Chapter CLXXXV.[1]

PUNISHMENT OF WITNESSES FOR CONTEMPT.[2]

335. A statute penalizes recalcitrancy of witnesses summoned to testify before either House or any committee of either House.

Witnesses summoned to testify may not excuse themselves under the plea that their testimony would compromise them.

Sections 192–194 of title 2 of the United States Code provide:

Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any questions pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months.

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

Whenever a witness summoned as mentioned fails to testify, and the facts axe reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action.

336. The case of Harry F. Sinclair, a recalcitrant witness, in 1924.

Counsel for a contumacious witness, present at the examination and transgressing the bounds of propriety, was admonished.

For declining to testify or to obey a subpoena duces tecum commanding him to produce certain papers, Harry F. Sinclair was certified to the district attorney for contempt.

Form of subpoena duces tecum issued by order of the Senate.

A committee in reporting the recusancy of a witness, included a transcript of the testimony, so as to show in what the contempt consisted.

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[1] Supplementary to Chapter LIII.

[2] See also the case of Marshall, sections 350–354, Chapter CCII, in this volume; also section 542 of the same chapter.

While certification of a contumacious witness to the district attorney for contempt is administrative, a motion authorizing certification has been admitted.

Discussion of the remedies open to the Senate under the statute.

On March 24, 1924,[1] in the Senate, Mr. Edwin F. Ladd, of North Dakota, presented a report from the Committee on Public Lands and Surveys, stating that the committee was charged under a resolution of the Senate adopted April 29, 1922, with the duty of making inquiry into the entire subject of leases upon naval oil reserves, and under a further resolution, adopted June 5, 1922, was authorized to require the attendance of witnesses and the production of books, papers, and documents, with the further authorization under resolutions adopted April 21, 1922, and May 15, 1922, to sit either en banc or by subcommittee during the sessions or the recesses of the Senate until otherwise ordered by the Senate. Pursuant to power thus conferred, the committee had entered upon this investigation, and had on March 22, 1924, caused to be served upon Harry F. Sinclair, the following subpoena duces tecum:

UNITED STATES OF AMERICA,
Congress of the United States.

To HARRY F. SINCLAIR,
Sinclair Consolidated Oil Co., New York City.

Greeting:

Pursuant to lawful authority, you are hereby commanded to appear before the Senate Committee on Public Lands and Surveys of the Senate of the United States on Friday, March 21, 1924, at 10 o'clock a. m., at their committee room in the Senate Office Building, Washington, D. C., then and there to testify what you may know relative to the subject matters under consideration by said committee, and bring with you all the books and records of the Hyva Corporation.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To David S. Barry, Sergeant at Arms of the Senate of the United States, to serve and return.

Given under my hand, by order of the committee, this 19th day of March, in the year of our Lord, one thousand nine hundred and twenty-four.

(Signed) E. F. LADD,
Chairman, Committee on Public Lands and Surveys.

(Indorsed on the reverse by signature of David S. Barry, Sergeant at Arms of the Senate of the United States.)

On being called to the stand as a witness before the committee Harry F. Sinclair refused, by advice of counsel, to answer any question propounded to him by the committee or to produce the books and records required in the subpoena, duces tecum.

Questions pertinent to the inquiry and which had been addressed by the committee to the witness and which the witness had severally declined to answer were appended to the report. The report concluded:

And now your committee reports to the Senate that the said Harry F. Sinclair, having appeared as a witness before your said committee, refused to answer questions pertinent to the question under inquiry, and is in contempt of the said committee and of the Senate.

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[1] Second session Sixty-eighth Congress, Record, p. 4785.

In the transcript appended the following appears:

Mr. LITTLETON. If I have any rights at all here—I am counsel for the witness—I certainly object to your putting into this record what you imagine the witness would have answered when he has claimed his rights here under the law. I protest most earnestly against it as an outrage.

Senator WALSH of Montana. I protest, Mr. Chairman, against any such remarks from counsel as an abuse of his privilege. Counsel yesterday, here by the courtesy of this committee, said that certain things that this committee propose to do were monstrous, and now we are told this morning that what I offered to do, with the privilege of the committee, is an outrage. That is an abuse of the privilege of counsel, and I desire the chairman to admonish counsel to that effect.

The CHAIRMAN. It is the opinion of the Chairman that counsel went, beyond his rights, both yesterday and to-day, in his statements.

On motion of Mr. Thomas J. Walsh, of Montana, the report of the committee was adopted and the President of the Senate was by the Senate directed to certify to the district attorney for the District of Columbia the facts as reported in the report of the Committee on Public Lands and Surveys.

In presenting the report, Mr. Walsh cited [1] sections 101, 102, 103, and 104 of the Revised Statutes providing penalties for refusal of witnesses to testify when summoned by the authority of either House of Congress, and said:

Mr. President, in view of the recusancy of the witness shown by the report just submitted, there are two questions open to the Senate, either to bring the witness before the bar of the Senate and, persisting in his contumacy, to commit him to the custody of the Sergeant at Arms for imprisonment until he shall consent to answer, or to report the matter, as contemplated by the statute which I have just read, for appropriate action by the district attorney of the District of Columbia and a grand jury.

I am sure that either of the remedies is exclusive of the other as matter of law, but as matter of practice they become practically so. The situation would be this: If the witness were brought before the bar of the Senate and an order, after his commitment, were made to the effect that he should stand committed until he should answer—I assume that he is in perfect good faith in the objection that he makes and in the position that he takes—he would, of course, then sue out a writ of habeas corpus, and he would be held under that writ. If the court should decide against him, that his objection is not well taken, he would be remanded to the custody of the Sergeant at Arms. He would then sue out a writ of error, and he would be entitled to bail under that writ of error.

In speaking to the motion, Mr. Walsh added: [2]

Mr. President, this is one of the gravest matters that can possibly have the attention of this body, affecting, as it does, the power to proceed in an orderly way to secure such information as it may need to aid it in the all-important task confided to this body by the Constitution and by the people. A contempt of a court, however humble that court may be, is always a matter of supreme importance. A contempt of this high tribunal can not be measured by any words.

An effort has been made, Mr. President, to impress the public mind with the idea, in the first place, that the power of the Senate of the United States to require witnesses to attend before it or before its committees in connection with matters of legislation, and particularly to require from such witnesses, as it is said, information of a "private" character and in relation to the "private" business of the witness is involved in "very grave doubt"; that it is a matter that requires the adjudication of the courts and of the highest tribunal of the Nation. I do not think, Mr. President, that either of the questions suggested, or any of those which have been raised as a ground for the refusal of the witness to testify are involved in this "serious doubt." I can

[1] Record, p. 4725.

[2] Record, p, 4789.

not read the decisions touching the power of either branch of Congress to compel the attendance of witnesses and to compel witnesses to testify as suggesting in any way that the question is one of "grave doubt" that can justify anyone in attempting, as a speculative matter, to secure an adjudication upon the subject. I think it involves the very life of the effective existence of the House of Representatives of the United States and of the Senate of the United States.

337. The case of Harry F. Sinclair, continued.

A witness refusing to testify before a committee of the Senate was indicted and tried in the district court.

Decision of the district court on the right of the Senate to compel testimony and the production of papers and records.

Pursuant to the order of the Senate [1] a formal certificate was issued, signed by the acting President pro tempore, and transmitted to the district attorney. A grand jury returned an indictment on March 31, 1924, and the case was tried in the Supreme Court of the District of Columbia.

338. The case of Harry F. Sinclair, continued. While emphasizing the importance of protecting the individual from unreasonable and arbitrary disclosures of his private affairs, the court holds that either House of Congress is authorized to require testimony in aid of legislation.

The fact that testimony sought by a committee of the House might militate against the interest of the witness in a pending suit was held not to excuse him from supplying information properly within the scope of the inquiry.

The trial resulting in a conviction and a sentence of imprisonment and fine having been imposed, the case was carried to the appellate court, which requested the United States Supreme Court to instruct it on certain points of law involved in the case. The Supreme Court, however, elected to consider the entire record and pass on all phases of the appeal instead of answering the specific questions.

Mr. Justice Pierce Butler delivered the opinion of the court on April 8, 1929. After citing the statute [2] under which indictment was returned, and reviewing the history of the case, the opinion thus outlines the contention of the appellant:

> Appellant contends that his demurrer to the several counts of the indictment should have been sustained and that a verdict of not guilty should have been directed. To support that contention he argues that the questions related to his private affairs and to matters cognizable only in the courts wherein they were pending, and that the committee avowedly had departed from any inquiry in aid of legislation.
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> He maintains that there was no proof of any authorized inquiry by the committee or that he was legally summoned or sworn or that the questions propounded were pertinent to any inquiry it was authorized to make, and that because of such failure he was entitled to have a verdict directed in his favor.
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> He insists that the court erred in holding that the question of pertinency was one of law for the court and in not submitting it to the jury and also erred in excluding evidence offered to sustain his refusal to answer.

The court first considers the contention of the appellant as to the limitations upon the power of Congress to inquire into private affairs and the importance of

[1] Second session Sixty-eighth Congress, Record, p. 4791.

