations. See Taylor, *op. cit. supra* note 20, at 244-47. The statute does, however, provide some protection against one of the most commonly cited executive session abuses: the subsequent release to the public of a slanted version of the testimony. If the slanted version is defamatory, its release is restricted by section 3d of the statute.

under the conditions set forth in section 4 of the statute, which includes release to other Congressmen, the interest of our society in untrammelled inquiry must prevail, and the statute recognizes this. If, on the other hand, the committee has deliberately chosen to publish the material, either by holding a public hearing or by releasing to the public a report or other publication, then it does not seem unreasonable for Congress to attach carefully drafted restrictions to the exercise of that power, since it is possible that someone will be hurt under such circumstances.

Public hearings, nevertheless, do serve a useful function in that they can act as a stimulant to the production of additional information on the relevant subject-matter.²⁶ It is important, therefore, that the restrictions upon a committee, even after a deliberate choice to publicize the defamatory material (or to hold a hearing at which it is likely to occur), should be as congenial as possible to the smooth flow of a hearing. The statute takes this into account, as noted below.

Second, the person aggrieved is given only certain limited self-protection rights by section 3b of the statute. No effort has been made, for example, to restrict by statute the immunity granted committee witnesses or staff members or, as has been suggested frequently, to remove jurisdiction altogether from certain committees which have been the prime source of unsubstantiated defamation in the past.²⁷ In addition, no effort has been made to require an actual decision as to who is telling the truth about the defamatory matter in dispute. The sole objective of the proposed legislation is to grant an aggrieved person the opportunity effectively to present his side of the matter to the committee which publicly heard the other side.²⁸

26. In addition, of course, to performing the "persuading" function. See note 20 *supra*.

27. The statute does not purport to resolve the problems raised by the scope of investigative power granted certain committees in Congress.

28. If, therefore, a person actually does engage in conduct which is generally regarded as disreputable and which the committee chooses to expose, the proposed statute would afford him little comfort. So long as the investigating committee gives him a fair chance to state his side of the case, he has no right under the statute to complain about the publicity he receives as a result of a public hearing.

It might be argued, therefore, that this statute misconceives the problem, and that what really is needed is protection against probing and exposure by a Congressional committee of a person's private life. But it is submitted that this problem cannot be cured by the process of legislation, not only because the likelihood of adoption of such legislation is extremely remote (even fair-minded Congressmen probably would not choose to restrict their future mobility in so broad a manner) but also because the process of defining what should be circumscribed is inexact. Does criminal activity, for example, constitute a part of a person's private life which a legislative committee under all circumstances must leave to the executive session, or not investigate at all? Is the fact that a person is a Communist something that must never be revealed in a public session and which must remain always in the domain of the executive session—or perhaps not a part of investigative committee jurisdiction at all—even when it includes affirmative acts of espionage by governmental employees? And does the term "private life" apply equally to all people, or should a distinction be drawn for persons employed in the government and other potentially sensitive positions?

It is recognized that entirely invalid invasions of the private lives of ordinary citizens have been made by investigative committees, particularly during the loyalty

The questions remain, nevertheless, as to what constitutes an effective presentation and whether it can stand in balance with the need for effective investigation. There is little doubt that section 3b rights encompass an effective presentation, since the aggrieved person is given the right not only to present his own testimony either in person or by affidavit but also to examine or cross-examine the persons who presented the defamatory testimony or other evidence against him and to call witnesses or produce other evidence on his own behalf. The discussion of the third, fourth and fifth limitations below will point out that this is subject to restrictions in order to reduce the time taken by this self-defense process. And it seems clear that, although section 3b contains the maximum assistance that one can expect in rebutting adverse testimony or other evidence, it also may be the minimum assistance that a person would need under some circumstances in order to rebut the adverse material effectively.

It is common knowledge that cross-examination of an adverse witness can expose his testimony to critical evaluation. For example, cross-examination would have quickly brought out the "correspondent's" basis for a number of the specific and strongly derogatory statements he made in the letter published in the Subcommittee study, particularly those statements which are difficult to rebut because it involves proving a negative.²⁹ Unrebutted, the statements could have a damaging effect upon an academic career.

The concept of granting persons whose reputations are at stake the right to cross-examine is not something new to Congressional investigations. Such diverse investigations as the Army-McCarthy hearings,³⁰ the investigations of the Harding scandals,³¹ and the very first investigation of Congress, that of General St. Clair's defeat at the Battle of the Wabash River,³² all have granted the right of cross-examination to persons whose

investigations of recent times. But it is submitted that the cure for this is not legislation. The only realistic restraining element for such conduct is the judiciary. Their role in interpreting the Constitution presents to them the opportunity to define the areas of individual activity that are outside the scope of legislative investigations (as was done, for example, in *DeGregory v. New Hampshire*, 383 U.S. 825 (1966)) without the involvement of self-interest that necessarily would be part of a legislative solution.

29. A good example of this is the statement in the letter that, "According to the published accounts of these teach-ins, Associate Professor of Political Science Richard B. Wilson was the chairman of the faculty committee which organized both affairs." See note 5 *supra*. The public letter written by three of the four named professors states that "No newspaper in the State of Colorado, so far as we are able to ascertain, published such a statement." *Colorado Daily*, *supra* note 3, at 1. This type of negative proof is extremely difficult to establish, yet the doubts could easily be resolved during cross-examination of the anonymous correspondent by simply asking him what published account he used as a basis for his statement.

30. Special Subcommittee on Investigations pursuant to S. Res. 189, *Charges and Countercharges Involving: Secretary of the Army Robert T. Stevens, etc.*, S. Rep. No. 2507, 83rd Cong., 2d Sess. 2 (1954).

31. *Hearings Before Select Senate Committee on Investigation of Attorney General pursuant to S. Res. 157*, 68th Cong., 1st Sess. 2, 6, 233 (1924).

32. See Taylor, *op. cit. supra* note 20, at 243-44.

reputations were at stake. This rebuts on the basis of experience the argument frequently heard that cross-examination is "too judicial" to be allowed in Congressional investigations.³³ In addition, it must also be kept in mind that the right to cross-examine under the statute is not absolute, as is explained below.

It is also true that the testimony of a witness appearing at the request of the aggrieved person can often resolve a point that is material, yet with respect to which neither side has any direct knowledge. For example, the testimony of a member of the Board of Publications at the University of Colorado as to the procedures used for ensuring the independent status of the University of Colorado student newspaper would have been directly relevant to the charge that the named faculty members control the paper and thereby brainwash the student body, and would have rapidly resolved the doubts surrounding that statement.³⁴ Once again, this suggestion contains nothing new or startling. Persons whose reputations were at stake during Congressional investigations have been given this right in the past.³⁵

It seemed desirable, therefore, in the interest of a full and fair investigation (which includes providing the maximum opportunity for ascertainment of the truth of the matter in dispute; presumably this will be consistent with the interests of the committee—see the fifth limitation below), to establish three basic rights on behalf of the person whose reputation is at stake as a result of the investigation: confrontation, self-testimony and a limited freedom to call witnesses and papers. This will ensure flexibility for future situations. And it all is subject to the committee control mentioned below.

