

THE DUTY OF DISCLOSURE IN PARLIAMENTARY INVESTIGATION: A COMPARATIVE STUDY*

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AFTER the Napoleonic wars there had been, in a few German pygmy states, isolated and almost insignificant attempts to introduce some sort of parliamentary inquiry.¹²⁹ Even a liberal-minded professor of southern Germany wrote, in 1830, that the parliament, though entitled to know the truth, could learn the facts only from the government.¹³⁰ Another writer, having highly praised the right of parliamentary inquiry as practiced in England, remarked resignedly that this right could hardly acquire citizenship in the "constitutional" monarchies of Germany.¹³¹

The political and constitutional storms of the year 1848 gave hope that in both *Germany* and *Prussia* introduction of the investigating privileges of the British Parliament would be possible. In the National Assembly in Frankfort a motion was brought forward recommending an adaptation of the English practice to hear witnesses and experts before parliamentary committees under oath. The motion was referred to a standing committee and heard of no more.¹³² In a later, rather confused discussion of similar questions before the same assembly, the fear was voiced that the hearing of witnesses by parliament might trespass dangerously upon the judicial sphere.¹³³

One of the subcommittees of the Constituent National Assembly of Prussia, meeting during the same period, had, under the influence of the

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¹²⁹ Often quoted is Art. 91 of the Constitution of Sachsen-Weimar-Eisenach, granted in 1816 by Goethe's friend, Karl August of Weimar. See, e.g., 2 Lammers, *Handbuch des deutschen Staatsrechts* 455 (1932).

¹³⁰ Von Rotteck, 2 *Lehrbuch des Vernunftrechtes und der Staatswissenschaften* 244 (1830).

¹³¹ 3 Zachariae, *Vierzig Bücher vom Staate* 263 (1839). The author was right. Only after the collapse of the German monarchies, eighty years later, was a true right of parliamentary inquiry created. A concise history of the pre-1918 attempts to introduce parliamentary inquiry is given in *Senat in Bremen v. Bürgerschaft in Bremen, Staatsgerichtshof*, July 12, 1921. 102 *Entscheidungen des Reichsgerichts in Zivilsachen* 425 et seq. (1921).

¹³² Session of May 29, 1848. 1 *Stenographischer Bericht über die Verhandlungen der deutschen konstituierenden Nationalversammlung* 164, 194 (1848). See, also, 1 Hatschek, *Deutsches und Preussisches Staatsrecht* 687 (1930).

¹³³ Session of October 6, 1848, *ibid.* vol. 4, 2433-4 (1848).

English constitutional practice, voted the introduction of parliamentary inquiry. Although the government was opposed because "the government was in a much better position to give the necessary information . . . to the parliament," the assembly favored the new institution because "the government could be partisan." The first draft had contained the provision that "the inquiring committees should be entitled to hear witnesses under oath, with the assistance of judges, and to require the aid of the administration." After the National Assembly had been dissolved by King Frederick William IV, Prussia received a constitution by royal decree. Both this constitution and its successor maintained for the two houses of parliament the right to keep themselves informed by instituting "committees for the investigation of facts."¹³⁴ But significantly enough, the additional provision concerning the gathering of evidence by the committees was omitted.¹³⁵

Actually, the Prussian parliament made use of its constitutional right of inquiry in exactly four cases over a period of seventy years (1848-1919). The first three committees, dealing with economic and educational questions, gathered their evidence merely from governmental sources, hearing some experts but no outside witnesses.¹³⁶ The fourth inquiry, organized by the lower house in November, 1863, in order to investigate the brutal intervention by Bismarck's government during the preceding elections, led to an open clash between parliament and government. The government was victorious, and a virtual breakdown of the whole institution of parliamentary inquiry followed. The majority of the House, still unbrokenly liberal in the midst of the "conflict" era, had voted the inquiry in accordance with Article 82 of the constitution. One representative had stressed that the governmental policy had hurled the country into such a "calamity" that only a thorough investigation could regenerate the nation. The Minister of the Interior, who had most conspicuously and

¹³⁴ Article 82. For the complete history of the origins of the provision, see 1 von Rönne, *Das Staatsrecht der Preussischen Monarchie* 290-1 (1881).

