

It will be noted, on pages 11 through 14 of the committee report, that the attorney for witness Hall made demand for an executive session. You will note, on page 11 of the report, that when the demand for an executive session was made, the subcommittee took a recess. It is obvious from the subcommittee chairman's statement following that recess, that the subcommittee had considered and determined not to take the testimony in executive session. The chairman so states, on page 12 of the Hall citation:

Your motion, now made, that Mrs. Hall be now heard in executive session I deny after consideration of the subcommittee. We have complied with [rule 27(m)] and all other applicable rules of the House and of this committee.

It is patently clear to the Chair that the subcommittee did comply with [clause 27 (m)], and made the determination necessary thereunder. Accordingly, the Chair overrules the point of order.

§ 16. Calling Witnesses; Subpenas

This section discusses the calling of witnesses generally, and, specifically, subpenas ad testificandum to compel testimony, and subpenas duces tecum to compel production of papers, before the House or Senate or their committees or subcommittees.⁽²⁾ It does not encompass all

2. See § 4, supra, for a discussion of subpenas issued to the executive

material relating to calling witnesses; subjects not discussed here include court subpoenas for House papers,⁽³⁾ investigations leading to impeachment,⁽⁴⁾ inquiries into conduct of Members,⁽⁵⁾ or qualifications or disqualifications of Members or Members-elect.⁽⁶⁾

A subpoena is not a necessary prerequisite to an indictment and conviction for contempt under the

branch, and § 11, supra, for discussion of fourth amendment considerations. See also 1 Hinds' Precedents § 25; 2 Hinds' Precedents §§ 1313 and 1608; 3 Hinds' Precedents §§ 1668, 1671, 1673, 1695, 1696, 1699, 1700, 1714, 1732, 1733, 1738, 1739, 1750, 1753, 1763, 1766, 1800, 1801-1810, 1813-1820; 6 Cannon's Precedents §§ 336, 338, 339, 341, 342, 344, 346-349, 351, 354, 376, for earlier precedents. For related discussion, see § 13.11, supra, regarding a subpoenaed witness right not to be photographed; §§ 15.1 and 13.6, supra, relating to disposition of requests to subpoena witnesses when derogatory information has and has not been received, respectively; and §§ 17.4 and 19.4, infra, relating to citation of persons who have not been subpoenaed. See also all precedents in § 20, infra, as they relate to refusals to appear, be sworn, testify, or produce documents in response to subpoenas.

3. See Ch. 11, supra, discussing privilege.
4. See Ch. 14, Impeachment Powers, supra.
5. See Ch. 12, supra.
6. See Ch. 7, Members, supra.

statute, 2 USC §192, because its provisions apply to contumacy by every person who has been “summoned as a witness by the authority of either House of Congress to give testimony or to produce papers. . . .”⁽⁷⁾

A voluntary appearance before a committee does not immunize a person against service of a subpoena. Consequently, a witness who was served with a subpoena at a hearing at which he appeared voluntarily and refused to answer questions could legally be indicted and convicted of contempt.⁽⁸⁾

A properly authorized subpoena issued by a committee or subcommittee has the same force and effect as a subpoena issued by the House or Senate itself.⁽⁹⁾ Authority to issue subpoenas is granted

either by provisions of the rules of the House⁽¹⁰⁾ or resolutions approved by the House or Senate.⁽¹¹⁾

Because failure to comply with procedures prescribed in the rules or authorizing resolution invalidates subpoenas, a subpoena signed by the chairman but not authorized by a subcommittee⁽¹²⁾ and another authorized by the chairman after consultation with one other member but not the full subcommittee,⁽¹³⁾ were held invalid.

Parliamentarian's Note: The committee or subcommittee must actually meet with a quorum

7. *Kamp v United States*, 176 F2d 618 (D.C. Cir. 1948). See also, *Sinclair v United States*, 279 U.S. 263, 291 (1929), which held that the contempt statute extends to a case where a witness voluntarily appears as a witness. Nonetheless, the House has deleted from a contempt citation names of persons who had not been subpoenaed; see §17.4, *infra*.
8. *Dennis v United States*, 171 F2d 986 (D.C. Cir. 1948).
9. *McGrain v Daugherty*, 273 U.S. 135, 158 (1927). See discussion at 6 Cannon's Precedents §341; see also *In re Motion to Quash Subpoenas and Vacate Service*, 146 F Supp 792 (W.D. Pa. 1956).

