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the rules of the House take cognizance of rights included in the sixth amendment, including right to counsel and compulsory process. Thus, a witness may be accompanied by his own counsel for the purpose of advising him of his constitutional rights.(7) Furthermore, if a committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, such person is entitled to request that additional witnesses be subpenaed.(8) Where the committee does not determine that evidence or testimony may defame, degrade, or incriminate any person, the chairman receives and the committee disposes of requests to subpena additional witnesses.(9)

Although sixth amendment procedural guarantees do not apply to investigative proceedings, they apply to the criminal proceedings brought as a result of them. A court of appeals reversed a contempt conviction on the ground that the question the witness refused to answer, whether he had been a "member of a Communist conspiracy," lacked the definiteness required by the sixth amendment provision, "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ."(10) A count of an indictment charging that a witness committed perjury before a congressional committee when he denied that he had ever been "a sympathizer or any other kind of promoter of Communism or Communist interests" was held void for vagueness under the sixth amendment.(11)

§ 13. Rights of Witnesses Under House Rules

In addition to constitutional provisions, certain rules of the House grant rights to witnesses at investigative hearings, or establish procedures for such hear-

tion and cross-examination, in that the court sustained the rules of the Commission on Civil Rights which did not grant these rights in fact-finding investigations.

7. Rule XI clause 28(k), *House Rules and Manual* § 735(k) (1973). See § 14, infra, for precedents dealing with the right to counsel.

8. Rule XI clause 28(m), *House Rules and Manual* § 735(m) (1973). See § 15, infra, for a discussion of the effect of derogatory information.

9. Rule XI clause 28(n), *House Rules and Manual* § 735(n) (1973). See § 13.6, infra, for a discussion of adoption of this rule.

10. *O'Connor* v *United States*, 240 F2d 404 (D.C. Cir. 1956).

11. *United States* v *Lattimore*, 215 F2d 847 (D.C. Cir. 1954).

ings.[12] A rule[13] permits witnesses to submit brief and pertinent sworn statements in writing for inclusion in the record in the discretion of the committee, which is the sole judge of the pertinency of testimony and evidence adduced at its hearing. Cases decided prior to adoption of this rule indicated that a committee's refusal to permit a witness to make a statement before he was sworn,[14] or read a prepared statement[15] or a detailed legal brief objecting to a committee's authority during a hearing,[16] did not excuse refusals to be sworn or answer questions.

Another rule[17] permits a witness to refuse to be exposed to media coverage during a hearing. Prior to adoption of this rule, it was held that hearings conducted before media were not rendered invalid by the absence of a House rule on the subject, nor by the absence of rulings of the Speaker in that Congress; it was further said that rulings by Speakers in earlier Congresses prohibiting media coverage were not applicable.[18] Courts also held that the presence of microphones and cameras did not constitute such a lack of proper decorum as to render the committee an incompetent tribunal and eliminate the "competent tribunal" element of the crime of perjury.[19]

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12. See §§ 13.1 to 13.11, infra. See also, Heuble, Edward, Congressional Resistance to Reform: The House Adopts a Code for Investigating Committees, 1 Midwest J. of Poll. Sci. 313 (Nov. 1957).

13. Rule XI clause 28 (p), *House Rules and Manual* § 735(p) (1973). See § 13.10, infra, for a discussion of adoption of this rule.

14. *Eisler* v *United States,* 170 F2d 273 (D.C. Cir. 1948); cert. dismissed, 338 U.S. 883 (1948).

15. *Townsend* v *United States,* 95 F2d 352, 360 (D.C. Cir. 1938), cert. denied, 303 U.S. 664 (1938).

16. *Barenblatt* v *United States,* 240 F2d 875 (D.C. Cir. 1957); vacated and remanded, 354 U.S. 930 (1957); aff'd., 252 F2d 129 (D.C. Cir. 1958); aff'd., 360 U.S. 109 (1959).

17. Rule XI clause 33(f)(2), *House Rules and Manual* § 739b (1973). See § 13.11, infra, for a discussion of adoption of this rule.

18. *Hartman* v *United States,* 290 F2d 460 (9th Cir. 1961); reversed on other grounds, 370 U.S. 724 (1962).

District courts reached conflicting holdings on the duty of a witness to answer questions at a televised hearing. Compare *United States* v *Kleinman,* 107 F Supp 407 (D.D.C. 1952), which held that a witness was justified in refusing to testify before the media, with *United States* v *Hintz,* 193 F Supp 325 (N.D. Ill. 1952) which held that the witness was not excused for that reason. Both of these decisions predated Rule XI clause 33(f) (2).

19. *United States* v *Moran,* 194 F2d 623 (2d Cir. 1952), cert. denied, 343 U.S. 965 (1952).