¹³⁵ von Rönne, *supra*, note 134, at p. 291, and Zweig, *Die parlamentarische Enquête nach deutschem und österreichischem Recht*, 6 *Zeitschrift für Politik* 267, at 285 (1913), maintain that this provision was omitted for the sole reason that it was self-evident. Actually it is probable that from the very outset the government attempted to give as little investigating power as possible into the hands of the committees (cf. the attitude of the French Senate above, at note 49). Lammers, *supra*, note 129, at p. 450, rightly calls Art. 82 a *lex imperfecta* because neither the constitution nor a subsequent statute provided for enforcement devices.

¹³⁶ See the account given in 3 *Sammlung sämtlicher Drucksachen des Hauses des Abgeordneten aus der VIII Legislatur Periode I Session 1863-64*, No. 102, pp. 6-7. 1 Bluntschli, *Allgemeines Staatsrecht* 530 (1868) complained in general that on the Continent the committees relied almost exclusively on evidence offered officially and neglected the testimony of witnesses so largely used in England.

successfully attempted to influence the election results, foresaw for the inquiry committee an unavoidable "conflict with administration and judiciary"; he threatened that the committee, which was organized in opposition to the government, would "not enjoy the ready cooperation of the government."¹³⁷

In its reports the committee raised the constitutional issue of the extent of its investigation powers. It maintained that Article 82 had provided exemption from the principle of the separation of powers and vested the inquiry committees with the rights of "authorities" (*Behörden*). Therefore the committee held itself to be entitled to employ all "legal means of evidence." The example of England was again cited.¹³⁸ The report admitted, however, that as a practical matter the evidence had remained scanty because of the government's strict order to all branches of the administration to ignore the requests of the committee.¹³⁹ As to witnesses, none but testimony voluntarily offered could be obtained. Where a witness, generally because of the government's attitude, declared himself unwilling to testify, the committee was powerless.¹⁴⁰ Also, it could only complain about the slowness of the majority of the courts to comply with the request to hear witnesses for the committee.¹⁴¹

In view of this situation, one of the committee members asked for the indictment of the cabinet for violation of the constitutional right of parliamentary investigation.¹⁴² A somewhat milder resolution, merely blaming the government for its attitude, was adopted by an overwhelming majority of the house.¹⁴³ Thus the extent of the investigating powers became a crucial issue. But a few hours after the adoption of the resolution, Bismarck dissolved the Prussian parliament, declaring its behavior harmful to the "power and honor of Prussia."¹⁴⁴ In that bombastic declaration was already sounded the fanfare of "necessary military expeditions."

¹³⁷ Session of November 28, 1863, 1 *Stenographische Berichte über die Verhandlungen* 168, 171, 178, 190 (1863-4).

¹³⁸ 1 Bericht der XII Kommission zur Untersuchung der Thatsachen etc., 3 Sammlung sämtlicher Drucksachen des Hauses der Abgeordneten aus der VIII Legislatur Period I Session 1863-4, No. 102, pp. 2-3.

¹³⁹ Ibid. 12-13, and No. 103, p. 2.

¹⁴⁰ Ibid. No. 103, pp. 33, 36, 37, 39, 41, 62.

¹⁴¹ Session of January 25, 1864. 2 *Stenographische Berichte über die Verhandlungen* (1863-4), 941.

¹⁴² See 1 Bericht etc. in 3 Sammlung, etc. No. 102, 15.

¹⁴³ See *ibid.*, 18, and session of January 25, 1864, 2 *Stenographische Berichte über die Verhandlungen* 941 (1863-4).

¹⁴⁴ Ibid., 943.

When the series of wars which then started were brought to a successful conclusion, the liberal opposition committed hara-kiri, and no longer strove for parliamentary rights. No other parliamentary inquiry was undertaken in Prussia until the establishment of the republic.¹⁴⁵

In the constitutions of Imperial Germany and of her predecessor, the Norddeutscher Bund, the right of inquiry was not mentioned. Twice, in 1868 and in 1890, an unsuccessful attempt was made by Social Democrats¹⁴⁶ to introduce it. During the discussion of the first proposal, in 1868,¹⁴⁷ one (liberal) representative declared the entire right of inquiry was not worth as much as was generally believed. Another pointed to the poor results in Prussia, for which he saw the reason, rightly, in the impossibility of compelling the testimony of private individuals and civil servants. To give the committee powers so extensive as those granted in England would certainly, he thought, meet with the resistance of the Federal Council and the government. And indeed the latter had asked for the rejection of the proposed amendment to the constitution; the majority of the House acted accordingly.