[2] 279 U.S. 263, 749.

protecting the individual from unreasonable and arbitrary disclosures of purely personal matters:

It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary, or unreasonable inquiries and disclosures in respect of their personal and private affairs.

The opinion, however, holds that the issues in the pending case do not relate merely to private or personal affairs and says:

But it is clear that neither the investigation authorized by the Senate resolutions above mentioned nor the question under consideration related merely to appellant's private or personal affairs. Under the Constitution (Art. IV, sec. 3) Congress has plenary power to dispose of and to make all needful rules and regulations respecting the naval oil reserves, other public lands and property of the United States. And undoubtedly the Senate had power to delegate authority to its committee to investigate and report what had been and was being done by executive departments under the leasing act, the naval oil reserve act, and the President's order in respect of the reserves and to make any other inquiry concerning the public domain.

While appellant caused the Mammoth Oil Company to be organized and owned all its shares, the transaction purporting to lease to it the lands within the reserve can not be said to be merely or principally the personal or private affair of appellant. It was a matter of concern to the United States. The title to valuable Government lands was involved. The validity of the lease and the means by which it had been obtained under existing law were subjects that properly might be investigated in order to determine what if any legislation was necessary or desirable in order to recover the leased lands or to safeguard other parts of the public domain.

Neither Senate Joint Resolution 54 nor the action taken under it operated to divest the Senate or the committee of power further to investigate the actual administration of the land laws. It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.

The record does not sustain appellant's contention that the investigation was avowedly not in aid of legislation. He relies on the refusal of the committee to pass the motion directing that the inquiry should not relate to controversies pending in court and the statement of one of the members that there was nothing else to examine appellant about. But these are not enough to show that the committee intended to depart from the purpose to ascertain whether additional legislation might be advisable. It is plain that investigation of the matters involved in suits brought or to be commenced under Senate Joint Resolution 54 might directly aid in respect of legislative action.

The court holds that the resolution empowering the committee to conduct the investigation was ample authorization for summoning witnesses and eliciting testimony:

There is some merit in appellant's contention that a verdict should have been directed for him because the evidence failed to show that the committee was authorized to make the inquiry, summon witnesses, and administer oaths. Resolutions 282 and 294 were sufficient until the expiration of the Sixty-seventh Congress during which they were adopted, but it is argued that Resolution 434 was not effective to extend the power of the committee. As set out in the indictment and shown by the record, Resolution 434 does not mention 294 or refer to the date of its adoption. The former so far as material follows: "Resolved, That Senate Resolution 282, agreed to April 21, 1922, and Senate Resolution 292, agreed to May 15, 1922, authorizing and directing the Committee on Public Lands and Surveys to investigate the entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the

preservation of its natural resources, and to report its findings and recommendations to the Senate * * * be * * * continued in full force and effect until the end of the Sixty-eighth Congress. The committee * * * is authorized to sit * * * after the expiration of the present Congress until the assembling of the Sixty-eighth Congress and until otherwise ordered by the Senate."

There is enough in that resolution to show that where "292" appears 294 was meant. The subject of the investigation is specifically mentioned. That is the only matter dealt with. The sole purpose was to authorize the committee to carry on the inquiry. It would be quite unreasonable, if not indeed absurd, for the Senate to direct investigation by the committee and to allow its power to summon and swear witnesses to lapse. The context and circumstances show that Resolution 294 was intended to be kept in force.

The court then rules that the questions propounded were within the scope of this authorization:

Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation. Appellant makes no claim that the evidence was not sufficient to establish the innuendo alleged in respect of the question; the record discloses that the proof on that point was ample.

Congress, in addition to its general legislative power over the public domain, had a the powers of a proprietor and was authorized to deal with it as a private individual may deal with lands owned by him. The committee's authority to investigate extended to matters affecting the interest of the United States as owner as well as to those having relation to the legislative function.

Before the hearing at which appellant refused to answer, the committee had discovered and reported facts tending to warrant the passage of Senate Joint Resolution 54 and the institution of suits for the cancellation of the naval oil reserve leases. Undoubtedly it had authority further to investigate concerning the validity of such leases, and to discover whether persons, other than those who had been made defendants in the suit against the Mammoth Oil Company, had or might assert a right or claim in respect of the lands covered by the lease to that company.

The contract and release made and given by Bonfils and Stack related directly to the title to the lands covered by the lease which had been reported by the committee as unauthorized and fraudulent. The United States proposed to recover and hold such lands as a source of supply of oil for the Navy. (S. J. Res. 54.) It is clear that the question so propounded to appellant was pertinent to the committee's investigation touching the rights and equities of the United States as owner.

Moreover, it was pertinent for the Senate to ascertain the practical effect of recent changes that had been made in the laws relating to oil and other mineral lands in the public domain. The leases and contracts charged to have been unauthorized and fraudulent were made soon after the Executive order of May 31, 1921. The title to the lands in the reserves could not be cleared without ascertaining whether there were outstanding any claims or applications for permits, leases, or patents under the leasing act or other laws. It was necessary for the Government to take into accounts the rights, if any there were, of such claimants. The reference in the testimony of Bonfils to the contract referred to in the question propounded was sufficient to put the committee on inquiry concerning outstanding claims possibly adverse and superior to the Mammoth Oil Company's lease. The question propounded was within the authorization of the committee and the legitimate scope of investigation to enable the Senate to determine whether the powers granted to or assumed by the Secretary of the Interior and the Secretary of the Navy should be withdrawn, limited, or allowed to remain unchanged.

The opinion concludes:

The reasons for holding relevancy and materiality to be questions of law in cases such as those above referred to apply with equal force to the determination of pertinency arising under section

102. The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be "pertinent to the question under inquiry." It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury.

The conviction was accordingly affirmed.

339. The case of M. S. Daugherty, in the Senate, in 1924.

A witness having declined to attend and produce documents, the Senate by resolution ordered his arrest.

A witness in the custody of the Sergeant at Arm having procured a writ of habeas corpus, the Senate requested the President to direct the Attorney General to defend the suit.

On April 26, 1924 [1] (legislative day of April 24), the Senate agreed to the following:

Whereas the select committee of the Senate, elected pursuant to Senate Resolution 157, Sixty-eighth Congress, first session, has submitted a report to the Senate; and

Whereas it appears from such report that M. S. Daugherty, as president of the Midland National Bank, Washington Court House, Ohio, was on March 22, 1924, duly served with a subpoena to appear forthwith before such committee in Washington, D. C., and then and there to testify relative to subject matters and to produce specified files, records, and books pertinent to the matter under inquiry, and was on April 11, 1924, duly served with a subpoena to appear forthwith before the committee in Washington Court House, Ohio, and then and there to testify relative to subject matters pertinent to the matter under inquiry; and

Whereas it appears from such report that the said M. S. Daugherty has, in disobedience of such subpoenas, failed so to appear or answer, or to produce such files, records, and books; and

Whereas the appearance and testimony of the said M. S. Daugherty is material and necessary in order that the committee may properly execute the functions imposed upon it and may obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper: Therefore be it

Resolved, That the President of the Senate pro tempore issue his warrant commanding the Sergeant at Arms or his deputy to take into custody the body of the said M. S. Daugherty wherever found, to bring the said M. S. Daugherty before the bar of the Senate, then and there to answer such questions pertinent to the matter under inquiry as the Senate may order the President of the Senate pro tempore to propound; and to keep the said M. S. Daugherty in custody to await the further order of the Senate.

On May 1 [2] (legislative day of April 24), the President pro tempore laid before the Senate a communication from the Sergeant at Arms in which the latter reported to the Senate that in pursuance to this resolution M. S. Daugherty has been arrested and taken into custody but had been released on writ of habeas corpus granted by the United States District Court of the Southern District of Ohio, Western Division, at Cincinnati.

Whereupon the Senate passed the following resolution:

Whereas under Senate Resolution No. 157 the special committee appointed to investigate the conduct of the office of Attorney General Harry M. Daugherty and his assistants did summon M. S. Daugherty to appear before it in person and to produce certain books and papers at room 410, Senate Office Building, Washington, D. C., which summons he disregarded, and the Senate thereupon ordered the arrest of said M. S. Daugherty, which order was executed by the Deputy

[1] First session Sixty-eighth Congress, Record, p. 7217.

[2] Record, p. 7592.

Sergeant at Arms. Thereupon the said M. S. Daugherty procured a writ of habeas corpus in the United States District Court of the Southern District of Ohio, the same being assigned for hearing at Cincinnati, Ohio, on May 10, 1924; and

Whereas the said committee did summon said M. S. Daugherty to appear before a subcommittee in person at Washington Court House, Ohio, which summons he disregarded, and thereupon brought an injunction suit in the Ohio court of common pleas in said city against Smith W. Brookhart and Burton K. Wheeler, said subcommittee, requiring them to answer on May 10, 1924:

Resolved, therefore, That the President of the United States be respectfully requested to direct the Attorney General to defend said suits on behalf of the Senate of the United States.

340. The case of M. S. Daugherty, continued.

A recalcitrant witness having been released from the custody of the Sergeant at Arms by judgment of a district court, the Senate authorized an appeal to the Supreme Court.