Third, section 3b is careful to spell out the fact that the committee has control over the time taken by the self-defense efforts of the aggrieved person. Testimony and papers must be "pertinent to the inquiry." The duration of the examinations and cross-examinations are "subject to reasonable limitations imposed by the committee." Furthermore, and most im-

33. Even Felix Frankfurter, then a professor at Harvard Law School, in his well-known article opposing procedural restrictions on investigating committees entitled *Hands Off the Investigations*, 38 *New Republic* 329, 331 (1924), stated that:

Of course, the essential decencies must be observed, namely opportunity for cross-examination must be afforded to those who are investigated or to those representing issues under investigation. . . . [T]hat opportunity has been scrupulously given by the Brookhart committee.

The Brookhart committee was the committee investigating Attorney General Daugherty at the time of the Harding scandals. See note 31 *supra*.

For further examples of the granting by Congressional investigative committees of the right to cross-examine, see Special Committee on Individual Rights as Affected by National Security, ABA, Report on Congressional Investigations, App. at 68-73 (1954).

34. One could argue that the Internal Security Subcommittee would not want to waste its time on such minor matters as whether or not brainwashing goes on through the student newspaper at the University of Colorado, and thus would find hearing testimony on this point tedious and annoying. Perhaps so. But then why did they publish the statement in the first place?

35. Taylor, *op. cit. supra* note 20, at 243-44.

portantly, the exercise of all rights contained in section 3b can be before only one member of the committee. All of this should serve to reduce the amount of time taken away from committee members, and yet should not adversely affect the aggrieved person's self-defense efforts.

Fourth, section 3b rights can be exercised by a person only if he is named or otherwise specifically identified at the public hearing or in the report or other publication of the committee. The limiting effects of this feature are obvious.

Fifth, a person is entitled to exercise section 3b rights only if the defamatory material was solicited by or was anticipated by³⁶ the committee, or any member or employee thereof,³⁷ or is relevant to the investigation. If none of these elements is present, section 3f limits the aggrieved person's rights to appearing personally before the committee or filing an affidavit with the committee, at the committee's option. If the committee so chooses, therefore, the exercise of section 3f rights need have no interruptive effect at all on the investigation.

The section 3f limitation is intended to cover situations where the defamation was spontaneous and unexpected. It substantially narrows the rights available to an aggrieved person under such circumstances for two reasons:

(1) It is highly probable that the committee would not be interested in ascertaining the truth about the matter, since it is unrelated to the committee's inquiry and was not anticipated or solicited by the committee or any member or employee thereof. Section 3f thus is keyed to the premise that the committee and the aggrieved person's interests should coincide if at all possible; it therefore limits the application of section 3b rights to situations where the committee presumably is interested in hearing both sides to the controversy and thus would not look upon the exercise by an aggrieved person of his section 3b rights as an undue burden;

(2) Due to its spontaneous and unanticipated character, the defamatory remark is less likely to receive widespread publicity. Although harm still may be done to the person named or otherwise specifically identified (and thus in such circumstances a person is given an opportunity to either testify on his own behalf or submit an affidavit on his behalf), never-

36. It is recognized that the phrase "anticipated by" is broad enough to include solicitations of evidence damaging to a person's reputation. It is nevertheless true that it may be extremely difficult to prove that damaging evidence was anticipated by a committee or one of its members or employees. And the aggrieved person may well be interested in problems of proof, since he may be trying to establish a case before a rules committee under section 6. The phrase "solicited by" therefore was included in order to reduce the problems of proof. A casual reference to the record normally will suffice to establish whether or not solicitation took place.

37. The language of this phrase is in addition to the relevant language in S. 3799. It is added on the theory that a committee should be responsible for the actions of its individual members and its employees, and that defamation may very well come about via that route.

theless in most instances it seems likely that the publicity would not be widespread enough to justify the exercise of the full panoply of section 3b rights.

Estimated Impact of Proposed Legislation

In assessing the impact of the proposed legislation on Congressional investigations and on the available time of Congressmen, it should be kept in mind that the statute will affect only a small minority of committee hearings. It will interrupt very few of the ordinary hearings held to consider new legislation. This is true because most Congressional committees are interested in facts and figures. They are not concerned with the beliefs or political associations or conduct of named persons. In most hearings defamatory statements about a specific person are rarely made, even more rarely publicized. Furthermore, even if such a remark does occur, or an individual feels that it did occur, section 3f will frequently block the application of section 3b since the remark presumably was not solicited or anticipated by the committee and it probably would not be relevant to the investigation. The aggrieved person would be left, if the committee so decided, with filing an affidavit with the committee, which would have no interruptive effect at all on the hearing or on the committee members' time.

Thus, the main impact of the proposed legislation will be on the investigations which involve the activities of individuals, with the activities usually having overtones of criminality. These investigations have usually received widespread publicity, making their chairmen famous and their focal point of inquiry uncomfortable. It is here where the proposed legislation would have the greatest interruptive effect. But it is also here where the committee presumably is interested in ascertaining the truth about the defamatory material, since the material has been solicited or anticipated by the committee or is clearly relevant to the investigation.³⁸

Under these circumstances, the exercise of section 3b rights should not act as a deterrent to a full investigation; indeed, it would seem to work toward that end, since it encourages a complete airing of the facts. The impact of the statute on investigations thus would not be all negative. Additionally, it seems clear that the adoption of the proposed statute would tend to increase the credibility of the reports and conclusions drawn from the investigation in the minds of knowledgeable people, since they could assume that a fair and full investigation had been made. Finally, it is in this type of investigation that the denial of fundamental fairness to persons is most obvious and most frequent. Protection of the individual, something our society has long honored, is needed here.

38. It should be stressed, however, that the proposed legislation does not require that an investigative committee publish only true material. A committee is only required to hear and publish both sides of the matter, not to decide questions of truth or falsity.

Some Arguments Against This Type of Legislation

One of the strongest published attacks against the adoption by Congress of rules for the protection of persons adversely affected by the investigative process is contained in an article written in 1949 by George Meader, former Chief Counsel of the Senate War Investigating Committee.³⁹ Mr. Meader concentrated on Senate Concurrent Resolution 2, then pending in the Senate.⁴⁰ The resolution was substantially broader than the statute proposed in this paper,⁴¹ with the result that a good deal of Mr. Meader's criticism is not applicable. He did, however, make some general comments which would apply to the proposed statute as well as to all similar legislation. The comments, followed by the author's rebuttals, are quoted below.

A legislative committee is not a court and cannot effectively discharge its investigative and policy-making duties operating as a court, with pleadings, motions, arguments and rules of evidence.⁴²

This is perfectly true. The proposed statute does not encumber the committee with any of these courtroom procedural standards, which are geared toward the fair resolution of a specific dispute between parties, and are therefore not applicable to a committee investigation, which serves an entirely different function.