The bill introduced in 1890¹⁴⁸ emphasized the necessity of giving to the investigating committees the power to compel sworn testimony. In the discussion Bebel declared that without such powers the task of discovering the truth could not be fulfilled. The government once again opposed the bill as an attempt to vest in the parliament functions entrusted to the executive.¹⁴⁹

From these discussions it became evident that in Germany the right of political inquiry could not develop, as in France, without any statutory basis. The only half-developed parliamentarism in Prussia and Germany gave this right no more recognition than the vote of confidence enjoyed.

¹⁴⁵ Purely theoretical discussions about the extent and the powers of parliamentary investigations continued unabated. See von Rönne, *supra*, note 134, at p. 291-97. Even "in theory" it was admitted that the committees had no power to obtain evidence which was not voluntarily given. See Anschütz, *Deutsches Staatsrecht*, in 4 *Enzyklopaedie der Rechtswissenschaft*. Kohler 145 (1914).

¹⁴⁶ It is worth noting that in both France (see note 45 *supra*) and Germany the leaders of the Socialist opposition in the parliaments intervened on behalf of larger investigating powers. The explanation lies certainly in the fact that in both countries the parliamentary inquiry was an expression of distrust of the administration. Hence the eagerness of the opposition parties to secure effective means of investigation.

¹⁴⁷ Session of June 5, 1868. 1 *Stenographische Berichte über die Verhandlungen des Norddeutschen Bundes*. 1 *Legislatur Periode* 258-267 (1868).

¹⁴⁸ *Stenographische Berichte über die Verhandlungen des Reichstags*. 8 *Legislatur Periode* 1. Session, *Anlageband* 237 (1890).

¹⁴⁹ Session of December 9, 1891, *ibid.*, Vol. 5, 3288, 3292.

Moreover, public opinion did not clamor for parliamentary investigation; its value was recognized by only a few.¹⁵⁰

Max Weber, in his criticism of the political situation in Imperial Germany, attributed greater responsibility for the unsatisfactory results of constitutional life to the lack of parliamentary investigation than to any other single factor. The German parliament, he wrote, unable as it was to hear witnesses under oath on the facts, "independently of the good will of the administration," was condemned to "dilettantism as well as ignorance."¹⁵¹

It was more consonant with the actual distribution of power in Germany and the German states that, when the need for an investigation made itself felt, the government instituted inquiry committees by decree, whether on its own initiative or on the motion of the Reichstag.¹⁵² While parliamentarians sometimes sat on the committees, they were always in a minority. Other investigations were carried out by boards without any parliamentary ties.¹⁵³ Accordingly, the evidence examined by those imperial or royal committees was sifted by the authorities, and not by the parliament. Thus the investigations had none of the characteristics of a truly parliamentary inquiry and were but "the product of executive discretion."¹⁵⁴ In view of the kind of evidence gathered by them, the question

¹⁵⁰ "It must be admitted," says Neumann-Hofer, *Die Wirksamkeit der Kommissionen in den Parlamenten*, 4 *Zeitschrift für Politik* 51, at p. 72 (1911), "that a request [for the right of inquiry] had not often, and never urgently, been made."

¹⁵¹ Weber, *Parlament und Regierung im neugeordneten Deutschland* 57-8 (1918; written 1917).

¹⁵² A number of them are retrospectively mentioned by Heck, *Das parlamentarische Untersuchungsrecht* at p. 9-12 (1925) and by Jacobi, 2 *Verhandlungen des vierunddreissigsten deutschen Juristentags* (1926) (quoted hereafter 34, 2 J.T.) 85. These inquiries and their methods are treated in more detail by Morstein-Marx, *Commissions of Inquiry in Germany*, 30 *Am. Pol. Sci. Rev.* 1134 (1936), by Zahn, article on *Wirtschaftsenquete in Handwörterbuch der Staatswissenschaften*, 4th ed. *Ergänzungsband* 1091 et seq. (1929), and by Rosenbaum, *Zur Methode von Enquêtes*, 11 *Wirtschaftsdienst* 949 et seq. (1926) and *Deutsche Enquêtes*, *ibid.* 1023 et seq.

¹⁵³ Typical was the situation in Prussia, when a representative, Lasker, asked for a parliamentary investigation into the railroad concessions (see 2 *Anlagen zu den Stenographischen Berichten über die Verhandlungen des Hauses der Abgeordneten*, 11 *Legislatur Periode* 750 (1872/3). Before the debate was opened, a royal message, signed, among others, by the very minister whose activity was to be investigated, established a special commission, in which the representatives of the government had the majority. See *ibid.* 867. Before withdrawing his motion, Lasker showed the difference existing between a parliamentary inquiry and an investigation by the royal commission. See 2 *Stenographische Berichte über die Verhandlungen des Hauses der Abgeordneten*, 11 *Legislatur Periode* 1043-50, 1059 (1872/3).