10. In the 93d Congress, five committees, Appropriations, Budget, Government Operations, Internal Security, and Standards of Official Conduct, possessed authority under the rules to grant subpoenas; see Rule XI clauses 2(b), 8(d), and 11(b) respectively, *House Rules and Manual* §§679, 691, and 703 A (1973). In the 94th Congress, all committees functioning under Rule X or XI were granted subpoena authority by the standing rules and only select committees derived subpoena authority from special resolutions.
11. Note: Recent changes in the procedure described herein, including methods of authorization, will be discussed in supplements to this edition as they appear.
12. *Shelton v United States*, 327 F2d 601 (D.C. Cir. 1963).
13. *Liveright v United States*, 347 F2d 473 (D.C. Cir. 1965).

present to authorize the issuance of a subpoena, since under section 407 of *Jefferson's Manual* a committee "can only act when together, and not by separate consultation and consent."

Minor irregularities in the form of a subpoena do not invalidate it when the meaning is clear to the person to whom it is directed. An objection to a variance between a subpoena duces tecum which directed the witness to produce records of the United Professional Workers of America, and an indictment, which alleged refusal to produce records of the United Public Workers of America, of which the witness was president, was held to be frivolous, particularly because the witness called attention to the error.⁽¹⁴⁾

A subpoena directing a member of the executive board of an association to produce organizational records was held not defective as being addressed to an individual member of the board rather than to the association.⁽¹⁵⁾ And postponement of a hearing did not ex-

cuse a refusal to testify on a date subsequent to the one that appeared on the subpoena, despite the fact that the subpoena did not contain a clause directing the witness to remain until excused, when the witness was present in Washington on the later date to attend the hearing and did not raise the issue at the time.⁽¹⁶⁾

Unlike a minor irregularity in form, a finding of invalidity of part of a subpoena voids the whole subpoena. Following the general rule that, "one should not be held in contempt under a subpoena that is part good and part bad,"⁽¹⁷⁾ a court of appeals stated in one case that the court had a burden to see that the subpoena was good in its entirety. Believing that a person facing punishment should not have to cull the good from the bad, the court dismissed the indictment for contempt, because the subpoena exceeded the authority delegated to the committee.⁽¹⁸⁾ Similarly, the contempt conviction of the Executive Director of the Port of New York Authority, who provided subpoenaed materials relating to the actual activities and

14. *Flaxer v United States*, 235 F2d 821 (D.C. Cir. 1956), vacated and remanded, 354 U.S. 929 (1957), aff'd., 258 F2d 413 (D.C. Cir. 1958), reversed on other grounds, 358 U.S. 147 (1958).

15. *United States v Fleischman*, 339 U.S. 349 (1950), rein. denied, 339 U.S. 991 (1950).

16. *United States v Groves*, 18 F Supp 3 (W.D. Pa. 1937).

17. *Bowman Dairy Company v United States*, 341 U.S. 214 (1951).

18. *United States v Patterson*, 206 F2d 433 (D.C. Cir. 1953).

operations of the authority but refused to supply materials relating to the reasons for these activities, was reversed on the ground that the latter category exceeded the authority granted by the House to the investigative unit, a subcommittee.⁽¹⁹⁾ Nonetheless, in one case it was held that the mere possibility that the general terms of a subpoena could be construed to include materials protected by the first amendment could not justify a blanket refusal to produce anything, in the absence of an objection that the subpoena was too broad.⁽²⁰⁾ And a witness' conviction for obstruction of justice for mutilating or concealing records subpoenaed was upheld on appeal notwithstanding the fact that the subpoena had not been properly authorized. A valid subpoena was not considered vital, since the defendant knew the documents were desired by a congressional committee.⁽¹⁾

To assure the attendance of a witness who refused to answer questions before a committee, the

19. *Tobin v United States*, 306 F2d 279 (1962), cert. denied, 371 U.S. 902 (1962).