Furthermore, Senate Concurrent Resolution 2 gives persons claiming to be defamed more than a day in court. No court in which allegedly defamatory testimony might be received would halt the trial of the case to permit the aggrieved person to intervene and offer evidence as to the damaging remark.⁴³

This is true, and superficially it is an appealing analogy. But it is necessary

39. Meader, *Limitations on Congressional Investigation*, 47 Mich. L. Rev. 775 (1949).

40. S. Con. Res. 2, 81st Cong., 1st Sess., 95 Cong. Rec. 60 (1949). The resolution was introduced by Senator Lucas, then majority leader of the Senate, in an effort to establish some procedural rules for Congressional committees. Mr. Meader indicated that companion resolutions to Senate Concurrent Resolution 2 were introduced in the House of Representatives by Representative McCormack, majority leader of the House, and by Representative Sabath, chairman of the Rules Committee of the House. Meader, *supra* note 39, at 778.

41. The Resolution covered such topics as right to counsel, limitations on the power of committee members to speak publicly for compensation about the committee, limitations on the power of a committee to issue a report without a majority vote, and so forth, all of which are outside the scope of the proposed statute. In addition, the Resolution gave "any person who believes that testimony or other evidence in a public hearing before any committee tends to defame him or otherwise adversely affect his reputation" the right to testify personally on his behalf, have the committee secure witnesses for him (but no more than four) and to cross-examine the witnesses whose testimony adversely affected him (limited to one hour). *Id.* at 779. The Resolution thus does not take into account spontaneous and unexpected defamation, nor does it give the committee control over the amount of time taken by the self-defense process, relying instead on its crudely drawn maximum limitations.

42. *Id.* at 780.

43. *Ibid.*

to keep in mind the radically different nature of the two proceedings. A court is engaged in reaching a decision on a specific dispute between parties which has been placed before it according to certain procedural rules. Anything outside this specific dispute is irrelevant to the decision making process and thus is promptly excluded—or should be.

The function of a legislative investigative committee is completely different. As Mr. Meader himself says, a committee is not a court. It is not at all interested in a specific decision as to a dispute between contending parties. It is interested in gathering and analyzing facts on a more general and neutral level. An exercise of section 3b rights by an aggrieved person under the proposed statute would not “halt the trial.” It would provide additional facts, subject to the control of the committee as to when and how long this took place, in an area where (taking into account the limitations imposed by section 3f) the committee’s interest presumably lies.

Senate Concurrent Resolution 2 would provide a means for spotlight seekers to indulge their proclivities in Congressional hearings almost without limit.⁴⁴

This problem was clearly recognized in drafting the proposed statute and every effort was made to curb possible abuse of the statute. The language “almost without limit” would not apply to the proposed statute. Many barriers are thrown in the path of spotlight seekers, as has been explained at length elsewhere in this paper.⁴⁵ Whether some determined and clever person may nevertheless succeed in abusing the statute should, as is explained later, at least be given the test of experience, in light of the statute’s effort to rectify an area of abuse of individual rights.

The testimony or evidence considered by a person to be defamatory might consist of an irrelevant, gratuitous remark made by a witness before a committee, which the committee could not anticipate or prevent. Nevertheless, under Senate Concurrent Resolution 2, the committee would be required to sit and hear a petitioner’s statement and the statements of four witnesses called in his behalf and a cross-examination of the alleged defamer or defamers for hours, if not days.⁴⁶

This point has been specifically met and overcome by section 3f.

In any event, any rules, whether adopted by a committee or by the entire Congress, should clearly specify that they do not give

44. *Ibid.*

45. See pages 58-63 *supra*. It should be noted that the concept of granting a person who is a stranger to the committee proceedings (except that his name was mentioned) the opportunity to appear before the committee and present evidence on his own behalf is not something new to Congress. See Special Committee on Individual Rights as Affected by National Security, ABA, Report on Congressional Investigations, App. at 118-34 (1954), which documents numerous examples of Congressional investigations where persons implicated by testimony at a hearing were permitted to appear on their own behalf before the committee.

46. *Id.* at 780-81.

rights which would permit a successful challenge to the validity of committee or Congressional action or would constitute a defense to proceedings for punishment of a contempt of Congress. Unless this effect is specifically precluded, the whole subpoena power of Congress is undermined.⁴⁷

Mr. Meader's conclusion is extraordinary. First, the contempt defense (which is granted by section 5 of the proposed statute) affects only persons who are defamed during the investigation. These persons do not constitute all, or probably even most, persons who are subpoenaed to testify before a committee.⁴⁸ Second, the contempt defense provision comes into effect only when the committee denies a person a right created under the proposed statute. The committee still remains, therefore, in absolute control over its power to recommend citations for contempt. And its power of subpoena is in no way affected, to say nothing of the whole subpoena power of Congress.

Section 9,⁴⁹ requiring committees to give advance notice of adverse comment, is unwieldy. What constitutes adverse comment is subject to a wide difference of opinion. It is difficult enough under existing practices to prepare and obtain agreement of committee members on a report. The requirement of giving advance notice to an indeterminate class of persons and allowing them a "reasonable" time to oppose the committee's findings and conclusions would slow down and make extremely difficult the issuance of reports.⁵⁰

Although requiring that a party defamed be given an opportunity to state his side of the case prior to the issuance of a report may indeed slow down the issuance of reports, it seems more than compensated for by the fact that the reports when issued will be more complete and that the persons defamed will have been accorded fair treatment. And Mr. Meader inadvertently rebuts his own argument by noting that the Truman-Mead committee (of which he was counsel) submitted draft reports to government officials and interested private individuals for comment as to the accuracy of the facts and the soundness of conclusions, and admitting that, "This is a salutary practice. It improves the quality of committee reports."⁵¹

47. *Id.* at 782.

48. In addition, as explained in note 79, *infra*, section 5 today reflects existing law, in part. *Yellin v. United States*, 374 U.S. 109 (1963), held that a witness need not respond to questions if the committee before which he is testifying has violated one of its rules.

49. Section 9 of the Resolution states that the committee shall not publish a report adversely commenting on any person "unless and until such person has been advised of the alleged misconduct or adverse comment and has been given a reasonable opportunity" to present a sworn statement with respect thereto. Meader, *supra* note 39, at 786.

50. *Id.* at 783.

51. *Ibid.*

Finally, Mr. Meader comments that:

It seems unwise to destroy the flexibility of operations in legislative committees in their formulation of national policies and to impose limitations upon the discretion and power of all legislators merely for the purpose of restraining abuses by a few members of Congress. . . . Their [Senators and Congressmen] responsibility is great. They ought not to be limited by inflexible, time-consuming procedures in discharging that responsibility.⁵²

Aside from the fact that most people are under the impression that national policies are formulated by Congress, not by committees, it remains to be demonstrated that general rules of the type set forth in the proposed statute will indeed "destroy the flexibility of operations." As has been noted elsewhere, the proposed statute will not affect most hearings. And in the few it does affect, those which center on the activities and thoughts of individuals, any loss of flexibility seems compensated for not only by the gain in additional facts by the committee but also by the committee's gain of additional public confidence as a result of fair treatment of persons adversely affected by the investigation.