M. S. Daugherty was permanently discharged from the custody of the Sergeant at Arms on May 31,[1] by the district court, which pointed out that the investigation by the committee was on the initiative of the Senate only and not of both Houses of Congress; that the authorizing resolution failed to set forth the purpose of the investigation and gave no intimation that it was in aid of legislation; that the investigation committee was without warrant of law to exercise a judicial function, and the effort to compel attendance of witnesses and production of documents was under the circumstances an infringement on the rights of a citizen under the Constitution.

An appeal to the Supreme Court was authorized by the following resolution agreed to June 5,[2] S. Res. 247 (legislative day of June 3):

Whereas in a proceeding in the United States District Court for the Southern District of Ohio, western division, entitled "In the matter of the application of Harry S. Daugherty for writ of habeas corpus," an opinion has been handed down and judgment entered by the judge hearing said cause, which seriously affects the constitutional rights and power of the Senate of the United States and of the Congress; and

Whereas it is believed that said opinion and judgment are erroneous; and

Whereas it is highly desirable to have the law in the matter settled by the Supreme Court: Therefore be it

Resolved, That the Attorney General, on behalf of the Senate and the respondent in said cause, be requested to have the proper officials of his department, including counsel heretofore designated in the cause, take the necessary steps for a prompt review and determination thereof by the Supreme Court.

And the special committee appointed under Senate Resolution No. 157 is hereby authorized and empowered to secure the services of such other counsel, to act in conjunction with the Attorney General, as to it may seem necessary and advisable.

341. The case of M. S. Daugherty, continued.

Decision by the Supreme Court on the power of Congress to compel testimony.

Deputies with authority to execute warrants may be appointed by the Sergeant at Arms under a standing order of the Senate.

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[1] Record, p. 10480.

[2] Record, p. 10635.

Subpoenas issued by a committee of the Senate summoning witnesses to testify in an investigation authorized by the Senate are as if issued by the Senate itself.

At the January term of 1927,[1] Justice Van Devanter delivered the opinion of the Supreme Court.

As to the authority of deputies appointed by the Sergeant at Arms to execute warrants under a standing order of the Senate the court finds its validity established by long practice and ample provision of law, and says:

The witness challenges the authority of the deputy to execute the warrant on two grounds—that there was no provision of law for a deputy, and that, even if there were such a provision, a deputy could not execute the warrant because it was addressed simply to the Sergeant at Arms. We are of opinion that neither ground is tenable.

The Senate adopted in 1889 and has retained ever since a standing order declaring that the Sergeant at Arms may appoint deputies "to serve process or perform other duties" in his stead, that they shall be "officers of the Senate," and that acts done and returns made by them "shall have like effect and be of the same validity as if performed or made by the Sergeant at Arms in person." In actual practice the Senate has given full effect to the order; and Congress has sanctioned the practice under it by recognizing the deputies—sometimes called assistants—as officers of the Senate, by fixing their compensation and by making appropriations to pay them. Thus there was ample provision of law for a deputy.

The Court further finds that such warrants may be addressed to the Sergeant at Arms only, in pursuance of a Senate resolution contemplating service by either and holds:

The fact that the warrant was addressed simply to the Sergeant at Arms is not of special significance. His authority was not to be tested by the warrant alone. Other criteria were to be considered. The standing order and the resolution under which the warrant was issued plainly contemplated that he was to be free to execute the warrant in person or to direct a deputy to execute it. They expressed the intention of the Senate; and the words of the warrant were to be taken, as they well could be, in a sense which would give effect to that intention. Thus understood, the warrant admissibly could be executed by a deputy if the Sergeant at Arms so directed, which he did.

The requirement of the fourth amendment that a warrant for arrest be supported by oath is held to be complied with on the committee's report under the sanction of their oaths of office as follows:

The witness points to the provision in the Fourth Amendment to the Constitution declaring "no warrants shall issue but upon probable cause supported by oath or affirmation" and contends that the warrant was void because the report of the committee on which it was based was unsworn. We think the contention overlooks the relation of the committee to the Senate and to the matters reported, and puts aside the accepted interpretation of the constitutional provision.

The committee was a part of the Senate, and its members were acting under their oath of office as senators. The matters reported pertained to their proceedings and were within their own knowledge. They had issued the subpoenas, had received and examined the officer's returns thereon (copies of which accompanied the report), and knew the witness had not obeyed either subpoena or offered any excuse for his failure to do so.

The constitutional provision was not intended to establish a new principle but to affirm and preserve a cherished rule of the common law designed to prevent the issue of groundless warrants. In legislative practice committee reports are regarded as made under the sanction of the oath of office of its members; and where the matters reported are within the committee's knowledge and

[1] McGrain *v.* Daugherty, 273 U. S. 135.

constitute probable cause for an attachment such reports are acted on and given effect without requiring that they be supported by further oath or affirmation. This is not a new practice but one which has come down from an early period. It was well recognized before the constitutional provision was adopted, has been followed ever since, and appears never to have been challenged until now. Thus it amounts to a practical interpretation, long continued, of both the original common law rule and the affirming constitutional provision, and should be given effect accordingly.

The principle underlying the legislative practice has also been recognized and applied in judicial proceedings. This is illustrated by the settled rulings that courts in dealing with contempts committed in their presence may order commitments without other proof than their own knowledge of the occurrence, and that they may issue attachments, based on their own knowledge of the default, where intended witnesses or jurors fail to appear in obedience to process shown by the officer's return to have been duly served. A further illustration is found in the rulings that grand jurors, acting under the sanction of their oaths as such, may find and return indictments based solely on their own knowledge of the particular offenses, and that warrants may be issued on such indictments without further oath or affirmation; and still another is found in the practice which recognizes that where grand jurors, under their oath as such, report to the court that a witness brought before them has refused to testify, the court may act on that report, although otherwise unsworn, and order the witness brought before it by attachment.

We think the legislative practice, fortified as it is by the judicial practice, shows that the report of the committee—which was based on the committee's own knowledge and made under the sanction of the oath of office of its members—was sufficiently supported by oath to satisfy the constitutional requirement.

As to whether subpoenas issued by a committee of the Senate possess the validity of subpoenas issued by the Senate itself and whether in event of disobedience the act that the contumacy related only to testimony sought by a committee is a valid objection the opinion continued:

The witness also points to the provision in the warrant and in the resolution under which it was issued requiring that he be "brought before the bar of the Senate, then and there" to give testimony "pertinent to the subject under inquiry," and contends that an essential prerequisite to such an attachment was wanting, because he neither had been subpoenaed to appear and testify before the Senate nor had refused to do so. The argument in support of the contention proceeds on the assumption that the warrant of attachment "is to be treated precisely the same as if no subpoena had been issued by the committee, and the same as if the witness had not refused to testify before the committee." In our opinion the contention and the assumption are both untenable. The committee was acting for the Senate and under its authorization; and therefore the subpoenas which the committee issued and the witness refused to obey are to be treated as if issued by the Senate. The warrant was issued as an auxiliary process to compel him to give the testimony sought by the subpoenas; and its nature in this respect is not affected by the direction that his testimony be given at the bar of the Senate instead of before the committee. If the Senate deemed it proper, in view of his contumacy, to give that direction it was at liberty to do so.

342. The case of M. S. Daugherty, continued.

Each House of Congress has power through its own process to summon a private individual before one of its committees to give testimony which will enable it the more efficiently to exercise its constitutional legislative function.

A witness may rightfully refuse to answer where the committee exceeds its power or where questions submitted are not pertinent to the matter under inquiry.

It is to be presumed that the object of the Senate in ordering an investigation is to secure information which will aid it in legislating

In a resolution ordering an inquiry it is not necessary for the House or Senate to specify its legislative purposes; for inasmuch as this is the only legitimate purpose under which such investigations may be conducted, in the absence of evidence to the contrary, such purpose is presumed.

The doctrine that the Houses of Congress are empowered to require the testimony of individuals in the exercise of their legislative functions is thus established:

The first of the principal questions—the one which the witness particularly presses on our attention—is, as before shown, whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.

The Constitution provides for a Congress consisting of a Senate and House of Representatives and invests it with "all legislative powers" granted to the United States, and with power "to make all laws which shall be necessary and proper" for carrying into execution these powers and "all other powers" vested by the Constitution in the United States or in any department or officer thereof. (Art. I, secs. 1, 8.) Other provisions show that, while bills can become laws only after being considered and passed by both houses of Congress, each house is to be distinct from the other, to have its own officers and rules, and to exercise its legislative function independently. (Art. I, secs. 2, 3, 5, 7.) But there is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively. So the question arises whether this power is so far incidental to the legislative function as to be implied.

In actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the State legislatures.

The court, however, recognizes the restrictions which govern, the Houses in the exercise of such powers and the limitations upon their right to inquire into purely personal affairs. After citing a number of cases confirming that opinion the court says:

While these cases are not decisive of the question we are considering, they definitely settle two propositions which we recognize as entirely sound and having a bearing on its solution: One, that the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and the other, that neither house is invested with "general" power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied.