20. *Shelton v United States*, 404 F2d 1292 (D. C. Cir. 1968), cert. denied, 393 U.S. 1024 (1969).

1. *United States v Presser*, 292 F2d 171 (6th Cir. 1961), aff'd. 371 U.S. 71 (1961).

House or Senate may order the Speaker or President of the Senate, respectively, to issue a warrant ordering the Sergeant at Arms to arrest the witness and bring him before the bar of the parent body, if there is a reasonable belief that important evidence may otherwise be lost.⁽²⁾

Where a committee of Congress has subpoenaed a witness to appear at a hearing without defining questions to be asked, the judicial branch should not enjoin in advance the holding of the hearing or suspend the subpoena; the rights of a witness regarding any question actually asked at the hearing are subject to determination in appropriate proceedings thereafter.⁽³⁾

2. *Barry v United States ex rel. Cunningham*, 279 U.S. 597, 619 (1929). This case, based on an investigation of a Senator-elect, is discussed at 6 Cannon's Precedents §§ 346-349.

The fact that an alien who had been subpoenaed by a House committee was arrested by Immigration and Naturalization Service officers and taken before the committee in their custody did not relieve him of his obligation to testify. Although the issue of legality or illegality of the arrest could be raised in a judicial proceeding, it was irrelevant to the committee proceedings. *Eisler v United States*, 170 F2d 273 (D.C. Cir. 1948), cert. dismissed, 338 U.S. 883 (1949).

3. *Mins et al. v McCarthy*, 209 F2d 307 (D.C. Cir. 1953).

Two recent cases discussing injunctions against compliance with congressional requests or subpoenas will be treated in more detail in supplements to this edition. In an action by Ashland Oil, Inc., to enjoin the Federal Trade Commission from furnishing certain trade secrets to a congressional subcommittee, the Court of Appeals for the District of Columbia held that the Federal Trade Commission was not precluded by statute from transmitting trade secrets to Congress pursuant either to subpoena or formal request. *Ashland Oil, Inc. v Federal Trade Commission*, 548 F2d 977 (D.C. Cir. 1976). In the other case, the Justice Department sought to enjoin American Telephone & Telegraph Co. from complying with a subpoena issued by the Chairman of the House Committee on Interstate and Foreign Commerce. The information sought pursuant to the subpoena related to electronic surveillance, and the executive branch contended that disclosure of the information created a risk to national security. The District Court for the District of Columbia having issued an injunction against compliance with the congressional subpoena, the U.S. Court of Appeals for the District of Columbia remanded the case without decision on the merits and called for further negotiations between the parties. *United States v American Telephone & Telegraph Co.*, 551 F2d 384 (D.C. Cir. 1976). The Court further directed the District Court to modify the injunction with respect to information regarding domestic surveillance, disclosure of which had not

Habeas Corpus

§ 16.1 A subcommittee may petition a court to issue a writ of habeas corpus to compel attendance of an incarcerated person at a committee hearing.

On Sept. 10, 1973,⁽⁴⁾ the fact that the Special Subcommittee on Intelligence of the Committee on Armed Services had petitioned a U.S. district court to issue a writ of habeas corpus ad testificandum to compel the attendance of a witness, G. Gordon Liddy, before a hearing of the subcommittee, was revealed to the House in House Report No. 93-453.

BACKGROUND

At the time of the subcommittee hearings, Mr. Liddy was in confinement in the District of Columbia Jail as the result of his conviction on the Watergate breakin. Accordingly, the subcommittee petitioned Chief Judge John J. Sirica of the United States District Court for the District of Columbia for a Writ of Habeas Corpus Ad Testificandum as the only means of obtaining Mr. Liddy's presence before the subcommittee. In his discretion Judge Sirica signed that petition and an order was delivered to the United States Marshal for Mr. Liddy's appearance before the subcommittee on July

been found to create an undue risk to national security.

4. 119 CONG. REC. 28951, 93d Cong. 1st Sess.

20, 1973. [See Appendix 1, pp. 16–17.]
Mr. Liddy appeared as ordered.

Subpena as Prerequisite for Contempt

§ 16.2 The House and not the Chair determines whether persons who have not been subpoenaed may be cited for refusal to produce organizational books, records, and papers.