Judge Wyzanski has been cited by many, including Mr. Meader, for an attitude of general reluctance toward the adoption of procedural reforms in Congressional investigations. One of the opening sentences of an article written by him in 1948 seems to confirm this:

The aversion to these reform measures is due in part to a justified belief that most investigations are satisfactory and those that are unsatisfactory could be cured not by differences in rules but only by differences in men and in the time they spend in preparing for hearings.⁵³

This statement is surprising. To apply it uniformly would mean to abandon rules altogether, since apparently rules do not make any difference, and staff our seats of authority only with good men. This not only ignores the uniformity-of-treatment theory behind rules but also takes the patently unrealistic view that the process of choosing good men is infallible. It also apparently advances the proposition that rules can have no deterrent effect.

It should be pointed out, however, that Judge Wyzanski was inconsistent with his own statement elsewhere in his article:

And yet even if all abuses cannot be reached by a statute, if Congress enacted legislation which sought to cure only a few glaring evils, its action might not only accomplish those specific cures but might by demonstrating its awareness of the necessity of Congressional self-restraint have a salutary effect on practices not specifically outlawed. Congressmen, better than most people, know that a statute is more than a sovereign's command enforced by a sanction; it is also an educational force going beyond

52. *Id.* at 784.

53. Wyzanski, *Standards for Congressional Investigations*, 3 Record of N.Y.C.B.A. 93 (1948).

the letter of the statute book; it sets in motion new trends which form new social patterns.⁵⁴

Judge Wyzanski then proposed several rules which should be adopted by statute.⁵⁵

Another authoritative voice which is cited for generally opposing codes of fair practices for Congressional investigating committees is that of Telford Taylor.⁵⁶ Actually, Professor Taylor does not come out against codes of fair practices as such (in fact, he endorses Judge Wyzanski's proposals) so much as he does against what he calls "far-reaching" proposals. One proposal which he characterizes as far-reaching includes the right to call witnesses and to cross-examine hostile witnesses. Since this is contained in section 3b of the proposed statute, Professor Taylor's view is quoted at length here:

But when we turn to propositions for giving persons under investigation the rights to call witnesses in their own behalf and to cross-examine hostile witnesses, we must guard against encumbering the investigative power and destroying its flexibility and efficacy. Courts are concerned with individual rights and liabilities, and their procedures are governed accordingly. Legislative committees have broader functions which require looser procedural standards; the informing function will wither if unduly circumscribed. A committee investigating social, economic or political problems cannot be required to weigh every disputed question of fact as if it were a judicial tribunal. I do not believe that it is feasible or practical to lay down rigid requirements with respect to the summoning and cross-examination of witnesses without undermining the investigative process itself.⁵⁷

It is difficult to know precisely why Professor Taylor takes the categorical position stated in the last sentence quoted above. Certainly the prior language in the paragraph gives no support to the statement. Such statements as "we must guard against encumbering the investigative power and destroying its flexibility and efficacy" and "the informing function will wither if unduly circumscribed" are clearly true but are meaningless generalities.

The only sentence at all specific in the paragraph quoted above is the statement that a committee "cannot be required to weigh every disputed question of fact as if it were a judicial tribunal." Again, this is

54. *Id.* at 106.

55. Judge Wyzanski recommended that a witness called before a Congressional committee "have the rights (a) to have counsel present, (b) to file a written statement before the hearing [is] concluded and (c) to have an accurate record kept of his own testimony." *Ibid.* Any disagreement that Judge Wyzanski may have with the proposed statute, therefore, would most likely involve scope, not philosophy.

56. Taylor, *op. cit. supra* note 20. Mr. Taylor is now a professor of law at Columbia University School of Law. He was practicing law in New York City at the time he wrote his excellent book on Congressional investigations.

57. *Id.* at 254-55.

clearly true. The proposed statute does not contain such a requirement. The committee is not required to weigh or decide any factual issues. It is only required to allow the aggrieved party to state his side of the case, subject to reasonable limitations imposed by the committee and applicable only when the committee has published or will publish the adverse evidence and the evidence was relevant to the investigation or was solicited or anticipated by the committee. This is not requiring an investigative committee to act as a court or to assume the admittedly complex and restricting procedural rules and regulations imposed on a court.

As a result, one is left with Professor Taylor's unexplained opinion that the right to call witnesses and to cross-examine hostile witnesses will undermine the investigative process.⁵⁸ Knowledgeable people—including public representatives—disagree with this opinion. In supporting this statement, one need go no further than the Congressmen who introduced the resolution that Mr. Meader was objecting to; they were the majority leaders of the Senate and the House of Representatives.⁵⁹

Professor Taylor continues in the next paragraph to another objection:

There is another and equally serious objection. The only method of law enforcement that is consonant with our constitutional democracy is judicial enforcement. The more investigating committees are hedged about with legal restrictions on their procedures, therefore, the more the courts would be called upon to perform a supervisory function. Increasingly, the committees would appear to be inferior tribunals, subject to appellate review by the courts.⁶⁰

The answer to this contention is that the proposed statute does not purport to give the courts a "supervisory function." The courts are involved in the proposed statute only in a negative sense, which is that the courts would no longer be available to prescribe contempt convictions against adversely affected persons if the committee refused to follow the procedures established by the proposed statute. Nowhere does the statute provide for the courts to affirmatively step in and enforce anything.

Finally, Professor Taylor notes that:

In fact, one of the dangers of these far-reaching proposals for reform of investigative procedures is that, in the event of their

58. One mistake that seems to be made regularly by those who challenge specific rules of procedure for investigating committees is that the rules will have an equal impact upon all investigations. This is not true. The proposed statute, for example, will materially affect only those investigations which are centered on the individual person. There are many investigations, such as those concerning the tariff laws, the munitions industry, the food industry, and so forth, which are not primarily involved with persons but rather are involved with impersonal objects such as markets, distribution systems, economic concentration via merger, and so forth. The statute normally will not act as a substantial interruption to such investigations since the major time of the investigation is spent impersonally.

59. See note 40 *supra*.

60. Taylor, *op. cit. supra* note 20, at 255.

adoption, the public would conclude that committee hearings had been turned into real trials, in the course of which guilt or innocence might be determined.⁶¹

It is recognized that "trial by committee" is indeed a danger; and it is present whenever a committee chooses to exercise its subpoena power and inaugurate a widely publicized investigation of a sensitive and probably unrespectable part of the private life of this nation. But it is submitted that this danger exists today and has existed for many years. The public seems incapable of distinguishing even crudely drawn jurisdictional lines.⁶² The proposed statute will at least ensure that the person who is already being "tried" in the mind of the public has a chance to state his side of the case. Those who are more sophisticated, and who presently realize that trials are not taking place, surely will retain their ability to distinguish between a court and an investigative committee if the proposed statute is adopted.