When such limitations are exceeded the right of a witness to decline to answer is thus upheld by the court:

We come now to the question whether it sufficiently appears that the purpose for which the witness's testimony was sought was to obtain information in aid of the legislative function. The court below answered the question in the negative and put its decision largely on this ground, as is shown by the following excerpts from its opinion:

"It will be noted that in the second resolution the Senate has expressly avowed that the investigation is in aid of other action than legislation. Its purpose is to 'obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.' This indicates that the Senate is contemplating the taking of action other than legislative, as the outcome of the investigation, at least the possibility of so doing. The extreme personal cast of the original resolutions; the spirit or hostility toward the then Attorney General which they

breathe; that it was not avowed that legislative action was had in view until after the action of the Senate had been challenged; and that the avowal then was coupled with an avowal that other action was had in view—are calculated to create the impression that the idea of legislative action being in contemplation was an afterthought."

"That the Senate has in contemplation the possibility of taking action other than legislation as an outcome of the investigation, as thus expressly avowed, would seem of itself to invalidate the entire proceeding. But, whether so or not, the Senate's action is invalid and absolutely void, in that, in ordering and conducting the investigation, it is exercising the judicial function, and power to exercise that function, in such a case as we have here, has not been conferred upon it expressly or by fair implication. What it is proposing to do is to determine the guilt of the Attorney General of the shortcomings and wrongdoings set forth in the resolutions. It is 'to hear, adjudge, and condemn.' In so doing it is exercising the judicial function."

"What the Senate is engaged in doing is not investigating the Attorney General's office; it is investigating the former Attorney General. What it has done is to put him on trial before it. In so doing it is exercising the judicial function. This it has no power to do."

We are of opinion that the court's ruling on this question was wrong, and that it sufficiently appears, when the proceedings are rightly interpreted, that the object of the investigation and of the effort to secure the witness's testimony was to obtain information for legislative purposes.

The court then applies the rule to the pending case as follows:

It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress axe needed from year to year.

The court accordingly deduces:

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject matter was not indispensable.

343. The case of M. S. Daugherty, continued.

It is not a valid objection to such investigation that it might disclose wrongdoing by a public official named in the resolution.

The Senate as a continuing body may continue its committees through the recess following the expiration of a Congress.

Jefferson's Manual and Hinds' Precedents are cited by the Supreme Court as authorities in parliamentary procedure.

As to the objection advanced by the appellee that information elicited in such an interrogatory might incriminate a public official, the opinion declares:

Of course, our concern is with the substance of the resolution and not with any nice questions of propriety respecting its direct reference to the then Attorney General by name. The resolution, like the charges which prompted its adoption, related to the activities of the department while he

was its supervising officer; and the reference to him by name served to designate the period to which the investigation was directed.

We think the resolution and proceedings give no warrant for thinking the Senate was attempting or intending to try the Attorney General at its bar or before its committee for any crime or wrongdoing. Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on his part.

The corroborative effect of a resolution directing the arrest of a witness in supplementing the inference of the earlier resolution that the information desired was sought as a basis for legislative action regardless of the suggestion of "other action" is thus set out in the opinion:

The second resolution—the one directing that the witness be attached—declares that his testimony is sought with the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of "other action" if deemed "necessary or proper" is of course open to criticism in that there is no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed.

We conclude that the investigation was ordered for a legitimate object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; that the Senate is entitled to have him give testimony pertinent to the inquiry, either at its bar or before the committee; and that the district court erred in discharging him from custody under the attachment.

The right of the Senate as a continuing body to continue its committees through the recess following the expiration of a Congress is affirmed as follows:

Another question has arisen which should be noticed. It is whether the, case has become moot. The investigation was ordered and the committee appointed during the Sixty-eighth Congress. That Congress expired March 4, 1925. The resolution ordering the investigation in terms limited the committee's authority to the period of the Sixty-eighth Congress; but this apparently was changed by a later and amendatory resolution authorizing the committee, to sit at such times and places as it might deem advisable or necessary. It is said in Jefferson's Manual: "Neither House can continue any portion of itself in any parliamentary function beyond the end of the session without the consent of the other two branches. When done, it is by a bill constituting them commissioners for the particular purpose." But the context shows that the reference is to the two houses of Parliament when adjourned by prorogation or dissolution by the King. The rule may be the same with the House of Representatives whose members are all elected for the period of a single Congress; but it can not well be the same with the Senate, which is a continuing body whose members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress, save as vacancies may occur through death or resignation.

Mr. Hinds in his collection of precedents says: "The Senate, as a continuing body, may continue its committees through the recess following the expiration of a Congress"; and, after quoting the above statement from Jefferson's Manual, he says: "The Senate, however, being a continuing body, gives authority to its committees during the recess after the expiration of a Congress." So far as we are advised the select committee having this investigation in charge has neither made a final report nor been discharged; nor has it been continued by an affirmative order. Apparently its activities have been suspended pending the decision of this case. But, be this as it may, it is certain that the committee may be continued or revived now by motion to that effect,

and, if continued or revived, will have all its original powers. This being so, and the Senate being a continuing body, the case can not be said to have become moot in the ordinary sense. Our judgment may yet be carried into effect and the investigation proceeded with from the point at which it apparently was interrupted by reason of the habeas corpus proceedings.

The final order of the lower court in discharging the witness from custody is therefore reversed.

344. The case of Robert W. Stewart.

A witness having refused to answer questions the committee of inquiry reported to the Senate which issued a warrant for his arrest and directed the Sergeant at Arms to take him into custody.

Instance wherein the courts denied an application for writ of habeas corpus asked by a recusant witness and remanded the petitioner to the custody of the Senate.

Contention that the Senate is without power to arrest a witness while in attendance in obedience to a subpoena was characterized by the courts as frivolous.

A contention that the Senate may not inquire into private and personal affairs of a witness was overruled by the court on the ground that the Houses of Congress are authorized to call for information essential for the exercise of their power of legislation.

On February 1[1] (calendar day, February 3, 1928), in the Senate Mr. Thomas J. Walsh, of Montana, from the Committee on Public Lands and Surveys, authorized by resolution[2] to inquire into the disposition of certain Liberty bonds acquired by the Continental Trading Co., reported that one Robert W. Stewart summoned as a witness had declined to answer certain questions propounded by the committee.

By direction of the Senate a warrant[3] was issued, and the recusant witness having been apprehended and detained in the custody of the Sergeant at Arms of the Senate, petitioned the Supreme Court of the District of Columbia for a writ of habeas corpus.

Mr. Justice Jennings Bailey in delivering the opinion of the court denying the petition first considered the issue raised by the petitioner as to the power of the Senate to arrest witnesses:

> The warrant was issued and executed and the petitioner now claims that he is being unlawfully detained by the respondents, the Sergeant at Arms of the Senate and his deputy. He rests his claim upon three propositions.
>
> First:
>
> "The Senate is without power to arrest and attach petitioner for the purpose of compelling him to attend as a witness before the Senate when at the time of the arrest the witness was in attendance before the Senate committee under and in obedience to a subpoena, issued by it."
>
> If the committee was seeking information as a basis for legislation by Congress and if the questions asked the petitioner were pertinent to such inquiry and did not invade any of his constitutional rights, it was his duty to answer, and his refusal to do so could be treated as an act of contempt of the Senate. The Senate might thereupon have had him attached to be brought before

[1] First session Seventieth Congress, Senate Report No. 229.

[2] Senate Resolution No. 101.

[3] Record, p. 2440.

the bar of the Senate to answer for his contempt, as has been done in several cases, but instead took a more lenient course in having him brought before the bar of the Senate to answer such pertinent questions as might be asked him there. There was no question but that he had refused to answer as reported by the committee, and he has no ground to complain that he was to be given an opportunity to purge himself of his contempt by giving his testimony before the Senate instead of being brought before its bar for punishment. The attachment could properly be based on his recalcitrant conduct as a witness before the committee. The Senate is not necessarily controlled by the practice of the courts in similar cases.

The contention of the petitioner that the Senate was not authorized to inquire into the personal affairs and private affairs is thus treated by the court:

Petitioner's second and third propositions are:

"Resolution 101 does not call for information essential for the exercise of the power of legislation, but is an attempt at exercising judicial function, beyond the powers of the Senate, and authorizes an inquiry into the private affairs of individuals."

"Petitioner answered every question put to him of public interest with respect to the disposition of the bonds held by the Continental Trading Co. The questions he refused to answer dealt with private and personal matters, the answers to which could in no way furnish information essential to the efficient performance of any legislative function of the Senate."

Resolution 101 authorizes an investigation supplementary to one theretofore authorized, and of which the committee had made no final report. The former investigation had resulted in legislation directing the prosecution of suits, one of which had resulted in the recovery of valuable property of the Government, and in other legislation, and it may be assumed that the Senate had in mind the possibility of the need of further legislation when the latest resolution was passed. The failure to specify such purpose is not fatal to the inquiry. Where the particular investigation has already formed the basis of legislation, the court will not assume that some particular phase of a later investigation supplementary to the former can not be made for the purpose of legislation and that the Senate is transcending its functions under the Constitution.