¹⁵⁴ Morstein-Marx, *supra*, note 152, at p. 1140. An interesting view of the proceedings of one of the most outstanding of these inquiries is given by Weber, *Die Ergebnisse der deutschen Börsenenquete*, 43 *Zeitschrift für das Gesamte Handelsrecht* 83 et seq. (1895).

how far their investigative powers extended would hardly arise.¹⁵⁵ It was at all times admitted that the committees did not have any power to compel testimony.¹⁵⁶

The constitution of the German Republic granted the right of inquiry to the Reichstag. Article 34 reads, in its most important parts,¹⁵⁷ "The Reichstag has the right, and on proposal of one-fifth of its members the duty, to appoint investigating committees. These committees, in public sittings, shall inquire into the evidence which they or the proponents deem necessary. The public can be excluded by a two-thirds majority vote of the investigating committee. . . . The courts and administrative authorities are required to comply with requests by these committees for information, and the records of the authorities shall on request be submitted to them. The provisions of the Code of Criminal Procedure shall apply (as far as they are appropriate) to the inquiries of those committees and of the authorities assisting them, but the secrecy of letters and other mail, telegraph and telephone services shall remain inviolate." In imitation of this institution, most of the German states adopted similar provisions in the new state constitutions.¹⁵⁸

The introduction of the right of inquiry into the constitution of Weimar was due to the direct influence of Max Weber.¹⁵⁹ He had earlier praised the

¹⁵⁵ Embden, *Wie sind Enquêtes zu organisieren?* in *Das Verfahren bei Enquêtes über soziale Verhältnisse* 12 (1877), identifies rightly the "Beamtenstaat" with what he calls the "incomplete inquiry" and modern parliamentarism with the complete inquiry. The delimitation of both types corresponds to the distinction made in the text. Embden admits that in the Germany of his day only "incomplete inquiries," i.e., investigations without investigating power, were tolerated.

¹⁵⁶ Neumann-Hofer, *supra*, note 150, at p. 73, called this impossibility an "irreparable handicap" for the German commissions when compared with the British. On the occasion of the investigation into the cartels, it was proposed to enact special laws giving to the inquiry committees the power to compel testimony, in imitation of English and American practices. The proposal was rejected. See *Reichsamt des Innern*, 1 *Denkschrift über das Kartellwesen*. *Drucksachen des Reichstags* No. 4, 6 (1906).

¹⁵⁷ Translation adapted from Mattern, *The Constitutional Jurisprudence of the German National Republic* 429-30 (1928).

¹⁵⁸ See, e.g., Art. 25 of the Prussian, Art. 52 of the Bavarian, Art. 21 of the Saxon, Art. 8 of the Württembergian, constitutions.

¹⁵⁹ The part which Weber actually played in the history of the article is interestingly told, with the use of private correspondence and unpublished drafts of the constitution, by Heck, *supra*, note 152, at p. 13-14. It was equally due to Weber's influence that the parliamentary investigation in Germany also had the function of protecting the minority of the parliament: one-fifth of the members could request the investigation (see Weber, *supra*, note 151 at p. 67). This particular feature cannot be discussed here. About its (perhaps more theoretical than practical) importance, see Morstein-Marx, *Beiträge zum Problem des parlamentarischen Minderheitenschutzes*, 12 *Abhandlungen und Mitteilungen aus dem Seminar für öffentliches Recht* (1924); he calls (p. 33) Art. 34 the "most significant purgatory of political morals known to the constitution." Similarly Lewald, *Enquêterecht und Aufsichtsrecht*, 5 *Archiv des öffent-*

right of inquiry as yielding the "very best results of the English Parliament," and had recommended its introduction in Germany as the "fundamental pre-condition of all further reforms."¹⁶⁰