The last example of negative commentary, this time directed specifically toward the proposed statute, is that contained in a letter from Congressman Charles McC. Mathias, Jr., to the author.⁶³ Mr. Mathias, after noting his agreement that there is a need to protect individuals against damaging allegations made before, or printed by, Congressional committees, states as follows:

Concerning the provisions of your bill, I agree with its objectives, but am not sure that many Members of Congress would endorse points 4 and 5 of your section 3b. These bear directly on the problem of whether Congressional committee investigations are quasijudicial in nature, a problem which the Congress has never fully resolved. To date, cross-examination by witnesses, and adversary proceedings in general, have been permitted by individual chairmen only in extraordinary circumstances, where the witness against whom allegations were made was an individual of high stature or important office. In other cases, it is likely that many Members would recommend the initiation of libel suits in the appropriate courts.

Nor am I sure that legislation of this form is best. Traditionally both the House and the Senate have been reluctant to permit the other body to pass judgment on its operating rules, as would be necessary in the course of enacting a law to protect individuals against allegations made to committees. Traditionally, too, each House has adopted its rules at the beginning of each Congress,

61. *Id.* at 256.

62. See, for example, note 8 *supra*.

63. The letter is dated September 12, 1966. Mr. Mathias is on the Judiciary committee of the House, and is himself very concerned about the problems raised by the excesses of some investigative committees. He has introduced a bill, H.R. 12425, 89th Cong., 2d Sess. (1966), which provides for the appointment of a special committee in each House to study all contempt reports of investigative committees to see whether, among other things, the body before which the alleged contempt was committed exceeded its authority, violated the constitutional rights of the person alleged to be in contempt, or otherwise acted in a manner contrary to law or to any applicable legislative rules and thereafter to submit a report and recommendations to the relevant House.

in accord with the principle that no Congress may bind a subsequent one in this regard. These two institutional principles, plus the independence generally accorded to committee chairmen, would be cited by many Members as arguments against your bill.

The first institutional principle mentioned by Congressman Mathias, that self-defense is permitted by Congress only when the person affected is "an individual of high stature or important office," is doubtless true as a practical matter. If a constituent happens to be person of importance, then the "essential decencies" are accorded to him. If, however, he happens simply to be an ordinary citizen who made the mistake of visiting the New Masses, or joining the wrong group or saying the wrong thing publicly, then he must accept a double standard. As noted earlier,⁶⁴ the ordinary citizen is the person who is most likely to need the aid of the proposed statute, since he may not prove newsworthy in attempting to publish his reply, whereas an individual of high stature or important office probably would enjoy some news coverage in making his reply.

More importantly, however, is the point that Congress acts on a double standard, based on the "high stature" of a person, with respect to persons adversely affected by its investigative process. This double standard is the antithesis of everything this country is purported to stand for. The Declaration of Independence states that "We hold these truths to be self-evident, that all men are created equal. . . ."⁶⁵ Since this statement obviously cannot mean equal in mental or physical ability or in wealth, it must mean equal in the eyes of the government. Yet the current treatment of persons desiring the right to face the person who damaged their reputation constitutes unjustifiable inequality occasioned by the government itself.

Mr. Mathias' statement that, "In other cases [*i.e.*, those where the individual does not enjoy stature or important office], it is likely that many Members would recommend the initiation of libel suits in the appropriate courts." The only difficulty with this otherwise perfectly sensible alternative is that it raises Constitutional problems, particularly if the subject of the libel suit happens to be a Congressman.⁶⁶ Even if the subject is not a Congressman, immunity problems remain.⁶⁷ Not only is the alternative of litigation not feasible for these reasons, but also it is submitted that the fear of libel suits and possible heavy damages liability may deter potential witnesses and thereby restrict the availability of information far more than the possibility that their testimony would be subjected to cross-examination under the proposed statute.

Mr. Mathias' second paragraph is substantially rebutted by Section 1b of the proposed statute. Neither House would be passing judgment on

64. See pp. 53-54 *supra*.

65. Documents of American History 100 (Commager ed. 1949).

66. See note 10 *supra*.

67. See note 12 *supra*.

the rules of the other since the other is free to change its rules in any manner and at any time it sees fit. It is true that normally each House adopts its rules at the beginning of each Congress, but, as is noted elsewhere in this paper,⁶⁸ there exist today some rules which are in the form of statutes. The statutory form of the proposed legislation is therefore not a new or unique procedure.

Finally, Mr. Mathias notes that the independence generally accorded to committee chairmen would be used as an argument against the proposed statute. The response to this point is that the proposed statute affects very little of the traditional independence of committee chairmen. The committees and their chairmen retain control over the entire self-defense proceedings.⁶⁹ They have available executive sessions, where the proposed statute does not apply at all. They may choose what, who, when and where they want to investigate. In addition, independence is not a virtue unto itself. One must always look at the affect it is having on others. If independence is abused, all reasonable people would agree that it must be curbed, if it can be curbed without destroying the reason for the independence in the first place. This is the goal of the proposed statute.

Discussion of Certain Specific Sections

Section 1a of the proposed legislation states that the legislation is enacted by the Congress "as an exercise of the rule-making power of the Senate and the House of Representatives and as such shall be considered part of the rules of each House . . ." The function of the proposed legislation as part of the rules of each House is thus made explicit. The proposed legislation is couched in the form of a statute rather than specific amendments to existing rules primarily because the U.S. Code is more readily available to lawyers than the House and Senate rules, uniform procedure in both Houses seems desirable for the sake of simplicity and does not seem to involve any particular disadvantages unresolvable by section 1b (discussed below), and a statute bears greater dignity. This is not a new or unique procedure, since some of the Senate rules are in the form of a statute (see, for example, 44 Stat. 1877 (1926), 2 U.S.C. § 196 (1964)).

Section 1b of the proposed legislation expressly recognizes that either the House or the Senate is free at any time to change its rules in accordance

68. See the second paragraph below in text. It should also be noted that the proposed Legislative Reorganization Act of 1966 defines some Congressional committee procedures by statute rather than by the rules of each House. For example, the Act requires each standing committee to hold its hearings in public unless . . . the committee determines by a majority vote that the testimony to be taken at that hearing may relate to a matter of national security or tend to reflect adversely upon the character or reputation of the witness or any other individual.

S. 3848, 89th Cong., 2d Sess. § 103(a) at 13 (1966); S. Rep. No. 1629, 89th Cong., 2d Sess. 16 (1966). This section of the Act, incidentally, while constituting a praiseworthy effort by the Joint Committee to cover the problem of defamation before Congressional committees, is subject to the criticisms made in note 17 *supra* with respect to House Rule XI, § 26 (m).