The petitioner states that he appeared voluntarily before the committee to give his testimony. He took an oath to tell "the truth, the whole truth, and nothing but the truth." He raised no general objection to the scope of the inquiry, but after he had proceeded to answer numerous questions he finally refused to answer as to his knowledge of anyone who received the Liberty bonds mentioned in the resolution or whether he had discussed any of the bond transactions with Sinclair, and other questions of similar character. He voluntarily testified in part, but refused to tell the whole truth, and a partial truth may be as misleading as a falsehood. These questions were clearly relevant to the inquiry and involved no question of privilege. They did not involve the private affairs of the witness, and the witness can not make such a claim on behalf of others when he does not appear to be acting in a representative capacity. But even such a ground would not be an excuse for failure to answer questions relevant to any matters which were the subject of proper inquiry.

The opinion concludes:

In my opinion the grounds upon which the petitioner refused to testify were frivolous and without legal bases and his attachment was justified.

The writ of habeas corpus will be discharged and the petitioner remanded to the custody of the respondents.

The witness appealed from the order of the court but pending the appeal elected to appear before the committee [1] and answer the questions from which he had previously excused himself.

The Senate accordingly adopted the following resolutions vacating the order of arrest.

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[1] Senate Report No. 897.

Resolved, That the order of the Senate heretofore made on the 3d day of February, 1928, directing the Sergeant at Arms to take into custody one Robert W. Stewart and bring him before the bar of the Senate is hereby vacated.

This order shall not be construed as any intimation on the part of the Senate that the indictment heretofore returned against the said Robert W. Stewart for refusal to answer questions propounded to him by the Committee on Public Lands and Surveys should be dismissed.

Simultaneously, the Senate—

Ordered, That the Secretary of the Senate be, and he is hereby, directed to transmit a copy of the report submitted this day by the Committee on Public Lands and Surveys to the United States district attorney for the District of Columbia with a view to having said district attorney determine whether Robert W. Stewart should not be presented to a grand jury for indictment on the charge of perjury.

345. The case of Robert W. Stewart, continued.

A witness giving contradictory testimony while under order for arrest for refusing to answer questions propounded by a committee of inquiry, the Senate vacated the order and referred the case to the district attorney.

In order to support a charge of perjury it must be shown that a quorum of the committee of investigation was present at the time the offense was committed.

The recording of members of a committee as present on their telephonic request does not constitute attendance and physical presence is necessary to make a quorum for the transaction of business.

If a quorum be present and subsequently Members leave temporarily or otherwise a quorum is presumed to be present until and unless the question of no quorum is raised.

A rule adopted by a Senate committee providing that the presence of six Senators should constitute a quorum of the committee was held by the courts to be invalid because adopted at a meeting at which less than a quorum of the committee was present.

The witness was indicted for perjury and tried in the Supreme Court of the District of Columbia and acquitted on the ground that a quorum of the committee was not present on the occasion of the inquiry which resulted in the indictment.

Justice Jennings Bailey in charging the jury said in part:

The first thing that must be proved in this case is that the defendant was sworn to testify before a competent tribunal. If the tribunal before which he testified was not a competent tribunal, he can not be convicted of perjury, no matter how false his testimony may have been. The indictment alleges that he testified before a meeting of the Committee on Public Lands and Surveys of the Senate. To constitute a meeting of a committee, there must be present a majority of the committee, and by "present" I mean actually, physically present. You have heard the testimony as to marking certain members as present with the word quorum after their names when they were not actually, physically present, but when the Senator or his secretary had telephoned the clerk of the committee to mark him as present. That is not such a presence as would be sufficient, even if a majority of such members so telephoned, to constitute a meeting of the committee.

A meeting means a meeting of at least a majority of the committee. In this case, the committee being composed of fifteen, before there could be a meeting of the committee, there must have been present at least eight members of that committee physically in the committee room.

If such a committee so met; that is, if eight members, did meet, and thereafter during the progress of the hearing some of them left temporarily or otherwise and no question was raised as

to the lack of a quorum, then the fact that the majority did not remain there would not affect, for the purposes of this case, the existence of that committee as a competent tribunal, but before the oath was administered, and before the testimony of the defendant was given, there must have been as many as eight members of that committee present.

346. The case of Thomas W. Cunningham, recusant witness.

A witness having refused to answer certain questions propounded to him by a special committee of the Senate duly authorized to investigate the subject of inquiry, the Senate issued a warrant for his arrest and certified its committee's report of the circumstances to the district attorney.

Decision of the Supreme Court on the right of the Senate to subpoena witness and compel testimony.

On March 22, 1928,[1] Mr. William H. King of Utah, on behalf of the special committee authorized to investigate expenditures in senatorial primaries and elections, submitted the report [2] of that committee setting forth the refusal of a witness, Thomas W. Cunningham, to answer certain questions pertinent to the matter under inquiry. Whereupon the Senate agreed to a resolution directing the President of the Senate to issue his warrant to the Sergeant at Arms commanding him to apprehend and detain the witness in custody to await the further order of the Senate.

Subsequently,[3] the Sergeant at Arms having made his return showing the arrest of the witness and his release on a writ of habeas corpus under bail, the Senate certified to the United States District attorney its committee's report of the circumstances.

The witness was indicted by the grand jury in the Supreme Court of the District of Columbia and the case reached the United States Supreme Court and was finally passed on at the May term, 1929.[4]

347. The case of Thomas W. Cunningham, recusant witness, continued.

In providing for the arrest of a recalcitrant witness it is unnecessary for the Senate in inditing the resolution to determine whether the testimony sought and refused was pertinent to the inquiry.

The exercise by the Senate of its judicial powers to judge election returns and the qualifications of its members necessarily involves the power to compel testimony.

In the exercise of its right to pass on the eligibility of its members the Senate may act directly or through a committee.

It is presumed that in the eliciting of testimony the Senate will observe all constitutional restraints.

Mr. Justice Sutherland delivered the opinion of the Court. The opinion refers specifically to the following resolution [5] of the Senate:

Whereas it appears from the report of the Special Committee Investigating Expenditures in Senatorial Primary and General Elections that a witness, Thomas W. Cunningham, twice called before the committee making inquiry as directed by the Senate under Senate Resolution 195 of

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[1] First session Seventieth Congress, Record, p. 5144.

[2] Senate report No. 604.

[3] Record, p. 5353.

[4] Barry *v.* U. S. Ex rel Cunningham, 279 U. S. 597.

[5] S. Res. No. 179.

the Sixty-ninth Congress, declined to answer certain questions relative and pertinent to the matter then under inquiry:

Resolved, That the President of the Senate issue his warrant commanding the Sergeant at Arms or his deputy to take into custody the body of said Thomas W. Cunningham wherever found, and to bring the said Thomas W. Cunningham before the bar of the Senate, then and there or elsewhere as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate, through its said committee, or the President of the Senate, may propound, and to keep the said Thomas W. Cunningham in custody to await further order of the Senate.

The court construes this resolution as expressing the purpose of the Senate to elicit testimony in response to questions to be propounded at its bar and holds that in deciding whether the witness must attend it is not material to consider whether the information sought to be elicited from him by the committee is pertinent to the inquiry which it has been directed to make. The court says:

The correct interpretation of the Senate's action is that given by the district judge and by Judge Woolley. It is true the special committee in its report to the Senate recited Cunningham's contumacy and recommended that he be adjudged in contempt, but the resolution passed by the Senate makes it entirely plain that this recommendation of the committee was not followed. The Senate resolution, after a recital of Cunningham's refusal to answer certain questions, directs that he be attached and brought before the bar of the Senate, not to show cause why he should not be punished for contempt, but "to answer such questions pertinent to the matter under inquiry as the Senate through its said committee or the President of the Senate may propound. * * *" We must accept this unequivocal language as expressing the purpose of the Senate to elicit testimony in response to questions to be propounded at the bar of the Senate, and the question whether the information sought to be elicited from Cunningham by the committee was pertinent to the inquiry which the committee had been directed to make may be put aside as immaterial.

The court holds that the exercise by the Senate of its Constitutional power to judge the election and qualification of its members necessarily involves the ascertainment of facts, the attendance of witnesses and the power to compel answers to pertinent questions, and says:

Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own Members. That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections. Exercise of the power necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review.

As to the latitude allowed the Senate in taking testimony itself or through its committees the opinion continues:

In exercising this power, the Senate may, of course, devolve upon a committee of its Members the authority to investigate and report; and this is the general, if not the uniform practice. When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate. But undoubtedly, the Senate, if it so determine, may in whole or in part dispense with the services of a committee and itself take testimony; and, after conferring authority upon its committee, the Senate, for any reason satisfactory to it and at any stage of the proceeding, may resume charge of the inquiry and conduct it to a conclusion or to such extent as it may see fit.