The question of investigating powers was treated first in a committee of the Constitutional National Assembly almost casually. The representative of the Department of Justice drew attention to the necessity of compelling testimony under oath. As between the two ways to achieve this—either a detailed regulation in the standing order of the Reichstag, or an application of the Code of Criminal Procedure—he declared himself in favor of the first. Nevertheless the committee members decided for the application of the Code as far as appropriate.¹⁶¹ Max Weber had remarked in his previous private draft that since parliamentary inquiry involved the public interest even more than did penal procedure, all powers of enforcement should be given to the investigating committees. He therefore recommended at least a complete, not only an "appropriate," application of the Code of Penal Procedure.¹⁶² The plenary session of the Assembly adopted the provision concerning parliamentary inquiry, probably without realizing its importance, without discussion, almost unwittingly.¹⁶³

During the years of the Weimar Republic, the Reichstag and, among the German states, particularly the parliament of Prussia, frequently made use of the right of inquiry.¹⁶⁴ In the two cases in which the newly-

lichen Rechts, N.F. 326 (1923); at 320 he connects the protection of the minority with the general function of the inquiry: the discovery of the truth is furthered in situations where a parliamentary majority would prefer to leave facts undiscovered.

¹⁶⁰ Weber, *supra*, note 151 at p. 59-60.

¹⁶¹ 336 Verhandlungen der verfassungsgebenden Deutschen Nationalversammlung. Anlagen zu den stenographischen Berichten No. 391. Bericht des Verfassungsausschusses 266. In some of the state constitutions (see the list in Lammers, *supra*, note 129, at p. 470) there is no reference to the provisions of the Code of Penal Procedure. The committees of those states were therefore unable to enforce their decisions on testimony, etc.

¹⁶² See Heck, *supra*, note 152, at p. 57. Weber's opinion is diametrically opposed to that of Michon, *Des Enquêtes parlementaires* (1890), who at p. 61 expresses opposition to any compulsory power of the committees because "the social interest" involved in parliamentary inquiry is less great than in the repression of delinquency.

¹⁶³ Session of July 3, 1919, 327 Verhandlungen der verfassungsgebenden Deutschen Nationalversammlung 1264 B, 1291 B.

¹⁶⁴ The most important inquiries of the Reichstag are listed and discussed briefly by Poetzsch-Heffter, *Vom Staatsleben unter der Weimarer Verfassung*, 13 *Jahrbuch des öffentlichen Rechts* 121-23 (1925); 17 *ibid.* 75-6 (1929). See also Kötting, *Die Entwicklung des öffentlichen Rechts in Preussen*, 18 *ibid.* 19 (1930), and von Jan, *Verfassung und Verwaltung in Bayern*, 15 *ibid.* 4 (1927), and 19 *ibid.* 7 (1931). I am very much indebted for valuable remarks on the practice of parliamentary investigation in republican Germany to Professor Hans Staudinger, formerly Staatssekretär in German ministries, now Dean of the Graduate Faculty of Political and Social Science of the New School for Social Research, New York City, and to

created Constitutional Court (Staatsgerichtshof) had to decide on the issue of parliamentary inquiry, it attempted to narrow down its scope considerably.¹⁶⁵ However, the institution as such could no longer be eliminated,¹⁶⁶ and continued to be practiced until the end of the Republic in 1933.¹⁶⁷

Unlike the situation prevailing in France, in Germany Article 34 seemed to have given a statutory delimitation of investigating powers. From the very beginning, however, sharp controversies arose concerning the extent of the powers of committees over persons and papers, the uncertainty being favored both by the somewhat vague wording of Article 34 and by the particular circumstances of the first parliamentary inquiry under the new regime.

The National Assembly in Weimar had decided to place the investigations concerning the responsibility of the German imperial authorities for the World War and its prolongation in the hands of a parliamentary inquiry commission, such as was provided for in Article 34.¹⁶⁸ In spite of

Dr. Ernst Hamburger, former member of the Prussian Landtag, now Research Associate of the same faculty.

¹⁶⁵ See the decision mentioned above at note 131, and *Fraktion der Bürgerpartei und des Bauernbundes im württembergischen Landtag v. (1) den württembergischen Landtag, vertreten durch seinen Präsidenten, (2) den Freistaat Württemberg, vertreten durch seinen Staatspräsidenten, Staatsgerichtshof* January 12, 1922. 104 *Entscheidungen des Reichsgerichts in Zivilsachen* 423 et seq. (1922). In this second case it is asserted that even after 1919 the parliamentary inquiry in Germany and her states could not have the broad functions held in Great Britain. Lengthy excerpts from the two decisions in English translation are given by Mattern, *supra*, note 157, at p. 285 et seq. A sharp criticism of the decisions is voiced by Poetsch-Heffter, *Zwei Urteile des Staatsgerichtshof über Untersuchungsausschüsse*, 4 *Archiv. des öffentlichen Rechts* N.F. 210-38 (1922), and by Lewald, *supra*, note 159 at p. 278.