69. See pp. 61-62 *supra*.

with its own procedure "whether or not such changes are inconsistent with this Act." This makes clear the inherent flexibility of each House to govern its own procedures⁷⁰ and to make whatever changes in the proposed legislation experience proves necessary. Amendment would not have to be made by statute and thus would not be subject to a Presidential veto or to the cooperation of the other House.⁷¹

Section 3a is designed to give the person who is defamed an opportunity to present his side of the case at the same public hearing at which the defamatory testimony or other evidence was introduced, if possible. The rebuttal would thus have the maximum opportunity to share in the publicity granted the initial material. The section recognizes that it may prove impossible for a committee acting in good faith and with the fairest of intentions to notify a person who has been defamed in sufficient time to allow the person a rebuttal during the same public hearing. One problem that could arise, for example, is that of the aggrieved person being seriously ill or out of the country and not readily available either for receiving notice or for testifying during the same public hearing. Section 3c is intended to cover this situation.

Section 3b has already been explained at length. It is, of course, the key section to the entire legislation.

Section 3c, as mentioned above, covers the situation where the person named or otherwise specifically identified in a defamatory context did not receive notice in sufficient time to appear at the same public hearing, or did not receive notice at all.⁷² He is given a period of one year following termination of the public hearing in which to exercise his section 3b rights. If he does not both obtain knowledge of the defamation within one year of the close of the public hearing and exercise his rights, then he has no protection under the proposed statute.⁷³ The fact, however, that he himself has not heard of the defamatory allegations within one year after their publication, or does not choose to exercise his rights, may indicate in some situations that the damage to his reputation is not too substantial.

70. U.S. Const. art. I, § 5.

71. It is conceded that this militates against the statement that the U.S. Code is more available to lawyers, since amendments may not be reflected in the Code. Nevertheless, statutory enactment will at least put an attorney on notice that there are some standards in this area. His reading of section 1b should alert him to updating his information by request to the committee involved.

72. The language of section 3c of the proposed statute is changed slightly from the language of S. 3799, note 24 *supra*, in order to cover a gap that was inherent in the language of S. 3799. The language of S. 3799 reads, "If a person is not given notice pursuant to section 3a, and a hearing. . . ." The problem that this created was that notice could have been given pursuant to section 3a and yet if the person affected was for some reason unable to present his side of the case prior to the termination of the public hearing, he would be unable, according to the literal language of the statute, to exercise rights under section 3b. The omission of the phrase, "a person is not given notice pursuant to section 3a, and" resolves the problem.

73. The one year limitation was established to provide a ready cut-off for the committee. It is recognized that the period is short, but it seems necessary due to the ever-changing membership of committees, and so forth.

Section 3d applies the protective provisions of section 3b to reports or other publications of a committee. For evidence that this additional protection is needed one needs go no further than the situation described at the beginning of this paper. The Subcommittee study was not based on a public hearing, but rather was a compilation by the Subcommittee staff of various pamphlets, clippings, letters, and so forth. It nevertheless had a substantial impact, as evidenced by the headline coverage mentioned earlier.

If section 3b proves acceptable, there should be no problem with section 3d. There is no longer any question of surprise and inconvenience to a committee holding a hearing in good faith. The committee is in complete control of what it will or will not publish. If material appears defamatory and the committee does not wish to get involved in the process of a section 3b inquiry, it simply may choose not to publish the material. This may seem impractical, but alternative procedures are available. Section 4 of the proposed statute provides that unpublished material gathered without regard to the statute may be submitted:

to authorized federal executive investigative or intelligence agencies or agencies prosecuting crime or to crime-prosecuting agencies of state governments or to other committees of Congress or to individual Members of Congress, on the condition that no publication of such material shall be made in the absence of conformity with the procedures set forth in Section 3.⁷⁴

This leaves a committee that has received unsubstantiated defamatory information which it nevertheless feels may prove useful to another Congressional committee, for example, free to provide such committee with the information. If, on the other hand, the committee feels that publication of the information is required for the public interest, then surely the public interest would best be served by placing the public in a position to evaluate both sides of the matter. It is not apparent how the public interest would be served by a Congressional investigative committee deliberately publishing unsubstantiated defamatory material.

Some people may claim that the above discussion does not resolve the problem presented by the good faith publication by a committee of material it does not consider defamatory which is afterwards challenged by an unusually sensitive and not particularly busy person who takes the position under section 3g that he has been defamed and demands the full panoply of rights under section 3d, including publication of a supplementary report. Under such a circumstance, since the committee obviously could not plead lack of relevancy and thereby utilize section 3f, it would be left with

74. The phrase "or to individual members of Congress" is an addition to the language of S. 3799. It is intended to cover the situation where a committee issues a report to Congress based on abstract statistics (in an effort to avoid section 3b) but wants to remain free to demonstrate to members of Congress the evidence behind the statistics if they wish to avail themselves of the privilege.

denying that the petitioner had made his determination in good faith.⁷⁵ Assuming that the committee made its own judgment in good faith, it could expect support for its decision from the rules committee, assuming that the person thereafter entered a complaint under section 6 of the statute. As a result, the person taking an unreasonable position on defamation would not have an adverse affect on the committee's operations or budget.⁷⁶

Section 3g allows the person named or otherwise specifically identified to determine whether or not the reference to him is defamatory. At first glance this seems extraordinary, and raises the specter of a committee being plagued by litigious and overly sensitive citizens. It is nevertheless true that

75. The language requiring good faith under section 3g is an addition to S. 3799. It was added in order to make explicit what was always in section 3g by implication.

76. Some people might contend that the provision that a person has to act in good faith under section 3g will destroy the effectiveness of the statute in the hands of an unfair and unscrupulous committee, on the theory that the committee will always decide that defamation did not take place and that the person is acting unfairly. An effort has been made to alleviate this problem by establishing under section 6 the right of a person to complain to the appropriate rules committee, which in turn is obligated to investigate the complaint and report its findings to the appropriate House. A frivolous complaint could be dispatched in a one-sentence report to the House. If the complaint is legitimate, however, then it should receive fair treatment in the hands of the more neutral rules committee, which in turn should act as a restraining force on the investigative committee.

The response to the rules committee provision might be that it is much ado about nothing, since the prevailing clubsmanship atmosphere in Congress means that the rules committee will white-wash the actions of the investigating committee, and that the appropriate House will readily accept a perfunctory report. This is indeed a danger. Such a danger exists because the entire statute has to have as its basis an assumption of good faith in Congress as a whole. Professor Taylor was correct when he said that the judiciary cannot get involved in supervising the day to day activities of Congressional committees. (See note 60 *supra*.) Our system of separation of powers requires that Congress have the power to run its day to day operations, including general supervision of its committees, independently of any other branch.