Adoption of Code of Fair Procedures, Generally

§ 13.1 The House adopted the Code of Fair Procedures, establishing procedural rights for witnesses at investigative hearings.

On Mar. 23, 1955,[1] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, granting certain procedural rights to witnesses at investigative hearings.

AMENDING THE RULES OF THE HOUSE OF REPRESENTATIVES

MR. [HOWARD W.] SMITH of Virginia: Mr. Speaker, by direction of the Committee on Rules, I call up House Resolution 151 and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That rule XI 25 (a) of the Rules of the House of Representatives is amended to read:

"25. (a) The Rules of the House are the rules of its committees so far as possible, except that a motion to recess from day to day is a motion of high privilege in committees. Committees may adopt additional rules not inconsistent therewith."

Sec. 2. Rule XI (25) is further amended by adding at the end thereof:

"(h) Each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall be not less than two.[2]

"(i) The chairman at an investigative hearing shall announce in an opening statement the subject of the investigation.[3]

"(j) A copy of the committee rules, if any, and paragraph 25 of Rule XI of the House of Representatives shall be made available to the witness.[4]

"(k) Witnesses may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.[5]

"(l) The chairman may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt.[6]

"(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 subpena additional witnesses.[7]

"(n) Except as provided in paragraph (m), the chairman shall receive and the committee shall dis-

1. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

2. This provision is discussed at § 13.3, infra.

3. This provision is discussed at § 13.4, infra.

4. This provision is discussed at § 13.7, infra.

5. This provision is discussed at § 14.1, infra.

6. This provision is discussed at § 13.5, infra.

7. This provision is discussed at § 15.1, infra.

pose of requests to subpena additional witnesses.

"(o) No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee.[8]

"(p) In the discretion of the committee, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The committee is the sole judge of the pertinency of testimony and evidence adduced at its hearing.[9]

"(q) Upon payment of the cost thereof, a witness may obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when authorized by the committee."[10]

MR. SMITH of Virginia: Mr. Speaker, I yield 30 minutes to the gentleman from Ohio [Mr. Brown].

Mr. Speaker, at this time I offer a committee amendment.

The Clerk read as follows:

Committee amendment offered by Mr. Smith of Virginia: On page 1, line 4, after the word "as", strike out the word "possible" and insert in lieu thereof "applicable."

The committee amendment was agreed to.

MR. SMITH of Virginia: Mr. Speaker, I offer another committee amendment.

The Clerk read as follows:

Committee amendment offered by Mr. Smith of Virginia: On page 2, line 7, after the word "witnesses", insert "at investigative hearings."

MR. SMITH of Virginia: Mr. Speaker, I think I should say a word in explanation of that amendment. The bill reads:

Witnesses may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

The real purpose of this bill has to do with investigative committees and not legislative committees. This amendment simply makes that clear, that it applies not to the legislative committees.

THE SPEAKER:[11] The question is on the committee amendment offered by the gentleman from Virginia [Mr. Smith].

The committee amendment was agreed to. . . .

MR. SMITH of Virginia: Mr. Speaker, I move the previous question on the resolution.

The Speaker: Without objection, the previous question is ordered

MR. [KENNETH B.] KEATING [of New York]: I object, Mr. Speaker.

THE SPEAKER: The question is on ordering the previous question.

The previous question was ordered.

THE SPEAKER: The question is on the resolution.

The resolution was agreed to.

A motion to reconsider was laid on the table.

The debate that preceded the adoption of the measure included an explanation as to its background and purpose:[12]

8. This provision is discussed at § 13.9, infra.

9. This provision is discussed at § 13.10, infra.

10. This provision is discussed at § 13.8, infra.

11. Sam Rayburn (Tex.).

12. 101 CONG. REC. 3569–71, 84th Cong. 1st Sess.

MR. SMITH of Virginia: Mr. Speaker, this resolution is a resolution reported by the Committee on Rules as a general guide for committees in the conduct of their hearings. As you know, there has been a lot of publicity and there has been some criticism about the conduct of hearings, particularly in investigative committees. The purpose here is to lay down a general framework or guide for the use of all legislative committees and may be supplemented by those committees from time to time as the exigencies require, so long as they do not conflict with the general purposes of this. This resolution is intended to lay down the general groundwork that will, perhaps, avoid some of the criticism that has taken place in the past.

There are two items that I think I should call particular attention to. One is the proviso that no subcommittee shall consist of less than two members. In other words, that abolishes the custom of one-man subcommittees.

The other is that when a person is named in a committee hearing and his good reputation besmirched, he shall have a prompt opportunity to appear and refute the charges.

I think those are the main things in the bill, except the provision that any witness that is called by an investigative committee shall have the right to have counsel to advise him as to his constitutional rights. . . .

