AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 8: The New Deal/Great Society Era – Separation of Powers

Barenblatt v. United States, 360 U.S. 109 (1959)

Lloyd Barenblatt was a psychology instructor at Vassar College who was subpoenaed to testify before the House Un-American Activities Committee. After Barenblatt refused to answer any questions about his past and present membership in the Communist Party, he was found guilty in federal district court of contempt of Congress and sentenced to six months in prison and fined $250. Barenblatt appealed to the Court of Appeals for the District of Columbia, which unanimously affirmed his conviction. He then appealed to the U.S. Supreme Court. The Supreme Court initially asked the federal circuit court to reconsider his conviction in light of the new decision in Watkins v. United States *(1957). In a divided vote, the lower federal court affirmed its first decision. Barenblatt again appealed to the Supreme Court, and this time the Court sustained the actions of the circuit court. The Supreme Court's vote was 5-4. The five justices in the majority included two from the original* Watkins *majority (Frankfurter, Harlan), one from the* Watkins *dissent (Clark), and two who had not voted in* Watkins *(Whittaker, Stewart).*

Two critical events happened in between Watkins *and* Barenblatt. *First, the Senate came surprisingly close to passing the Jenner-Butler Bill, which would have stripped part of the Court's appellate jurisdiction and challenged several of the Court's anti-Communist rulings, including* Watkins. *Second, Justices Whittaker and Stewart joined the Court, filling two seats that were vacant when* Watkins *was argued.*

Does the Harlan majority opinion make a convincing distinction between the facts of Watkins *and* Barenblatt*? Might Harlan and Frankfurter have been more convinced by the Jenner-Butler Bill? How is the logic of the dissenting opinion in* Barenblatt *different from the majority opinion in* Watkins*? Internal documents from the Court indicate that Frankfurter convinced Warren to deemphasize the First Amendment in his majority opinion in* Watkins.[1]

JUSTICE HARLAN delivered the opinion of the Court.

Once more the Court is required to resolve the conflicting constitutional claims of congressional power and of an individual's right to resist its exercise. The congressional power in question concerns the internal process of Congress in moving within its legislative domain; it involves the utilization of its committees to secure "testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution." . . . The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far reaching as the potential power to enact and appropriate under the Constitution.

Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive. And the Congress, in common with all branches of the Government, must exercise its powers subject to the

[1] Bernard Schwartz, *Super Chief* (New York: New York University Press, 1983), 237–239.

limitations placed by the Constitution on governmental action, more particularly in the context of this case the relevant limitations of the Bill of Rights.

. . . . In the present case congressional efforts to learn the extent of a nation-wide, indeed world-wide, problem have brought one of its investigating committees into the field of education. Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain. But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher. An educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls.

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We here review petitioner's conviction . . . for contempt of Congress, arising from his refusal to answer certain questions put to him by a Subcommittee of the House Committee on Un-American Activities during the course of an inquiry concerning alleged Communist infiltration into the field of education.

. . . . [P]etitioner specifically declined to answer each of the following five questions:

> "Are you now a member of the Communist Party? . . . .
> "Have you ever been a member of the Communist Party? . . .
> . . . .

. . . . Petitioner expressly disclaimed reliance upon "the Fifth Amendment."

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. . . . Petitioner contends that *Watkins* v. *United States* . . . held the grant of this power in all circumstances ineffective because of the vagueness of Rule XI in delineating the Committee jurisdiction to which its exercise was to be appurtenant. . . .

The *Watkins* case cannot properly be read as standing for such a proposition. A principal contention in *Watkins* was that the refusals to answer were justified because the requirement . . . that the questions asked be "pertinent to the question under inquiry" had not been satisfied. . . . This Court reversed the conviction solely on that ground, holding that Watkins had not been adequately apprised of the subject matter of the Subcommittee's investigation or the pertinency thereto of the questions he refused to answer. . . . In short, while *Watkins* was critical of Rule XI, it did not involve the broad and inflexible holding petitioner now attributes to it.

Petitioner also contends, independently of *Watkins*, that the vagueness of Rule XI deprived the Subcommittee of the right to compel testimony in this investigation into Communist activity. We cannot agree with this contention, which in its furthest reach would mean that the House Un-American Activities Committee under its existing authority has no right to compel testimony in any circumstances. Granting the vagueness of the Rule, we may not read it in isolation from its long history in the House of Representatives. . . . The Rule comes to us with a "persuasive gloss of legislative history" . . . which shows beyond doubt that in pursuance of its legislative concerns in the domain of "national security" the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country.

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We are urged, however, to construe Rule XI so as at least to exclude the field of education from the Committee's compulsory authority. . . .

To the contrary, the legislative gloss on Rule XI is again compelling. Not only is there no indication that the House ever viewed the field of education as being outside the Committee's authority under Rule XI, but the legislative history affirmatively evinces House approval of this phase of the Committee's work. . . .

In this framework of the Committee's history we must conclude that its legislative authority to conduct the inquiry presently under consideration is unassailable, and that independently of whatever bearing the broad scope of Rule XI may have on the issue of "pertinency" in a given investigation into

Communist activities, as in *Watkins*, the Rule cannot be said to be constitutionally infirm on the score of vagueness. The constitutional permissibility of that authority otherwise is a matter to be discussed later.

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The precise constitutional issue confronting us is whether the Subcommittee's inquiry into petitioner's past or present membership in the Communist Party transgressed the provisions of the First Amendment, which of course reach and limit congressional investigations.

The Court's past cases establish sure guides to decision. Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown. These principles were recognized in the *Watkins* case. . . .

The first question is whether this investigation was related to a valid legislative purpose, for Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to such a purpose. . . .