The good faith assumption made above admittedly looks weak when one reflects on the past actions of some Congressional investigative committees, including Senator McCarthy's and including the Subcommittee study described at the beginning of this paper, which constituted a flagrant denial by the Subcommittee of the free speech and open debate theory underlying our system of government. The only response that one can make to this legitimate doubt is that the concept of rules committee supervision operating under a statute defining specific procedures has never been tried before. It may operate as a restraining influence on unsubstantiated defamation. It is at least worth trying.

The other provision which should assist in encouraging the committee to act fairly is section 5, which is the provision denying the committee the right to use statutory contempt in forcing a witness to testify before it if the person has been adversely affected by the denial by the committee of any right created or affirmed under the statute. Even though the person adversely affected may not be a witness before the committee in the particular hearing or publication, nevertheless the committee may wish to retain the power to call him at some other time with respect to the subject matter of the investigation. The language of section 5 forbids the use of the contempt power under such circumstances. This may encourage the committee to think twice when making decisions under the statute.

It is recognized that section 5 does not protect against the committee recommending that the appropriate House punish a witness for contempt under its traditional powers to do so, which operates outside of the court system. See Taylor, *op. cit. supra* note 20, at 6-8, 35. Once again, it is necessary to rely upon the good faith actions of Congress as a whole, particularly when it has before it a statute and a concrete situation.

the person himself is initially best able to determine whether he has been defamed.⁷⁷ Abuse of section 3g would be blocked by the requirement of good faith mentioned immediately above, or by the provisions of section 3f, or by the broad discretion given the committee in section 3b. A provision similar to section 3g in that it lets the person affected determine whether or not he has been defamed was adopted into law by New York State, which contains a large and varied population, and has been in effect there for over a decade, apparently without any adverse consequences on legislative investigations.⁷⁸

77. The situation described at the beginning of this paper can be used to demonstrate the importance of section 3g. Senator Dodd, in his message informing the President of the University of Colorado that the Subcommittee was deleting the anonymous letter from future reprints of the Subcommittee study, stated as follows:

Nowhere in the section dealing with the University of Colorado is the statement made that those who participated in the teach-in were Communists or under Communist influence.

Rocky Mountain News, Oct. 28, 1965, p. 7, col. 2. It is entirely possible, therefore, that Senator Dodd would take the position that the Subcommittee study could not reasonably be construed as damaging the reputation of anyone at the University. This is why the initial decision as to defamation is left to the person named or otherwise specifically identified in the publication. Senator Dodd's statement quoted above, while literally true, completely ignores the real problem, which was that the defamation took place by innuendo and implication. The sheer impact of the Subcommittee study in the Rocky Mountain region (see note 8 *supra*) demonstrates that innuendo and implication—particularly when it is so clearly drawn as in the study—can be highly effective.

78. N.Y. Civil Rights Law § 73(6). This statute gives any person "whose name is mentioned or who is specifically identified and who believes that testimony or other evidence given at a public hearing or comment made by any member of the agency or its counsel at such hearing tends to defame him or otherwise adversely affect his reputation" the right to appear and testify on his own behalf or to file an affidavit under oath, at the option of the agency. A letter to the author, dated October 14, 1966, from Emanuel R. Gold, Counsel—Majority Leader, New York State Assembly, after noting that he would like to communicate with other members of the Legislature when it reconvenes after January 1, 1967 in order "to satisfy my own desire to answer your question to the fullest extent possible," states he has contacted the Counsel to the Speaker of the Assembly "and it appears as though the existence of Section 73(6) has caused no particular difficulties in any legislative investigations as far as we are able to determine . . . [T]here do not seem to be any situations where an investigation has been tied up because of an overabundance of such requests by individuals."

The author has also received a letter, dated October 25, 1966, from the Temporary President of the Senate of the State of New York, Mr. Earl W. Brydges. Mr. Brydges states as follows:

I am sure you can appreciate that it is difficult for me to generalize as to the experience which our many legislative committees may have had on this subject over the years. While I am unable to refer you to any specific data on this question, my own view would be that this statutory provision has been used very infrequently and has not impeded the work of our committees.

It might be argued that the New York experience should be disregarded on the grounds that the proposed statute, which allows more extensive rights to a defamed person under certain circumstances, is more susceptible to tying up an investigation than the New York statute, which more narrowly defines the rights of a defamed person. This is of course possible, despite the fact that the broad provisions of the proposed statute are limited to circumstances where the interest of the committee in hearing both sides of the matter and the rights of the person to cross-examine and testify overlap, which should reduce, if not eliminate, the "tying up" problem. The experience of New York is nevertheless relevant since it serves to substantiate a common sense appraisal that there probably are very few persons around who deliberately will attempt to create trouble under such

The "enforcement" provisions, sections 5 and 6, have already been discussed in note 76. It should be noted that section 5 in part reflects existing law.⁷⁹

CONCLUSION

A major effort has been made throughout the proposed statute to narrow its breadth of coverage in order to avoid impeding legislative investigative committees. This has been done, for example, by completely excluding executive sessions, by reducing the applicability of section 3b rights to certain limited circumstances, by requiring that the person aggrieved be named or otherwise specifically identified in the publication, by granting the committee broad discretion to control the time taken under section 3b, and so forth.

It is nevertheless true that legitimate doubts can remain as to whether the objectives sought by this legislation would not be so abused by unfair persons as to impede a well-intentioned and fairly run Congressional investigation. The fact that the House Rules XI, § 26 (h)-(q)⁸⁰ and the New York Civil Rights Act § 73 (6)⁸¹ have remained in effect for over a decade tend somewhat to rebut such doubts. In addition, since it is impossible presently to say that the above safeguards will be *ineffective*, the legislation should be given the test of actual experience.

This is particularly true in view of this country's traditional respect for personal dignity and fundamental fairness. These concepts constitute the core of the proposed legislation. Adoption of the statute would eliminate the anomalous situation of this nation's legislative body—which acts so frequently to ensure fair and equal treatment to all citizens—itsself not according individuals involved in its investigative process such treatment.

Section 1b recognizes that either House can change the statute at any time. If experience proves that the proposed statute is subject to abuse despite the above safeguards, then it would be a simple matter for either House to change the statute as it sees fit.

protective provisions and who happen to be publicly named or otherwise specifically identified during an investigation. One would seem safe in saying that Congress should not refuse to adopt protective legislation on the speculative fear that such would happen. If it is contended that New York's experience is not sufficiently relevant, then it is submitted that there is no substitute for the actual experience of Congress itself.

79. The case of *Yellin v. United States*, 374 U.S. 109 (1963), decided that the denial by an investigating committee of rights under its rules permits the witness affected by the denial to refuse to testify, on the grounds that this is the only recourse he has.

80. See note 17 *supra*.

81. See note 78 *supra*.

APPENDIX

A BILL

To regulate certain procedures of Congressional investigating committees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

Sec. 1. *Rule-making Power of the Senate and the House.* This Act is enacted by the Congress:

a. As an exercise of the rule-making power of the Senate and the House of Representatives and as such shall be considered as part of the rules of each House and to the extent that it is inconsistent therewith shall supersede rules now existing.

b. With full recognition of the constitutional right of either House to change its rules at any time in accordance with its own procedures, whether or not such changes are inconsistent with this Act.