¹⁶⁶ See Alsberg, 34. 1 J. T. 335 (1926). For the fact that parliamentary investigations actually never became a "significant feature of Weimar democracy," see *infra*, note 272.

¹⁶⁷ We omit from the following discussion the investigations carried out by the so-called socialization committees in 1919 and 1920 (*Reichsgesetzblatt*—1919—198 and *ibid.*—1920—981; see also Rosenbaum, *supra*, note 152, at p. 1026) and by the commission of inquiry which proposed in 1926 to survey the possibilities of economic recovery (*Reichsgesetzblatt* (1926) 195-6; see also Rosenbaum, *Die Enquête von 1926*, 11 *Wirtschaftsdienst* 1053 ff. (1926), and Morstein-Marx, *supra*, note 152, at p. 1142-3). Not only from the constitutional aspect was neither of these commissions a parliamentary investigating committee, the one being designated as a "free scientific body," the other as an "organ of the national government with a privileged status." Likewise the composition of these commissions, as well as their methods of discovering the facts, and the legal basis for their investigating powers, differed so greatly from ordinary parliamentary committees that they cannot be treated here. The extremely meager results of these and some similarly organized economic committees were notorious. This was due, of course, much more to the historical circumstances than to the extent of the investigating powers of the committees. See also Hartnig, *Darstellung des Enquêteverfahrens* 27-55 (1931).

¹⁶⁸ Session of August 20, 1919, 329 *Verhandlungen der Verfassungsgebenden Nationalversammlung* 2708 A. For more details, see W. Jellinek, *Revolution und Reichsverfassung*, 9 *Jahrbuch für öffentliches Recht* 89 et seq. (1920).

assertions to the contrary,¹⁶⁹ there could be no doubt that the committee was constitutional; nothing in Article 34 forbade the opening of such an investigation. Another question was whether a parliamentary committee was particularly fitted to pass judgment on events of world history where not only the mistakes of a government and its agents but an entire regime, its foundations and basic beliefs, had to be judged.¹⁷⁰ Undoubtedly, for political as well as legal reasons,¹⁷¹ it must be considered a stroke of bad luck that the young right of inquiry in Germany was subjected at its very birth to the strain of the so-called War Guilt Committee.¹⁷² The difficulties started as soon as the committee began to gather evidence by hearing political and military leaders of Imperial Germany. All of them took the oath according to the German Code of Criminal Procedure, which, with certain exceptions, declares the oath of witnesses obligatory.¹⁷³ But some of them did so under violent protestations against the fact that sworn testimony was asked of persons who could be indicted the very next day on the same facts.¹⁷⁴ One witness after another protested against the "illegal combination of defendant and witness in the same person . . . the abnormality contrary to the legal conceptions of all civilized nations."¹⁷⁵ When General Ludendorff, during a committee hearing, read a

¹⁶⁹ See, e.g., Kaufmann, *Untersuchungsausschuss und Staatsgerichtshof* 22 (1920); Finger, *Das Staatsrecht des Deutschen Reiches der Verfassung* v. 11 Aug. 1919 261 (1923).

¹⁷⁰ Characteristically enough, Max Weber, the staunchest advocate of the right of inquiry, advised strongly against entrusting the question of war guilt to a parliamentary investigation. See his letter to the *Frankfurter Zeitung* of March 20, 1919, published in *Gesammelte Politische Schriften* 487 (1921). An analogous investigation was conducted by the committee instituted in France in 1871 to pass judgment on the responsibility of the French Government of National Defense (see especially the "Note" of this inquiry committee, Session of November 13, 1872; Annexe No. 1416 J. O. 251-258 (1876)). The results of both the German and the French committees were equally poor, not only because the subject of their investigations was not suited to parliamentary inquiry, but also because their investigating powers were inadequate to their tasks (see Arnitz, *Les Enquêtes parlementaires d'ordre politique* 92 (1917), and *Vossische Zeitung*, February 11, 1926).

¹⁷¹ The hearing of the imperial generals Hindenburg and Ludendorff was an occasion for the staging of reactionary mass demonstrations (see *Vossische Zeitung*, November 14, 1919).

¹⁷² Only a few months after the enactment of the Constitution, the institution of parliamentary inquiry committees was already (in a Reichstag debate) under the fire of arguments springing from the unsatisfactory results of the War Guilt Committee. See session of October 24, 1919, 330 *Verhandlg.* etc. 3395 D.