MR. [EDWIN E.] WILLIS [of Louisiana]: Mr. Speaker, a group of us collaborated with the gentleman from California [Mr. Doyle] in the preparation of House Resolution 151. I was a member of that group. During the course of its consideration I will be glad to try to answer pertinent questions as to the details of the resolution. For the moment, however, I think it would be well for me to discuss the background and the broad outline of the proposal.

The most important thing to keep in mind is that the resolution simply sets forth minimum standards of conduct, particularly with reference to investigative hearings. Thus the very first paragraph of the resolution provides, "Committees may adopt additional rules not inconsistent herewith." Some committees may want to spell out their rules in greater detail. As a matter of fact, the rules of the House Committee on Un-American Activities are broader than the resolution presently before the House for consideration, but the point is that this particular committee and the other committees which may presently spell out their rules in broader terms than provided in House Resolution 151 could change their rules. Here we are amending the rules of the House itself. Since the rules of the House are binding on its committees, the net result is that the minimum standards of conduct set forth in House Resolution 151 will have to be respected by the committees. In other words, committee rules can provide for more but not less than the requirements set forth in this resolution.

MR. [CLARENCE J.] BROWN of Ohio: . . . Now, if I may, I shall try to the best of my ability, to explain in a few very short sentences just what this resolution does. I think the primary object that is accomplished or will be accomplished by the adoption of this resolution is that it does fix definitely in the rules that you cannot have 1-man subcommittees and that any subcommittee

taking evidence officially must consist of at least 2 members. Now, it does leave with the legislative committees the power and the authority to expand the rules of the House; in other words, under the present arrangement, each legislative committee, investigative committee, or special committee, is bound by the rules of the House and must follow the rules of the House. But, in addition, the committees now have the right and the authority to adopt additional rules for their own conduct if they so desire. In some instances we have had, more in another legislative body than in this one, subcommittees made up of only one person conducting the hearings. So, this resolution states very plainly in section 2 that each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall be not less than two.

In other words, the House under its general rules, by the adoption of this resolution, will say that you can fix any number of members on a committee or subcommittee as a quorum, provided you do not go below two; there must be at least two there, and that meets, as the gentleman who just preceded me explained, some of the legal questions that have arisen as the result of the cases taken to the Supreme Court. It cures that.

Criticism of Code of Fair Procedures

§ 13.2 The Code of Fair Procedures was criticized in debate at the time of its adoption.

On Mar. 23, 1955,[13] the Code of Fair Procedures was criticized as not providing sufficient safeguards to witnesses by Mr. Hugh D. Scott, of Pennsylvania.

MR. SCOTT: . . . As has already been pretty generally admitted, the Doyle resolution does not do anything which was not already in the discretion of committee chairmen, that I can see, except as to the two-man quorum, and that is bad. . . .

The pitifully inadequate Doyle resolution is powerless to prevent any of the following abuses, all of which have been the subject of widespread criticism:

First. It would allow a committee to circulate "derogatory information" from its confidential files without notice to the individuals concerned and without giving him an opportunity to explain or deny the defamatory material.

Second. It would allow a committee to make public defamatory testimony given at an executive session without notice of hearing to the person defamed.

Third. It would allow a committee to issue a public report defaming individuals or groups without notice or hearing.

Fourth. It would allow a committee chairman to initiate an investigation, schedule hearings and subpena witnesses without consulting the full committee.

Fifth. It would allow a committee chairman or member publicly to defame a witness or a person under investigation.

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13. 101 CONG. REC. 3573, 3574, 84th Cong. 1st Sess.

Sixth. It would not allow a person under investigation to cross-examine a witness accusing him at a public hearing.

Seventh. It would not entitle a witness to even 24 hours advance notice of a hearing at which his career or reputation would be at stake.

Eighth. It would not protect a witness from distraction, harassment, or nervousness caused by radio, TV, and motion picture coverage of hearing. This, however, is adequately taken care of for the present session by the ruling of the Speaker.[14]

Ninth. It contains no provision for enforcement of its prohibitions or for supervision of committee operations.

Tenth. Finally, and most important, it would not prevent the committee from sitting as a legislative court, trying guilt or innocence of individuals, or inquiring into matters wholly unrelated to any function or activity of the United States Government.

Alternate Codes of Fair Procedures were introduced by a Member[15] as House Resolution 447 of the 83d Congress and House Resolution 61 of the 84th Congress.[16]

Quorum

§ 13.3 The House amended its rules to provide that, "Each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall be not less than two."

On Mar. 23, 1955,[17] the House by voice vote approved House Res-

14. On Feb. 25, 1952, Speaker Sam Rayburn (Tex.), in response to a parliamentary inquiry of the Minority Leader, Joseph W. Martin, Jr. (Mass.), stated, ". . . There is no authority, and as far as the Chair knows, there is no rule granting the privilege of television of the House of Representatives, and the Chair interprets that as applying to these committees and subcommittees, whether they sit in Washington, or elsewhere. . . ." See 98 CONG. REC. 1334, 1335, 82d Cong. 2d Sess., for this ruling and 98 CONG. REC. 1567–71, 82d Cong. 2d Sess., Feb. 27, 1952, for a discussion of this ruling by Members.