Sec. 2. *Definitions.* As used herein, the term:

a. *Committee* means a standing, select or special committee of either House of Congress or a joint committee of the two Houses or, as the case may be, a duly authorized subcommittee of any of the foregoing.

b. *Hearing* means any public or private meeting of a committee for the purpose of hearing a witness testify before it.

c. *Person* shall include an individual, partnership, association, corporation or academic institution.

d. *Defame* means to charge with crime or misconduct, to disgrace, to injure professional standing, or otherwise to expose to public contempt, hatred, aversion, obloquy or scorn.

Sec. 3. *Rights of Persons Defamed by Public Testimony, Committee Reports or Committee Member's Comments.*

a. If a committee plans to receive at a public hearing testimony or other evidence which is likely to defame a person, such person shall be given reasonable advance notice of the probable introduction of defamatory testimony or other evidence and given a reasonable opportunity to appear at such hearing and exercise the rights contained under Section 3b. If, however, defamatory testimony or other evidence is introduced at a public hearing in the absence of advance notice to the person defamed, the committee promptly shall give notice to such person of the introduction of such testimony or other evidence in order that such person can exercise the rights contained in Section 3b at the same public hearing, if possible.

b. Subject to Section 3f, if a person's name is mentioned or he is otherwise specifically identified at a public hearing and if he believes that

testimony or other evidence introduced at the hearing tends to defame him, he is entitled to exercise any or all of the following rights, if requested by him during such hearing or pursuant to Sections 3c or d.

1. To obtain free of charge the transcript of any testimony or other evidence relating to him given in public before the committee.

2. To file an affidavit of rebuttal with the committee concerning such testimony or other evidence, which shall be made a part of the official files of the committee.

3. To appear personally before at least one member of the committee and publicly give sworn pertinent testimony on his own behalf, and under subpoena if he so elects, provided that he may thereupon be cross-examined by the committee.

4. To examine or cross-examine in person or by counsel any person or persons who presented such testimony or offered such other evidence before the committee. The committee shall bar any question not pertinent to the inquiry. Such examination shall be conducted publicly in the presence of at least one member of the committee. The duration of such examination shall be subject to reasonable limitations imposed by the committee.

5. To have the committee subpoena, as soon as practicable, a reasonable number of witnesses and papers on his behalf upon a showing that their testimony and such papers are pertinent to the inquiry and to examine such witnesses, either personally or by counsel, upon any matter pertinent to the inquiry. The duration of such examination shall be subject to reasonable limitations imposed by the committee. Such witnesses may thereupon be cross-examined by the committee. Such examination shall be conducted publicly in the presence of at least one member of the committee.

c. If a hearing has been held in the absence of a person and defamatory testimony or other evidence relating to him has been introduced, he shall be entitled to exercise the rights contained in Section 3b within a reasonable time after obtaining knowledge of the defamation, not to exceed a period of one year following the termination of the hearing, including the right to have the persons referred to in Section 3b (4) recalled for cross-examination as soon as practicable after he makes his request known to the committee. Notification to the committee shall be deemed sufficient and effective at the time such person deposits in the mail a properly stamped and addressed letter to the attention of the chairman of the committee and indicating such person's intention to exercise the rights contained in Section 3b.

d. No report or other publication of or purporting to be on behalf of a committee (including the release of testimony taken in executive session, or of a summary thereof) containing comment, testimony or other evidence that tends to defame a person named or otherwise specifi-

cally identified shall be made public unless such person has had the opportunity to exercise the rights contained in Section 3b, whether or not the report is based on a public hearing, and the transcript of his testimony and evidence is made part of such report or publication; in the event, however, that said opportunity has not been granted such person prior to publication, then such person shall be entitled to exercise the rights contained within Section 3b within a reasonable time after obtaining knowledge of the publication of the defamatory material, not to exceed a period of one year from the date of publication, and the resulting transcript of such person's testimony and evidence shall be published promptly thereafter in a supplementary report in the same manner and to the same extent as the original report by said committee was published.

e. No member or employee of a committee shall make any public comment based on an investigation in process by such committee naming or otherwise specifically identifying a person under investigation or about to be investigated by the committee or any witness in such investigation and tending to defame such person or witness unless and until a report on or reference to such person or witness has been duly issued by the committee in accordance with the procedures set forth in this Section. If such a comment is made, the person defamed shall be entitled to appear personally before at least one member of the committee and give sworn pertinent testimony on his own behalf or to file an affidavit with the committee concerning such comment, which testimony or affidavit shall be incorporated in the record of the investigatory proceeding and made part of the official files of the committee.

f. The rights contained in Section 3b shall be available to a defamed person only if the defamatory testimony or other evidence was relevant to the investigation being made by a committee or was solicited by or anticipated by the committee or any member or employee thereof. If the defamatory testimony or other evidence was unsolicited, was not anticipated, and was not relevant to the investigation, then such person shall only be entitled, at the option of the committee, either to appear personally before the committee and give sworn pertinent testimony on his own behalf or, in the alternative, to file an affidavit with the committee relating solely to matters relevant to the testimony or other evidence complained of. Such person's testimony or affidavit shall be incorporated in the record of the investigatory proceedings and made part of the official files of the committee.

g. The determination as to whether testimony or other evidence is defamatory shall be made in good faith on his own behalf by any person whose name is mentioned or who is otherwise specifically identified with such testimony or other evidence.

h. The rights contained in this Section, and the limitations with respect thereto, shall extend to the representative of the next of kin of any deceased person defamed or likely to be defamed at a public hearing.

Sec. 4. *Committee Files.* Material in possession of a committee tending to defame any person, living or dead, that has not previously been made public in the form of a duly authorized report or publication of such committee in conformity with the procedures set forth in Section 3 shall be confidential and shall be disclosed only for their official purposes to authorized federal executive investigative or intelligence agencies or agencies prosecuting crime or to crime-prosecuting agencies of state governments or to other committees of Congress or to individual members of Congress, on the condition that no publication of such material shall be made in the absence of conformity with the procedures set forth in Section 3.

Sec. 5. *Denial of Rights.* No person adversely affected by the denial by a committee of any right created or affirmed by this Act shall be prosecuted under 52 Stat. 942 (1938), 2 U.S.C. § 192 (1964) for any default or refusal to answer before said committee in any proceeding relating to the subject matter of the investigation during which his rights under this Act were denied.

Sec. 6. *Complaints to Rules Committees.* Complaints of violations of this Act may be filed by any Member of the Congress or by any person adversely affected thereby to the Committee on House Administration of the House of Representatives or the Committee on Rules and Administration of the Senate, as the case may be, which shall investigate such complaints, may conduct hearings thereon, and shall report its findings, conclusions and recommendations to the appropriate House.

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