¹⁷³ Articles 57, 58, and 61.

¹⁷⁴ At the time of the committee's investigations there was actually a proposal under discussion to try the members of the Imperial Government before a special high court. See Kaufmann, *supra*, note 169, at p. 29 et seq., and Kahl, *Untersuchungsausschuss und Staatsgerichtshof*, 25 *Deutsche Juristen Zeitung* 1 et seq. (1920).

¹⁷⁵ 1 *Stenographische Berichte über die öffentlichen Verhandlungen des 15 Untersuchungsausschusses der Verfassungsgebenden Nationalversammlung* 301, 313, 478; 2 *ibid.* 695-6. One of the committee members rightly emphasized (*loc. cit.* vol. 1, 479-81) that such a situation was not infrequent in parliamentary inquiries in other countries.

juridical dissertation expounding why, according to Article 54 (now Article 55) of the Code of Criminal Procedure, he and Hindenburg would be entitled to refuse any testimony,¹⁷⁶ and when he asserted that by taking the witness stand they volunteered their services for the discovery of the truth,¹⁷⁷ it became evident that a concerted manoeuvre was intended to challenge the committee. The committee was unable to meet this challenge, and was helpless when the same witnesses indulged in lengthy propaganda speeches against republican government and institutions. In Germany the institution of contempt of court is as unknown as it is in France.¹⁷⁸ Some of the most elementary rights of the tribunals to maintain order are scattered throughout various laws. As none of them is contained in the Code of Penal Procedure, to which alone Article 34 of the constitution referred, the chairman of the committee could only protest in vain against the witnesses who proceeded "according to plan." After the first hearing of Hindenburg and Ludendorff, the committee suspended its sessions for several months, although the evidence was by no means complete. It then decided to refrain from obtaining oral testimony because it had no other means of preventing the transformation of the committee's investigation into what its chairman, after the experience with the Kaiser's generals, called a "political debating club."¹⁷⁹ Weber had expected¹⁸⁰ that the parliamentary right of inquiry would terminate a situation in which the members of parliament very often could obtain only cynical and arrogant answers from acting government officials. A few months after the enactment of the new constitution, a parliamentary committee to which insufficient powers had been given was helpless

¹⁷⁶ Article 55 of the Code permits a witness to refuse to give testimony which could cause his criminal prosecution or that of his close relatives.

¹⁷⁷ *Berichte*, supra, note 175, vol. 2, 696-7. The opinion of the witnesses was shared by Hachenburg, *Juristische Rundschau*, in 24 *Deutsche Juristen Zeitung* 987 (1919); Ötger, *Untersuchung durch einen Reichstagsausschuss während schwebenden Strafverfahrens*, 91 *Der Gerichtssaal* 433 (1925); Kaufmann, supra, note 169, at p. 29, and Kahl, supra, note 174, at p. 1 et seq.

¹⁷⁸ This was considered by a German student of Congressional investigation as the most serious handicap for the inquiries organized by the parliaments of Republican Germany. See Böhmert, *Die Straf- und Zwangsbefugnisse der nordamerikanischen gesetzgebenden Versammlungen und ihrer Untersuchungsausschüsse* 4 (1927). On the significant difference which prevails in common law and in civil law countries in regard to contempt powers in general, see Pekelis, *Legal Techniques and Political Ideologies, A Comparative Study*, 41 *Mich. L. Rev.* 665 (1943), Pekelis, *Administrative Discretion and the Rule of Law*, 10 *Social Research* 33 (1943), and Krassa, *Interaction of Common Law and Latin Law: Enforcement of Specific Performance in Louisiana and Quebec*, 21 *Canadian Bar Rev.* 337 (1943).

¹⁷⁹ See 2 *Verhandlungen*, etc. 699, 700, 701, 705, 714, 759; and *Vossische Zeitung*, November 18, 1919.

¹⁸⁰ Supra, note 151, at p. 58.

against the provocative behavior of the military and political leaders of a defunct regime.