On Mar. 28, 1946,⁽⁵⁾ Speaker Sam Rayburn, of Texas, responded to a point of order regarding authority to entertain a resolution citing for contempt persons who had not been subpoenaed.

MR. [JOHN S.] WOOD [of Georgia]: Mr. Speaker, by direction of the Committee on Un-American Activities, I present a privileged report and ask that it be read. . . .

COMMITTEE ON UN-AMERICAN
ACTIVITIES

THE SPEAKER: The Clerk will read the report of the Committee on Un-American Activities.

The Clerk read as follows:

PROCEEDING AGAINST DR. EDWARD
K. BARSKY AND OTHERS

Mr. Wood, from the Committee on Un-American Activities, submitted the following report:

The Committee on Un-American Activities as created and authorized

by the House of Representatives by House Resolution 5 of the Seventy-ninth Congress, caused to be issued a subpoena to Dr. Edward K. Barsky, chairman of the Joint Anti-Fascist Refugee Committee, an unincorporated organization with offices at 192 Lexington Avenue, New York, N.Y. The said subpoena required the said person to produce books, papers, and records of the organization for the inspection of your committee; the subpoena is set forth as follows: . . .

In his appearance before the committee, Dr. Barsky stated that he was unable to produce the subpoenaed materials because that authority had not been granted by the members of the executive board.

At the request of a committee member, he supplied a list of names and addresses of board members. This list appeared in the report and resolution. Thereafter the following resolution was considered:

MR. WOOD: Mr. Speaker, I offer a privileged resolution (H. Res. 573) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That the Speaker of the House of Representatives certify the report of the House Committee on Un-American Activities as to the willful and deliberate refusal of the following persons to produce before the said committee for its inspection the books, papers, and records of an unincorporated organization known as the Joint Anti-Fascist Refugee Committee, with offices at 192 Lexington Avenue, New York, N. Y., together with all the facts relating

5. 92 CONG. REC. 2743–45, 79th Cong. 2d Sess.

thereto, under seal of the House of Representatives, to the United States attorney for the District of Columbia to the end that the said persons named below may be proceeded against in the manner and form provided by law:

Dr. Edward K. Barsky, 54 East Sixty-first Street, New York City.

Dr. Jacob Auslander, 288 West Eighty-sixth Street, New York City.

Prof. Lyman R. Bradley, New York University, New York City.

Mrs. Marjorie Chodorov, 815 Park Avenue, New York City. . . .

MR. [VITO] MARCANTONIO [of New York]: Mr. Speaker, a point of order.

THE SPEAKER: The gentleman will state it.

MR. MARCANTONIO: Mr. Speaker, I make a point of order against the resolution on the ground that it seeks to have cited by this House individuals who were never subpoenaed, and never given an opportunity to appear and state whether or not they would or could comply with a subpoena. Under

those circumstances, I maintain that insofar as those individuals are concerned this matter is not properly before the House, in that neither the resolution nor the report from the committee sets forth that these individuals were subpoenaed, with the exception of Dr. Barsky. None of the others were subpoenaed; none of the others came before the committee and were accorded even an opportunity to say "yes" or "no" as to whether or not they had authority or control over the records and books and whether they could or would comply with the committee's subpoena. For that reason, as far as they are concerned, this resolution is not properly before this House.

THE SPEAKER: The Chair is ready to rule.

The report and the resolution are both before the House for its determination, and not the determination of the Chair. The Chair overrules the point of order.⁽⁶⁾

D. AUTHORITY IN CASES OF CONTEMPT

§ 17. In General

The House may try a contumacious witness at its bar⁽⁷⁾ or pur-

6. See § 17.4, *infra*, discussing adoption of an amendment deleting names of all persons who had not been subpoenaed.

7. *Parliamentarian's Note*: No contumacious witness has been tried at the bar of the House or Senate between 1936 and 1973. In *Groppi v Leslie*, 404 U.S. 496 (1972), a decision

which reviewed an action of the Wisconsin legislature but nonetheless rested on congressional precedents, the U.S. Supreme Court held that a witness may not be punished for contempt unless he has been accorded