15. Hugh D. Scott, Jr. (Pa.), who in the 83d Congress chaired the subcommittee of the Committee on Rules which proposed a Code of Fair Procedures. A Republican, Mr. Scott was a majority member of the 83d Congress and a minority member of the 84th Congress. See also 101 CONG. REC. 218–21, 84th Cong. 1st Sess., Jan. 10, 1955, for Mr. Scott's comments on these resolutions.

16. The texts of these resolutions appear at 101 CONG. REC. 3574, 3575, 84th Cong. 1st Sess., Mar. 23, 1955. Final disposition was referral to the Committee on Rules. Mr. Scott also inserted an article from the Virginia Law Review entitled Rules for Congressional Committees: An Analysis of House Resolution 447, which he and Rufus King had written. This article, which includes a compilation of precedents, studies, statutes, and court opinions on investigations, appears at 101 CONG. REC. 3575–81, 84th Cong. 1st Sess., Mar. 23, 1955.

17. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

olution 151, known as the Code of Fair Procedures. One provision of the Code relates to the minimum number of members who must attend an investigative hearing and the requisite number for a quorum at all committee meetings,[18] and provides that, "Each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall be not less than two."

During the debate, Members discussed the reasons for and implications of this amendment.

Commenting on the effect of the amendment, Mr. Howard W. Smith, of Virginia, stated that this amendment "abolishes the custom of oneman subcommittees."[19]

Mr. Edwin E. Willis, of Louisiana, stated that this amendment was a response to the Supreme Court decision in *Christoffel* v *United States,* 338 U.S. 84 (1949), which reversed and remanded a conviction for perjury because the government had not proved that a quorum was present at the time the allegedly false testimony was given, as required by the District of Columbia statute defining perjury as giving false testimony under oath before a "competent tribunal."

Mr. Willis also observed:[20]

> I call to your particular attention the following hint the Supreme Court gave to Congress. In the course of the decision, the Court said:
>
> > It [the Congress] of course has the power[21] to define what tribunal is competent to exact testimony and the conditions that establish its competency to do so.
>
> Following that broad hint, the other body amended its rules to provide that at an investigative hearing testimony may be received by one member. Stated differently, the Senate rules now provide that a single member constitutes a quorum. . . .
>
> But while the other body amended its rules, we did not. Accordingly, one of the provisions of House Resolution 151 provides as follows:
>
> > Each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall be not less than two.
>
> I repeat that it is necessary for us to adopt a rule along this line in order to meet the decision of the Supreme Court in the Christoffel case. And I submit that at an investigative hearing a quorum should be not less than two. Of course, even after the passage of

18. See House Rules and Manual § 735(h) (1973).

19. 101 CONG. REC. 3569, 84th Cong. 1st Sess.

20. 101 CONG. REC. 3571, 84th Cong. 1st Sess.

21. This "power" is the constitutional mandate, " Each House may determine the Rules of its Proceedings . . ." Art. I, § 5 clause 2.

this resolution, a particular committee may require a greater number to constitute a quorum, but under the minimum standards of conduct which this resolution imposes, the quorum in no event can be less than two.

I submit that this is a sensible rule, as are all others embodied in the resolution. I personally oppose a one-man hearing. I think fair play requires that not less than two members should be present. This conforms more closely to our notions of fair proceedings.

But there is another reason why I think at least two members should be present at all times for taking testimony and receiving evidence. Forget the honest and cooperative witnesses for the moment. They never cause trouble to anyone and, of course, all committees bend backward to protect them. I have in mind the usual witnesses who appear before investigative committees such as the Committee on Un-American Activities of which I have the honor and privilege to be a member. These witnesses are tough. They are resourceful. They are sharp and smart. There is nothing they like better than to precipitate an argument with the presiding member. Yes, they are cunning. They are offensive and sometimes they are downright insulting. The presiding member must be on his toes and he is required to make quick and delicate rulings. Two heads are better than one in situations of this kind.

And so I am opposed to a one-man hearing, not only for the protection of the witness but more importantly for the preservation of orderly proceedings and the dignity of the committee of Congress.. . .

The debate also included an exchange regarding applicability of this provision:[1]

MR. [H.R.] GROSS [of Iowa]: Under section 2, subsection (h) each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall be not less than two. Does this mean in the absence of the adoption of rules that every committee, or that a standing committee such as the Committee on the Post Office and Civil Service could proceed with only two members constituting a quorum?