That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. . . .Justification for its exercise in turn rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by the Congress.

On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. . . .

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Nor can we accept the further contention that this investigation should not be deemed to have been in furtherance of a legislative purpose because the true objective of the Committee and of the Congress was purely "exposure." So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power. . . . "It is, of course, true," as was said in *McCray* v. *United States* (1904), . . . "that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power." These principles of course apply as well to committee investigations into the need for legislation as to the enactments which such investigations may produce. . . .

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We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended.

JUSTICE BLACK, with whom THE CHIEF JUSTICE and JUSTICE DOUGLAS concur, dissenting.

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. . . . I cannot agree with this disposition of the case for I believe that the resolution establishing the House Un-American Activities Committee and the questions that Committee asked Barenblatt violate the Constitution in several respects. (1) Rule XI creating the Committee authorizes such a sweeping, unlimited, all-inclusive and undiscriminating compulsory examination of witnesses in the field of speech, press, petition and assembly that it violates the procedural requirements of the Due Process Clause of the

Fifth Amendment. (2) Compelling an answer to the questions asked Barenblatt abridges freedom of speech and association in contravention of the First Amendment. (3) The Committee proceedings were part of a legislative program to stigmatize and punish by public identification and exposure all witnesses considered by the Committee to be guilty of Communist affiliations, as well as all witnesses who refused to answer Committee questions on constitutional grounds; the Committee was thus improperly seeking to try, convict, and punish suspects, a task which the Constitution expressly denies to Congress and grants exclusively to the courts, to be exercised by them only after indictment and in full compliance with all the safeguards provided by the Bill of Rights.

It goes without saying that a law to be valid must be clear enough to make its commands understandable. For obvious reasons, the standard of certainty required in criminal statutes is more exacting than in noncriminal statutes. . . . [T]he "vice of vagueness" is especially pernicious where legislative power over an area involving speech, press, petition and assembly is involved. For a statute broad enough to support infringement of speech, writings, thoughts and public assemblies, against the unequivocal command of the First Amendment necessarily leaves all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others. Vagueness becomes even more intolerable in this area if one accepts, as the Court today does, a balancing test to decide if First Amendment rights shall be protected. It is difficult at best to make a man guess -- at the penalty of imprisonment -- whether a court will consider the State's need for certain information superior to society's interest in unfettered freedom. It is unconscionable to make him choose between the right to keep silent and the need to speak when the statute supposedly establishing the "state's interest" is too vague to give him guidance. . . .

Measured by the foregoing standards, Rule XI cannot support any conviction for refusal to testify. In substance it authorizes the Committee to compel witnesses to give evidence about all "un-American propaganda," whether instigated in this country or abroad. The word "propaganda" seems to mean anything that people say, write, think or associate together about. The term "un-American" is equally vague. As was said in *Watkins* v. *United States*, . . . "Who can define [its] meaning . . . ? What is that single, solitary 'principle of the form of government as guaranteed by our Constitution'?" I think it clear that the boundaries of the Committee are, to say the least, "nebulous." Indeed, "It would be difficult to imagine a less explicit authorizing resolution." . . .

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But even if Barenblatt could evaluate the importance to the Government of the information sought, Rule XI would still be too broad to support his conviction. For we are dealing here with governmental procedures which the Court itself admits reach to the very fringes of congressional power. In such cases more is required of legislatures than a vague delegation to be filled in later by mute acquiescence. If Congress wants ideas investigated, if it even wants them investigated in the field of education, it must be prepared to say so expressly and unequivocally. And it is not enough that a court through exhaustive research can establish, even conclusively, that Congress wished to allow the investigation. I can find no such unequivocal statement here.

For all these reasons, I would hold that Rule XI is too broad to be meaningful and cannot support petitioner's conviction.

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Finally, I think Barenblatt's conviction violates the Constitution because the chief aim, purpose and practice of the House Un-American Activities Committee, as disclosed by its many reports, is to try witnesses and punish them because they are or have been Communists or because they refuse to admit or deny Communist affiliations. The punishment imposed is generally punishment by humiliation and public shame. There is nothing strange or novel about this kind of punishment. It is in fact one of the oldest forms of governmental punishment known to mankind; branding, the pillory, ostracism and subjection to public hatred being but a few examples of it. Nor is there anything strange about a court's reviewing the power of a congressional committee to inflict punishment. In 1880 this Court nullified the action of the House of Representatives in sentencing a witness to jail for failing to answer questions of a congressional committee. *Kilbourn* v. *Thompson* (1880). . . .

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I do not question the Committee's patriotism and sincerity in doing all this. I merely feel that it cannot be done by Congress under our Constitution. For, even assuming that the Federal Government can compel witnesses to testify as to Communist affiliations in order to subject them to ridicule and social and economic retaliation, I cannot agree that this is a legislative function. Such publicity is clearly punishment, and the Constitution allows only one way in which people can be convicted and punished. As we said in *Lovett* (1946), "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. *They intended to safeguard the people of this country from punishment without trial by duly constituted courts*." . . . (Italics added.)

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. . . . [T]he Court today fails to see what is here for all to see -- that exposure and punishment is the aim of this Committee and the reason for its existence. To deny this is to ignore the Committee's own claims and the reports it has issued ever since it was established. I cannot believe that the nature of our judicial office requires us to be so blind, and must conclude that the Un-American Activities Committee's "identification" and "exposure" of Communists and suspected Communists, like the activities of the Committee in *Kilbourn* v. *Thompson*, amount to an encroachment on the judiciary which bodes ill for the liberties of the people of this land.

JUSTICE BRENNAN, dissenting.

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