The court holds, however, that in the interrogation of witnesses by the Senate it is assumed that all constitutional restraints will be observed. The opinion proceeds:

In that event, the limitations put upon the committee obviously do not control the Senate; but that body may deal with the matter, without regard to these limitations, subject only to the restraints imposed by or found in the implications of the Constitution. We can not assume, in advance of Cunningham's interrogation at the bar of the Senate, that these restraints will not faithfully be observed. It sufficiently appears from the foregoing that the inquiry in which the Senate was engaged, and in respect of which it required the arrest and production of Cunningham, was within its constitutional authority.

It is said, however, that the power conferred upon the Senate is to judge of the elections, returns, and qualifications of its "Members," and, since the Senate had refused to admit Vare to a seat in the Senate or permit him to take the oath of office, that he was not a Member. It is enough to say of this, that upon the face of the returns he had been elected and had received a certificate from the governor of the State to that effect. Upon these returns and with this certificate he presented himself to the Senate, claiming all the rights of membership. Thereby, the jurisdiction of the Senate to determine the rightfulness of the claim was invoked and its power to adjudicate such right immediately attached by virtue of section 5 of Article I of the Constitution.

348. The case of Thomas W. Cunningham, recusant witness, continued.

Whether inquiry into the qualifications of a Senator-elect shall be made prior or subsequent to the administration of the oath is within the discretion of the Senate.

Refusal by the Senate to seat a claimant pending an investigation does not deprive the State of its "equal suffrage in the Senate," within the purview of the Constitution.

The power of the Senate to require testimony of witnesses is in no wise inferior to that exercised by a court of justice and includes under comparable circumstances the power to compel attendance.

A warrant for the arrest of a recalcitrant witness may issue without previous subpoena where service on the witness is a question of doubt.

The mooted question of whether inquiry into the qualifications of a Senator-elect shall be made prior to or subsequent to his admission to membership is thus decided:

Whether, pending this adjudication, the credentials should be accepted, the oath administered, and the full right accorded to participate in the business of the Senate was a matter within the discretion of the Senate. This has been the practical construction of the power by both Houses of Congress, and we perceive no reason why we should reach a different conclusion. When a candidate is elected to either House, he of course is elected a Member of the body; and when that body determines, upon presentation of his credentials, without first giving him his seat, that the election is void, there would seem to be no real substance in a claim that the election of a "Member" has not been adjudged. To hold otherwise would be to interpret the word "Member" with a strictness in no way required by the obvious purpose of the constitutional provision, or necessary to its effective enforcement in accordance with such purpose, which, so far as the present case is concerned, was to vest the Senate with authority to exclude persons asserting membership who either had not been elected or, what amounts to the same thing, had been elected by resort to fraud, bribery, corruption, or other sinister methods having the effect of vitiating the election.

The contention that the refusal to sweax a claimant pending an investigation of his qualifications served to deprive a State of its "equal suffrage in the Senate" is thus disposed of:

Nor is there merit in the suggestion that the effect of the refusal of the Senate to seat Vare pending investigation was to deprive the State of its equal representation in the Senate. The equal representation clause is found in Article V, which authorizes and regulates amendments to the Constitution, "provided, * * * that no State, without its consent, shall be deprived of its equal suffrage in the Senate. This constitutes a limitation upon the power of amendment and has nothing to do with a situation such as the one here presented. The temporary deprivation of equal representation which results from the refusal of the Senate to seat a Member pending inquiry as to his election or qualification is the necessary consequence of the exercise of a constitutional power and no more deprives the State of its "equal suffrage" in the constitutional sense than would a vote of the Senate vacating the seat of a sitting Member or a vote of explusion.

The opinion thus compares the power of the Senate with that exercised by a court of justice and its authority to issue warrants of arrest to compel attendance of witnesses:

In exercising the power to judge of the elections, returns, and qualifications of its Members, the Senate acts as a judicial tribunal, and the authority to require the attendance of witnesses is a necessary incident of the power to adjudge, in no wise inferior under like circumstances to that exercised by a court of justice. That this includes the power in some cases to issue a warrant of arrest to compel such attendance, as was done here, does not admit of doubt. (McGrain *v.* Daugherty, 273 U. S. 135, 160, 180.) That case dealt with the power of the Senate thus to compel a witness to appear to give testimony necessary to enable that body efficiently to exercise a legislative function; but the principle is equally, if not a fortiori, applicable where the Senate is exercising a judicial function.

That such warrants may issue without previous subpoena when there are reasons to doubt the appearance of the witness the opinion agrees:

The real question is not whether the Senate had power to issue the warrant of arrest but whether it could do so under the circumstances disclosed by the record. The decision of the court of appeals is that, as a necessary prerequisite to the issue of a warrant of arrest, a subpoena first should have been issued, served, and disobeyed. And undoubtedly the courts recognize this as the practice generally to be followed. But undoubtedly also a court has power in the exercise of a sound discretion to issue a warrant of arrest without a previous subpoena, when there is good reason to believe that otherwise the witness will not be forthcoming. A statute of the United States (U. S. C., title 28, sec. 659) provides that any Federal judge, on application of the district attorney, and being satisfied by proof that any person is a competent and necessary witness in a criminal proceeding in which the United States is a party or interested, may have such person brought before him by a warrant of arrest, to give recognizance, and that such person may be confined until removed for the purpose of giving his testimony, or until he gives the recognizance required by said judge. The constitutionality of this statute apparently has never been doubted. Similar statutes exist in many of the States and have been enforced without question.

The rule is stated by Wharton, 1 Law of Evidence, section 385, that where suspicions exist that a witness may disappear, or be spirited away, before trial, in criminal cases, and when allowed by statute in civil cases, he may be held to bail to appear at the trial and may be committed on failure to furnish it, and that such imprisonment does not violate the sanctions of the Federal or State constitutions.

349. The case of Thomas W. Cunningham, recusant witness, continued. The Senate having sole authority under the Constitution to judge of the election returns and qualifications of its members, may exercise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute.

The same presumption of regularity attaches to action by the Senate in directing the arrest of a recusant witness that applies to the proceedings of the courts.

It is assumed that the Senate will deal with a witness in accordance with recognized rules and discharge him from custody upon proper assurance that he will appear to testify when required.

A witness in custody for refusing to testify may invoke the action of the courts only on a clear showing of arbitrary and improvident use of the power amounting to a denial of due process of law.

The court interprets the Constitution as conferring on the Senate sole authority to judge of the elections and qualifications of its Members and the incidental power of compelling the attendance of witnesses without the aid of a statute. The opinion deduces:

> The validity of acts of Congress authorizing courts to exercise the power in question thus seems to be established. The Senate, having sole authority under the Constitution to judge of the elections, returns, and qualifications of its Members, may exercise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute. The following appears from the report of the committee to the Senate upon which the action here complained of was taken: "A subpoena was issued for his appearance early in June. A diligent search failed to locate him. Finally, Representative Golder, of the fourth district of Pennsylvania, communicated with the committee, stating that Cunningham would accept service. His whereabouts was disclosed and he was served." Upon examination by the committee he repeatedly refused to answer questions which the committee deemed relevant and of great importance, not upon the ground that the answers would tend to incriminate him but that they involved personal matters. These questions have already been recited, and it is impossible for us to say that the information sought and refused would not reflect light upon the validity of Vare's election.

That the act of the Senate in issuing warrants for the arrest of witnesses is attended by all the presumption of regularity applying to the proceedings of the courts the opinion affirms:

> It is not necessary to determine whether the information sought was pertinent to the inquiry before the committee, the scope of which was fixed by the provisions of the Senate resolution. But it might well have been pertinent in an inquiry conducted by the Senate itself, exercising the full, original, and unqualified power conferred by the Constitution. If the Senate thought so, and, from the facts before it reasonably believing that this or other important evidence otherwise might be lost, issued its warrant of arrest, it is not for the court to say that in doing so the Senate abused its discretion. The presumption in favor of regularity, which applies to the proceedings of courts, can not be denied to the proceedings of the Houses of Congress, when acting upon matters within their constitutional authority.

And that in dealing with witnesses the Senate will conform to well-established usage:

> It fairly may be assumed that the Senate will deal with the witness in accordance with well-settled rules and discharge him from custody upon proper assurance, by recognizance or otherwise, that he will appear for interrogation when required. This is all he could properly demand of a court under similar circumstances.

As to the invocation of judicial interference by a person arrested by the Senate the opinion concludes:

> Here the question under consideration concerns the exercise by the Senate of an indubitable power; and if judicial interference can be successfully invoked it can only be upon a clear showing

of such arbitrary and improvident use of the power as will constitute a denial of due process of law. That condition we are unable to find in the present case.

The judgment of the court of appeals holding the arrest void and the witness to be justified in refusing to testify was therefore reversed.

350. The case of Thomas W. Cunningham, recusant witness, continued. Further decision of the Supreme Court with particular reference to the relation of the question of pertinency of interrogatories propounded by the committee.

A resolution of the Senate giving the chronology of the case.