MR. SMITH of Virginia: Yes; I think that any subcommittee constituted of two members is sufficient.

MR. GROSS: That is with reference to subcommittees, then rule 11 deals with subcommittees, is that correct?

MR. SMITH of Virginia: To what rule does the gentleman refer?

MR. GROSS: Rule 11 section 2 (25). Does it deal only with subcommittees?

MR. SMITH of Virginia: It deals with all committees. . .

MR. [ELIJAH L.] FORRESTER [of Georgia]: . . . Let me show you gentlemen how hard it is to try to make some sort of provisions on rules of this kind. Take this particular rule of the 2-man committee. We wanted to write into that bill, and it is the sense of those who drew up the bill that where there is a committee of two, they shall be nonpartisan-one shall be a Democrat and one shall be a Republican. If you put that into the bill, and of course, we would like to have the Congress ob-

1. 101 CONG. REC. 3570, 3573, 3582,84th Cong. 1st Sess.

serve that, but if you put it into the bill, suppose you are out in California with a 2-man committee and suppose one of the members absented himself or suppose he was sick. Of course, you can see that there they are out in California and they are completely stymied. We did not put it in the bill, but we do think that is a rule that ought to be observed.

MR. [KENNETH B.] KEATING [of New York]: Mr. Speaker, will the gentleman yield on that point?

MR. FORRESTER: I yield.

MR. KEATING: With reference to that very provision, is it not the intention of the framers of this resolution that this should apply only to investigative hearings, because, certainly, there are many informal hearings by legislative committees where they take evidence with only one person sitting. It would greatly impede the work of those committees if, in a legislative committee, they were to require, always and without exception, more than one person.

MR. FORRESTER: Of course, that is the answer to that. . . .

MR. KEATING: . . . Indeed, I am fearful that the drafters of this resolution have, in one particular, imposed precisely the kind of limitation toward which I expressed unalterable opposition a few moments ago. That is at lines 10 through 12, on page 1, in the provision which allows and requires each committee to fix a number of its members to constitute a quorum, which number shall not be less than 2. This would be an unreasonable handicap and would expose the workings of our committee to exactly the vulnerability which was capitalized upon in the Christoffel case to defeat an otherwise valid conviction.

The Senate rule on the same subject, adopted after that case to meet the problem, reads as follows:

> Each standing committee, and each subcommittee of any such committee, is authorized to fix a lesser number than one-third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony.

You will note that in all cases, under the Senate rule, one-third of a committee or subcommittee, including 1 member of a 3-man subcommittee, shall be a quorum for the purpose of taking sworn testimony, and that each committee and subcommittee is expressly authorized to vest this authority in a lesser number if it so wishes. This rule properly protects the committee and vests rights in it without suggesting any crippling restrictions in the event that the committee or subcommittee finds itself dealing with a perjurer.

The difficulty pointed out in the Christoffel case was that one can only commit perjury before a competent tribunal and the court held that a congressional committee consisting of less than a quorum was not such a tribunal. Even the Senate's one-third rule might give rise to difficulties since it is usual during protracted hearings for individual members to enter and leave the hearing room so long as someone is present and presiding. So the Senate made it possible for its committees, in any case where perjury might be an issue, to authorize a single member to take the testimony and therefore to prevent any recurrence of the Christoffel result.

The provision in House Resolution 151 which I am discussing does just

the opposite; it leaves in doubt what a quorum for the purpose of taking testimony might be in case the committee or subcommittee happens to overlook the formality of prescribing one—and it requires, arbitrarily, at all times and in all cases, that testimony must be taken with at least two members present. I have served as chairman of one of these investigating committees, and I know from personal experience how very difficult it is to keep a multiple quorum in the hearing room and to try to reflect accurately in the record that more than one member is present at all times. We tried, for a while, to have the reporter indicate on the record something like "at this point Mr. So and So left the hearing room," "at this point Mr. So and So reentered the hearing room," and so forth. It just will not work. And if you did not do something like that in a subsequent perjury case long after the facts, the actual physical presence of at least two members would be open to challenge and a necessary subject of proof in court.

The momentary furor stirred up last year over the subject of so-called one-man committees never impressed me very much. If any abuses were actually attributable to this situation, they were the fault not so much of the one man who ran the hearings, but of the others who, for one reason or another, were not present. In at least 99 out of 100 cases where testimony is to be taken from friendly and cooperative witnesses, it would be a terrible burden and disadvantage to require more than one member attend to build a record of the same; in the 100th case, requiring the presence of two members would not make a great deal of difference anyway. I am strongly opposed to this provision, and, if afforded the opportunity I shall propose an amendment to delete it and offer a substitute.