On May 13, 1930,[1] Mr. George W. Norris, of Nebraska, in the Senate, moved this resolution:

Whereas on the 19th day of May, 1926, the Senate of the United States by resolution created a committee of five members and authorized and directed said committee "to investigate what moneys, emoluments, rewards, or things of value, including agreements or understandings of support for appointment or election to office have been promised, contributed, made, or expended, or shall hereafter be promised, contributed, expended, or made by any person, firm, corporation, or committee, organization, or association, to influence the nomination of any person as a candidate of any political party or organization for membership in the United States Senate, or to contribute to or promote the election of any person as a Member of the United States Senate"; and

Whereas in pursuance of its duty under said resolution the committee held a meeting at Washington, in the District of Columbia, on February 21, 1927, at which meeting Thomas W. Cunningham, in obedience to the subpoena of said committee, appeared as a witness; and

Whereas the said Thomas W. Cunningham refused to answer certain pertinent questions propounded to him by said committee; and

Whereas said Thomas W. Cunningham, by virtue of said refusal, violated section 102 of the Revised Statutes of the United States; and

Whereas the said Thomas W. Cunningham was thereafter, to wit, on April 20, 1928, indicted by a grand jury in the Supreme Court of the District of Columbia for refusing to answer the questions so propounded to him by said committee; and

Whereas the said Thomas W. Cunningham was afterwards, by virtue of a warrant issued on account of said indictment, arrested in the city of Philadelphia; and

Whereas the said Thomas W. Cunningham swore out a writ of habeas corpus in the District Court of the United States for the Eastern District of Pennsylvania; and

Whereas upon the hearing in said district court the said Thomas W. Cunningham was remanded to the custody of the United States marshal for removal to the District of Columbia; and

Whereas the said Thomas W. Cunningham appealed from said order of the district court of the United States to the Circuit Court of Appeals for the Third Circuit; and

Whereas upon such appeal the said circuit court of appeals, by a divided opinion reversed the said district court and ordered the said Thomas W. Cunningham discharged from custody; and

Whereas on the same state of facts and on account of the refusal of the said Thomas W. Cunningham to answer said questions as above set forth, the Senate of the United States issued its warrant directed to the Sergeant at Arms of the Senate, commanding the Sergeant at Arms to bring the said Thomas W. Cunningham before the Senate to answer the questions which he had refused to answer before said committee; and

Whereas in said case arising out of the same condition and the same state of facts, the said Thomas W. Cunningham in like manner swore out a writ of habeas corpus in the same courts above named and with like result; and

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[1] Second session Seventy-first Congress, Record, p. 8834.

Whereas in said last-mentioned case the Senate of the United States directed the committee to take an appeal to the Supreme Court of the United States, and the Supreme Court, upon the hearing of said appeal, reversed the order of the said Circuit Court of Appeals for the Third Circuit and reinstated the judgment of the district court, thereby holding that the said Thomas W. Cunningham was in contempt of the Senate for refusing to answer the questions above referred to and in effect holding that the circuit court of appeals in ordering the discharge of the said Thomas W. Cunningham was in error, and in effect reversing said decision (279 U.S. 597); and

Whereas after said decision of the Supreme Court of the United States the United States attorney filed a motion for a rehearing in the case above referred to wherein the Circuit Court of Appeals for the Third Circuit had ordered the discharge of said Thomas W. Cunningham; and

Whereas the said Thomas W. Cunningham has never been tried upon the indictment above referred to and there exists under the decision of the Supreme Court of the United States above referred to no reason why the said Thomas W. Cunningham should not be brought to trial in the Supreme Court of the District of Columbia upon said indictment: Therefore be it

Resolved, That the Hon. Leo. A. Rover, United States attorney for the District of Columbia, be, and he is hereby, directed to report to the Senate—

(1) Whether said motion for a rehearing in the Circuit Court of Appeals for the Third Circuit has been disposed of.

(2) If said motion for a rehearing has been disposed of and decided adversely to the contention of the United States, whether he, the said Leo A. Rover, has taken an appeal therefrom to the United States Supreme Court.

(3) If said motion for a rehearing has not been disposed of, why has the same been delayed?

(4) If said motion has been disposed of by the Circuit Court of Appeals for the Third Circuit, and the said Thomas W. Cunningham has been remanded to the United States marshal for the District of Columbia, why has the said Thomas W. Cunningham not been put upon trial upon the charges contained in said indictment?

In discussing the resolution Mr. Norris said:

I will say if there is any misstatement of fact in the whereases, I am unaware of it. The resolution is a little difficult to understand from a cursory reading of the whereases, but the Senate ought to realize the facts. Under the law, when a witness is subpoenaed before a committee of either branch of Congress and refuses to answer pertinent questions propounded to him, two things happen: First, he has committed a crime, a misdemeanor, by such refusal under section 102 of the Revised Statutes; and, second, he is in contempt of the Senate or the House, as the case may be. Then two courses can be pursued, or either one of them. In this instance both courses were pursued. When Mr. Cunningham refused to answer the questions of the then Senator Reed, of Missouri, the chairman of the committee, Senator Reed brought the matter before the Senate by proper resolution. The Senate referred the case to the United States district attorney for the District of Columbia for his attention, and also ordered the arrest of Mr. Cunningham. So there were two cases then pending against Cunningham arising out of the same state of facts.

It is a little difficult for a person who is not an attorney to realize that there are really two cases, that they axe exactly alike, that there is no difference in the facts, that they are exactly the same in each case. One was a prosecution for a violation of the statute, and one was action by the Senate to compel a witness who refused to answer proper questions.

351. The case of Thomas W. Cunningham, recusant witness, continued.

A further decision by the Supreme Court affirming the power of the Senate to compel testimony.

A recalcitrant witness having been committed for refusal to testify, the Supreme Court sustained the dismissal of a petition for a writ of habeas corpus.

The district judge ordered the commitment of the witness, who thereupon filed a petition for a writ of habeas corpus in the Federal district court. The court dismissed the petition; but on appeal to the Circuit Court of Appeals for the Third Circuit, the order of the district court was reversed [1] on the ground that the questions propounded by the committee of the Senate to the witness were not pertinent to the inquiry.

The case again coming up to the Supreme Court for review on a writ of certiorari, Mr. Justice Sutherland delivered the opinion [2] of the court, reversing the judgment of the court of appeals and holding that the order of commitment was proper and should have been sustained.

352. The case of Bishop James Cannon, jr.

Witnesses having refused to answer questions not contemplated in the resolution authorizing the inquiry, the committee formally declined to insist.

A committee of investigation decided that the powers granted by the resolution authorizing its appointment did not extend to questions propounded in the course of the inquiry and laid the transcript of the record before the Senate.

On June 19, 1930,[3] in the Senate, Mr. T.H. Caraway, of Arkansas, from the subcommittee of the Committee on the Judiciary, authorized to make a special investigation of lobbying, submitted a report from that committee as follows:

Resolved, That it is the sense of the subcommittee of the Committee on the Judiciary investigating lobbying that it should not insist on answers to questions propounded to Bishop James Cannon, jr., and that the transcript of the whole record be laid before the Senate.

Senator Walsh assents to this order only because of the doubt raised as to the authority of the committee under the resolution pursuant to which it is acting.

Mr. Caraway in speaking to the report of the subcommittee quoted in full the resolution [4] empowering the subcommittee to subpoena witnesses and designating the subjects of inquiry as follows:

Whereas it is charged that the lobbyists, located in and around Washington, filch from the American public more money under a false claim that they can influence legislation than the legislative branch of this Government costs the taxpayer; and

Whereas the lobbyists seek by all means to capitalize for themselves every interest and every sentiment of the American public which can be made to yield an unclean dollar for their greedy pockets: Now, therefore, be it

Resolved, That the Committee on the Judiciary of the United States Senate, or a subcommittee thereof be appointed by the chairman of the committee, is empowered and instructed to inquire into the activities of these lobbying associations and lobbyists.

To ascertain of what their activities consist, how much and from what source they obtain their revenues.

How much of these moneys they expend and for what purpose and in what manner.

What effort they put forth to affect legislation.

Said committee shall have the power to subpoena witnesses, administer oaths, send for books and papers, to employ a stenographer, at a cost not exceeding 25 cents per 100 words, to report

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[1] *United States ex rel. Cunningham* v. *Mathues, United States Marshal*, 50 Federal (2d) 449.

[2] *Fetters, U.S. Marshal*, v. *United States ex rel. Cunningham*, 283 U.S. 638.

[3] Second session Seventy-first Congress, House Report No. 43, part 10.

[4] Senate Resolution No. 20.

such hearings as may be had on any subject before said committee or subcommittee thereof, and do those things necessary to make the investigation thorough.

All the expenses for said purposes shall be paid out of the contingent fund of the Senate. For the purposes of this investigation the expenditure of $10,000 is authorized, or such part thereof as may be necessary.

Mr. Caraway in support of the resolution reported by the subcommittee said:

No one would contend that the resolution empowered the Senate committee to go into purely political activities.

That view of the authority and scope of the committee, and the limitations upon it, was announced by the chairman of the committee whenever the question arose. It first rose when the chairman of the Republican National Committee was before the committee. At that time a question was asked by myself touching a transaction that I recognize was political, although at the time that suggestion had not occurred to me. The Senator from Indiana, Mr. Robinson, objected. I conceded that the Senator from Indiana was correct, and I withdrew the question.