In the alternative, if it is the sense of a majority that some protection should be accorded witnesses who are threatened with abuse at the hands of a single member conducting a hearing to take sworn testimony, I would favor the approach recommended by Mr. Scott's subcommittee last year, namely, that such testimony could be taken in all cases by a single member unless the witness himself demanded to be heard by two or more members. Since the whole thing is only for the witness' protection, it makes good sense to let him make the demand if he wishes, and to regard it as waived otherwise.

Announcement of Subject of Investigation

§ 13.4 The House amended the rules to provide that, "The chairman at an investigative hearing shall announce in an opening statement the subject of the investigation."

On Mar. 23, 1955,[2] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which requires a chairman to announce the subject of an investigation.[3]

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2. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

3. See *House Rules and Manual* § 735(i) 1973).

During the debate questions about the effect of this amendment were raised:[4]

MR. [GEORGE] MEADER [of Michigan]: May I call the gentleman's attention to the first provision on page 2 relating to the statement by the chairman of the subject matter of the investigation. I would like to ask the gentleman three questions with respect to that provision: Does this deprive the committee of the power to determine the scope of its inquiry by requiring the chairman to state the subject of the investigation?

MR. [HOWARD W.] SMITH of Virginia: Not at all, no. All that requires is that a general statement shall be made of what a particular hearing is all about.

MR. MEADER: Second, under court decisions questions in a committee hearing must be pertinent to the inquiry. Would questions not relevant under the statement as made by the chairman but relevant under the committee's investigative jurisdiction have to be answered, or could the witness refuse to answer with impunity?

MR. SMITH of Virginia: No. The relevancy is determined by the resolution creating the special committee or the provision of the rules defining the jurisdiction of the standing committee.

MR. MEADER: A third question is, May the statement of the subject matter required to be made by the chairman be in broad terms or must it be detailed?

MR. SMITH of Virginia: Merely in broad terms, just a general statement of the subject matter of the inquiry. . . .

MR. [CLARENCE J.] BROWN of Ohio: . . . Then it goes further. Remember this deals almost primarily with investigative committees and the conduct of investigations by such committees. It says that the chairman of the committee at the beginning of an investigation shall announce in general terms in an open statement what the subject of the investigation is; in other words, you are looking into the stock market or you are looking into consumer prices or into the necessity for school construction or whatever it may be. It does not mean that you have to pinpoint every single question that you are going to ask, by any means. . . .

Criticism was made of the wording.[5]

MR. [KENNETH B.] KEATING [of New York]: In subdivision (i) at the top of page 2, where it says:

> The chairman at an investigative hearing shall announce in an opening statement the subject of the investigation.

My understanding is that the resolution authorizing any investigation covers the general subject, and it is the intention of that section to mean he shall announce the subject of the particular hearing which is then about to take place. If that is the understanding, I would think the substitution of the word "hearing" for "investigation" would be helpful.

MR. SMITH of Virginia: I think they mean the same thing. I believe you are correct in the statement you have made.

4. 101 CONG. REC. 3569, 3572, 84th Cong. 1st Sess.

5. 101 CONG. REC. 3570, 3582, 84th Cong. 1st Sess.

MR. KEATING: . . . On page 2, at line 3, the drafters of House Resolution 151 have seemingly chosen the wrong word. It is not important for the chairman to advise those present of the subject to which an investigation is being addressed. That is the subject specified in the committee's authorizing resolution and is known to everybody from the very outset. What is frequently helpful, and might well be required, is a statement of the subject matter of the particular hearing which is about to be commenced. A statement of the latter will advise the witness and his counsel of the specific grounds which the committee proposes to explore, and thus avoid surprise or misunderstanding with respect to the lines of questioning to which the witness is likely to be subjected.

Punishment of Breaches of Order

§ 13.5 The House amended its rules to provide that, "The chairman may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt."

On Mar. 23, 1955,[6] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which relates to the chairman's authority to punish breaches of order and decorum.[7]

During the debate on the resolution, the effect of this provision was discussed:[8]

MR. [CLARENCE J.] BROWN of Ohio: . . . Then it spells out into law again what I believe the chairman of the committee already has, the power to punish breaches of order and decorum and of professional ethics on the part of counsel, by censure and exclusion from the hearings.

That legalizes, and it does away with any doubt as to the right of a chairman, in a case like that of Henry Grunewald, which was mentioned a moment ago, to say, " You are violating the rules of this committee, you are out." And he will tell the witness to get another lawyer. And the committee may cite such an offender to the House for contempt. If a lawyer simply does not obey the orders of the chairman, if he creates a disturbance, if he refuses to leave, and the situation becomes serious such that the committee wants to recommend that he be cited by the House for contempt, then that may be done and it is up to the House to take action as it sees fit.

Parliamentarian's Note: Thus the right of witnesses at investigative hearings to be accompanied by their own counsel for advice concerning their constitu-

6. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

7. See *House Rules and Manual* § 735(l) (1973).

8. 101 CONG. REC. 3572, 84th Cong. 1st Sess.

tional rights is conditioned upon that counsel's behavior being consistent with professional ethical standards, and a witness must select another counsel if counsel is barred from committee hearings by unethical behavior.

Subpenas

§ 13.6 The House amended the rules to provide that, "Except as provided in paragraph (m), the chairman shall receive and the committee shall dispose of requests to subpena additional witnesses."

On Mar. 23, 1955,[9] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which relates to receiving and disposing of requests to subpena additional witnesses.[10]

During the debate, the effect and wording of this provision were discussed:[11]

> MR. [KENNETH B.] KEATING [of New York]: In subsection (m), it provides that if the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, the committee shall receive and dispose of requests from such person to subpena additional witnesses.[12]
>
> In the next section, it provides that except as above provided, the chairman shall receive and the committee shall dispose of requests to subpena additional witnesses. There is a difference in the language used there. Could the gentleman point out the significance of that or the reason why the different language is used?
>
> MR. [HOWARD W.] SMITH of Virginia: It is a very slight difference. You will find that the clause you refer to (3), comes under subsection (m). That is one of the things that apply under subsection (m) where a person is defamed. Subsection (n) is one that does not pertain to that particular section relative to defamation.
>
> MR. KEATING: I realize that is the language of the resolution, but I wonder why the requests for the issuance of subpenas are differently dealt with. It seems to me that the same considerations should apply in each instance.
>
> MR. SMITH of Virginia: I do think they are substantially the same. . . .
>
> MR. [CLARENCE J.] BROWN of Ohio: . . . Then there is a general provision, not just when some person makes a defamatory statement, but generally and in regard to other matters, the chairman shall receive requests for subpenaing additional witnesses.

Committee Rules

§ 13.7 The House amended its rules to provide that, "A copy

9. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.
10. See *House Rules and Manual* § 735(n) (1973.)
11. 101 CONG. REC. 3570–72, 84th Cong.1st Sess.
12. See § 15.1, infra, for a discussion of subsection (m), relating to the effect of derogatory evidence.

of the committee rules, if any, and paragraph 25 of Rule XI of the House of Representatives shall be made available to the witness."

On Mar. 23, 1955,[13] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which relates to a witness' access to a copy of committee rules.[14]

During the debate this provision was discussed:[15]

> MR. [CLARENCE J.] BROWN of Ohio: . . . It also provides that a witness who is called before that committee, either by subpena or who comes voluntarily, is entitled to receive a copy of the committee rules, if he so desires. Certainly that is a fair provision.

Transcripts

§ 13.8 The House amended its rules to provide that, "Upon payment of the cost thereof, a witness may obtain a transcript copy of the testimony given at a public session, or, if given at an executive session, when authorized by the committee."

On Mar. 23, 1955,[16] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which relates to a witness' access to a transcript.[17]

During the debate on the measure, this provision was discussed:[18]

> MR. [CLARENCE J.] BROWN of Ohio: . . . Finally, the witness is given the right, upon payment of the cost thereof, to obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when authorized by the committee.
>
> In other words, if he wants to know what he said, if he is being cited for contempt, he may get a copy of the transcript so that he may be prepared if he has to go to court.

Release of Secret Information

§ 13.9 The House amended the rules to provide that, "No evidence or testimony taken in executive session may be

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13. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

14. See *House Rules and Manual* § 735(j) (1973). On Jan. 22,1971, the language of this rule was slightly modified to, "A copy of the committee rules and this clause shall be made available to each witness." See H. Res. 5, adopted at 117 CONG. REC. 144, 92d Cong. 1st Sess.

15. 101 CONG. REC. 3572, 84th Cong. 1st Sess.

16. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

17. See *House Rules and Manual* § 735(q) (1973).

18. 101 CONG. REC. 3572, 84th Cong. 1st Sess.

released or used in public sessions without the consent of the committee."

On Mar. 23, 1955,[19] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which relates to use of evidence or testimony received in executive session.[20]

During the debate on the measure, this amendment was discussed [1]

> MR. [CLARENCE J.] BROWN of Ohio: . . . It also provides that no evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee. That means, of course, a majority of the committee.[2]

Submission of Written Statements

§ 13.10 The House amended its rules to provide that, "In the discretion of the committee, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The committee is the sole judge of the pertinency of testimony and evidence adduced at its hearing."

On Mar. 23, 1955,[3] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which relates to a witness' opportunity to submit sworn statements.[4]

During the debate, this provision was discussed: [5]

> MR. [CLARENCE J.] Brown of Ohio: . . . It also provides that in the discretion of the committee witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. Members of the House know how much time that can save.
>
> The committee is the sole judge of the pertinency of the testimony and evidence adduced at its hearing.
>
> I think they have that right now.