The same question arose six times subsequent to that while the same witness was before the committee, and it was, decided the same way each time. So, as I have indicated, that rule was invoked seven times to protect the chairman of the Republican National Committee from answering any inquiry touching political activities, and the question was decided in the same way each time.

The rule was also invoked to protect Mr. Curran, in charge of the National Association Against the Prohibition Amendment, and the decision previously made was adhered to without objection. The same rule was invoked to protect Josephus Daniels when he was before the committee, by the Senator from Montana, Mr. Walsh, who contended that a question asked of Mr. Daniels was outside the power of the committee and concerned a matter which it was beyond the scope of the committee to make inquiry, and the objection was sustained.

Every time that question arose it was held and decided by the committee, without a division of sentiment, so far as I know, in the same way.

353. The case of Bishop James Cannon, jr., continued.

In 1931 a committee of the Senate investigated campaign contributions and expenditures with special reference to violations of the Federal corrupt practices act involving false statements of campaign expenditures and the fraudulent conversion of campaign funds to private uses.

An instance wherein the Clerk of the House, without an order from the House, produced before a Senate committee of investigation, after the expiration of the statutory period provided for their preservation, statements filed in his office in compliance with the provisions of the Federal corrupt practices act.

Instance wherein a witness, summoned in pursuance and by virtue of the authority conferred on a committee to elicit testimony, declined to testify.

On April 10, 1930 [1] (legislative day of April 8), the Senate agreed to the resolution (S. Res. 403) as follows:

Resolved, That a special committee consisting of five Senators, to be appointed by the Vice President, is hereby authorized and directed to investigate the campaign expenditures of the various candidates for the United States Senate, the names of the persons, firms, or corporations subscribing, the amount contributed, the method of expenditure of said sums, and all facts in relation thereto, not only as to the subscriptions of money and expenditures thereof but as to the use of any other means or influence, including the promise or use of patronage, and all other facts in relation thereto which would not only be of public interest but which would aid the Senate in

[1] Second session Seventy-first Congress, Record, p. 6841.

enacting any remedial legislation or in deciding any contest which might be instituted involving the right to a seat in the United States Senate.

The investigation hereby provided for, in all the respects above enumerated, shall apply to candidates and contests before senatorial primaries, senatorial conventions, and the contests and campaign terminating in the general election in November, 1930.

No Senator shall be appointed upon said committee from a State in which a Senator is to be elected in the general election in 1930.

Said committee is hereby authorized to act upon its own initiative and upon such information as in its judgment may be reasonable or reliable. Upon complaint being made before said committee, under oath, by an person, persons, senatorial candidate, or political committee, setting forth allegations as to facts which, under this resolution it would be the duty of said committee to investigate, the said committee shall investigate such charges as fully as though it were acting upon its own motion, unless, after a hearing upon such complaint, the committee shall find that the allegations in said complaint are immaterial or untrue.

Said committee is hereby authorized, in the performance of its duties, to sit at such times and places, either in the District of Columbia or elsewhere, as it deems necessary or proper. It is specifically authorized to require the attendance of witnesses by subpoena or otherwise; require the production of books, papers, and documents; and to employ counsel, experts, clerical, and other assistants; and to employ stenographers at a cost not exceeding 25 cents per one hundred words.

Said committee is hereby specifically authorized to act through any subcommittee authorized to be appointed by said committee. The chairman of said committee or any member of any subcommittee may administer oaths to witnesses and sign subpoenas for witnesses; and every person duly summoned before said committee, or any subcommittee thereof, who refuses or fails to obey the process of said committee or who appears and refuses to answer questions pertinent to said investigation, shall be punished as prescribed by law.

The expenses of said investigation, not exceeding in the aggregate $100,000, shall be paid from the contingent fund of the Senate on vouchers signed by the chairman of the committee or the chairman of any subcommittee.

All hearings before said committee shall be public, and all orders or decisions of the committee shall be public.

The committee shall make a full report to the Senate on the first day of the next session of the Congress.

This resolution was supplemented on January 19, 1931[1] (legislative day of January 5), by the passage of the following:

Resolved, That the special committee of the Senate to investigate campaign expenditures, created under authority of S. Res. 215, adopted April 10, 1930, is hereby further authorized and directed to investigate any complaint made before such committee by any responsible person or persons, alleging (1) the violation, at any time within two years preceding the adoption of the aforesaid resolution, of any provision of the Federal corrupt practices act, 1925, involving a false statement of campaign expenditures, or (2) a fraudulent conversion to private uses, at any time within such period of two years, of any campaign funds contributed for use in any election as defined in the Federal corrupt practices act, 1925. The committee shall investigate fully the allegations in all such complaints, and shall, as soon as practicable, make a full report thereon to the Senate.

Under this authorization, the special committee thus constituted held hearings on February 11, 1931, which were attended by Bishop James Cannon, jr., and at which certain testimony adduced at former hearings before the subcommittee of the Committee on the Judiciary, in the form of memoranda relating to checks credited to the account of Bishop Cannon at various banks, were ordered incorporated in the record.

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[1] Third session Seventy-first Congress, Record, p. 2576.

In the course of the hearings William Tyler Page, clerk of the House of Representatives, appeared voluntarily before the committee and, being asked by the chairman to submit, from the files of the House, certain statements of campaign contributions and expenditures filed in the office of the Clerk of the House in the 1928 [1] campaign, without being sworn, testified as follows:

I am in a somewhat peculiar position with respect to these papers. For many years it has been the practice and policy of the House rather jealously to safeguard its archives, even from being produced upon a subpoena duces tecum before a court or even a committee of the Senate, without its consent. Having known of that practice for many years, and having observed it during my incumbency as Clerk of the House, I hesitated somewhat in coming here until I could rather clarify the situation, and make my coming voluntary altogether, and present to the committee certain statements which I think I am at liberty to present.

The Federal corrupt practices act in regard to statements filed under it in the office of the Clerk of the House says they "shall be preserved by the Clerk or Secretary for a period of two years from the date of filing, shall constitute a part of the public records of his office, and shall be open to public inspection."

Now this is what I find, that I have all of the statements filed in my office that pursuant to that law, by the so-called Anti-Smith Democrats in the campaign of 1928, were filed prior to the expiration of the 2-year period, or, in other words, they have been in my office now for more than two years, with one exception, and that is the statement dated February 15, 1929, filed by the treasurer of the so-called Anti-Smith Democrats with headquarters in Richmond, Va. The 2-year period with respect to that paper will have expired on next Sunday.

Now, in regard to these other papers, the time is past and, under the law, if I so choose I could utterly destroy them. That is not my policy, however. I keep these papers on file and have kept them since the campaign of 1920, for public inspection.

I only mention that to excuse myself from doing anything that might seem to be contrary to the policy of the House. Therefore I have brought these papers here, those antedating, or, rather, those that have been on file for two years or more, feeling at liberty so to do.

I find that in the testimony adduced before the lobby investigation, page 4857, and so forth, all of these statements filed by the treasurer of the Anti-Smith Democrats are set forth. I dare say somebody who had the right to do so, since these papers are open for public inspection, came in there and made copies of them.

Now, in regard to the statement of February 15, 1929, I have made a certificate as to its accuracy except in one respect. I found certain figures here that did not correspond with the original, and changed the statement accordingly, and embraced the change in my certificate, which I will give to the committee.

Now, let me say this, Mr. Chairman, if you please, that I feel at perfect liberty to make this certificate, because the making of a certificate is an exception to the general rule laid down some years ago in the House by the Judiciary Committee and by the House itself in regard to furnishing papers to court and committees under subpoena duces tecum, that where Congress has published a document, a certified copy thereof, if it be a House or Senate document, may be made, and this being a Senate document and the original paper being in my office and not in the Senate file, I feel at liberty to make this certificate.

Personally, I should have been glad to have appeared before this committee of the Senate, of course, and even under oath make any statement that might be desired, but I feel some hesitancy in going that far, but I did feel at liberty to come here and make the statement I have made.

On May 7, 1931,[2] in response to a subpoena, one Ada L. Burroughs appeared before the committee and, being questioned by the chairman and other members of

[1] Third session Seventy-first Congress, Hearings on S. Res. 215 and S. Res. 403, pp. 8, 9.

[2] Ibid, p. 68.

the committee, submitted a statement protesting the jurisdiction of the committee and declined to testify.

Bishop Cannon also submitted a statement and brief, questioning the jurisdiction of the committee and entering formal protest against the legality of Senate Resolution 403 and the investigation being conducted under its authorization.

In prosecution of this protest Bishop Cannon petitioned the Supreme Court of the District of Columbia for a writ of prohibition. The arguments by counsel being heard, the court, in an opinion delivered by Justice Joseph W. Cox, on August 13, 1931,[1] dismissed the petition. An appeal by the relator was dismissed in the Court of Appeals on November 2, 1931.[2]

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[1] Case No. 80100, Supreme Court of the District of Columbia.

[2] Bishop Cannon and Ada L. Burroughs were subsequently defendants in a case brought on indictment for violation of the corrupt practices act which was decided in their favor (65 Federal 2nd 796; 289 U.S. 159).