Media Coverage

§ 13.11 The House amended its rules to provide that, "No witness served with a subpena by the committee shall be required against his will to be photographed at any

19. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

20. See *House Rules and Manual* § 735(o) (1973).

1. 101 CONG. REC. 3572, 84th Cong. 1st Sess.

2. See § 13.2, supra, for criticisms of this and other provisions of the Code of Fair Procedures.

3. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

4. See *House Rules and Manual* § 735(p) (1973).

5. 101 CONG. REC. 3572, 84th Cong. 1st Sess.

hearing or to give evidence or testimony while the broadcasting of that hearing, by radio or television, is being conducted. At the request of each witness who does not wish to be subjected to radio, television, or still photography coverage, all lenses shall be covered and all microphones used for coverage turned off. This paragraph is supplementary to paragraph (m) of clause 27 of this rule, relating to the protection of the rights of witnesses."

On Jan. 22, 1971,[6] the House approved House Resolution 5, which adopted applicable provisions of the Legislative Reorganization Act of 1970,[7] including a rule[8] which requires any committee that permits media coverage of public hearings to adopt rules allowing witnesses not to be exposed to television or still cameras or microphones.

Responsibility to Protect Rights

§ 13.12 The witness is primarily responsible for protecting his rights and invoking procedural safeguards guaranteed under the rules of the House, notwithstanding the fact that he may be accompanied by counsel to advise him of his rights.

On Oct. 18, 1966,[9] during consideration of a privileged report, House Report No. 2305, relating to the refusal of Yolanda Hall to testify before the House Committee on Un-American Activities,[10] Speaker John W. McCormack, of Massachusetts, responded to a parliamentary inquiry regarding the responsibility of a witness to protect his rights.

MR. [SIDNEY R.] YATES [of Illinois]: Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state his parliamentary inquiry.

MR. YATES: Mr. Speaker, is it in order for me to request the Chair for an explanation of a part of the Chair's ruling; namely, that part which is directed to the representation before a committee of a witness by a lawyer?

In his ruling the Chair has indicated that counsel does not, as a matter of right, have the right to present argument, make motion, or make demands on the committee.

Does this mean, Mr. Speaker, that if an objection is to be voiced to an action

6. 117 CONG. REC. 144, 92d Cong. 1st Sess.
7. 84 Stat. 1140, Pub. L. No. 91–510, Oct. 26, 1970.
8. See *House Rules and Manual* § 739(b) (1973).
9. 112 CONG. REC. 27495, 89th Cong. 2d Sess.
10. See § 15.6, infra, for the point of order and debate regarding this report.

by the committee, that the objection must be made by the witness or the respondent himself, rather than by the counsel of the witness?

THE SPEAKER: It is incumbent upon the witness to protect himself, after consulting counsel, if he desires to consult counsel. But it is the duty of the witness to do so.

§ 14. —Right to Counsel

A witness' right to counsel[11] at an investigative hearing[12] is circumscribed by rules of the House,[13] rules of committees, precedents,[14] and court decisions. Rules of the House establish a minimum level of participation by counsel; committees either in their rules or in response to requests made at a hearing, may permit a counsel to do more than advise the witness about constitutional rights.

The Supreme Court implicitly approved a rule of the Committee on Un-American Activities which permitted counsel to accompany a witness for the purpose of advising him of his constitutional rights when it observed, "[Counsel for the witness] would not have been justified in continuing [seeking to read certain telegrams into the record], since Committee rules permit counsel only to advise a witness, not to engage in oral argument with the committee. Rule VII (b)."[15]

In General

§ 14.1 The House amended its rules to provide that, "Witnesses at investigative hearings may be accompanied by their own counsel for the purpose of advising them of their constitutional rights."

On Mar. 23, 1955,[16] the House by voice vote approved House Res-

11. See, for example, 3 Hinds' Precedents §§ 1696, 1741, 1771, 1788, 1837, 1846; 6 Cannon's Precedents § 400. 6 Cannon's Precedents § 336, for earlier precedents. For collateral sources, see Rauh, Joseph L., Jr., Representation before Congressional Committee Hearings, 50 J. of Crim. Law, Criminology, and Police Science 219 (1959), and Rauh and Pollitt, Right to and Nature of Representation before Congressional Committees, 45 Minn. L. Rev. 853 (1961).

12. This section deals only with investigative hearings on designated subject matters; it does not include investigations relating to impeachment (see Ch. 14, supra), election contests (see Ch. 9, supra), or conduct of Members (see Ch. 12, supra).

13. See §§ 14.1 and 14.2, infra.

14. See §§ 14.3 to 14.5, infra.

15. *Yellin* v *United States*, 374 U.S. 109, 112, 113 (1963).

16. 101 CONG REC. 3569, 3585, 84th Cong. 1st Sess.