During one of the sessions the former secretary of state, Helfferich, refused to answer a relatively unimportant question asked him by one of the committee members, Representative Cohn of the Independent Socialist Party. Mr. Helfferich motivated his refusal by the fact that Mr. Cohn had repeatedly declared that he looked upon the witness as a defendant. Moreover, Mr. Helfferich asserted that had this been a court proceeding, he would consider Mr. Cohn disqualified as a judge because of his political activities. Applying Article 69 (now Article 70)¹⁸¹ of the Code of Penal Procedure, the committee assessed a fine of 300 semi-inflated marks. The same witness later persisted in his attitude, specifying that he would answer every question of the chairman, but none put by Mr. Cohn. The committee assessed the fine for a second time, but subsequently had to cancel it because Article 70-IV of the Code prohibits repeated assessments of fines.¹⁸² However, even when the committee turned to the courts for the collection of the first fine, the higher courts sustained the witness's contention that the decree assessing the fine was illegal and hence could not be served nor the fine collected.¹⁸³ It is true that the behavior, outrageously disorderly, of the witness Helfferich during the incident would have been reason enough for several punishments for contempt, if only the committee had had any contempt power.

¹⁸¹ Article 51 provides, as to the witness who does not appear, a fine (ranging, before 1924, from 1 to 300 marks, since then, from 1 to 1,000 RM), or in case of non-payment, imprisonment up to six weeks. The witness can also be apprehended in order to secure his appearance. Article 70 provides, as to the witness who refuses to testify, a fine of equal amount, or imprisonment up to six months.

¹⁸² See 1 Verhandlungen, etc. 590-600, 670-673, 693-4; and Vossische Zeitung, November 15, 1919.

¹⁸³ See Kammergericht Zivil Senat 1 A, March 19, 1920, 40 Rechtsprechung der Oberlandesgerichte auf dem Gebiet des Zivilrechts 172 (1920); Vossische Zeitung, December 23, 1919, and February 8, 1920. It seemed actually doubtful whether the committee had rightfully applied Article 70. This provision is a weapon against the witness who refuses to contribute to the discovery of the truth; Helfferich had not refused to answer any question which the chairman would put to him. The whole situation, and even the various court decisions, were extremely involved. See also Heck, *supra*, note 152, at p. 70, and Siehr, *Zur Frage der Zeugnisverweigerung vor dem Untersuchungsausschuss*, 6 Deutsche Strafrechtszeitung 373-75 (1919). Binding, in *Leipziger Neuste Nachrichten*, January 6, 1920, and Kaufmann, *supra*, note 169, at p. 31, thought that the application of Article 70 by a parliamentary committee would never be "appropriate" in the sense of Article 34 of the constitution. If this suggestion, refuted by Hatschek, *supra*, note 132, at p. 700, had been followed, the inquiry committees would have been deprived of any effective means of furthering the discovery of the truth. This argumentation shows not only to what interpretation the vague wording of Article 34 easily lent itself, but, more important, that attempts to deny investigating powers to the parliament did not cease with the enactment of the republican constitution. Messrs. Binding and Kaufmann taught, respectively, penal and constitutional law at the leading German universities of Leipzig and Berlin.

In spite of this early setback, the investigating powers over witnesses granted by the constitution to the inquiry committees did not always prove equally unsuccessful for the discovery of the truth. In general the sharp antagonisms and the great number of parties under the Weimar Republic made for a painstaking investigation at least of those facts which in the opinion of one committee member could be detrimental to his political adversary.¹⁸⁴

That the committees had no contempt power to punish witnesses for disorderly behavior was authoritatively stated after many more controversies had arisen.¹⁸⁵ This situation frequently led to conflicts between committees and witnesses hardly reconcilable with the dignity of parliament.¹⁸⁶ But no statute was ever enacted to supplement the insufficient powers of parliament, the only bill introduced in the Reichstag dealing with the right of inquiry aimed at a substantial curtailment, not enlargement, of the committees' powers.¹⁸⁷

On the other hand, it was no longer denied that under Articles 51 and 70 of the Code of Penal Procedure the committees had the right to demand punishment of witnesses who failed to appear or refused to testify. To obtain such punishment, the committees still had to apply to the courts, but since courts and prosecuting authorities were now deemed obliged to comply with their requests,¹⁸⁸ no further difficulties seem to have arisen. It appears, however, that in not a single case was the imprisonment of recalcitrant witnesses resorted to, although the law would have entitled the committees to use this means of coercion.

¹⁸⁴ Characteristically enough, in those German states where the antagonisms between extremist parties developed earliest, the parliamentary inquiry was most frequently sought in order to compromise the political adversary. (See, for Thuringia, Köllreutter, *Parlament und Verwaltung*, 31 *Deutsche Juristen Zeitung* 257 (1926)). The esprit de corps among parliamentarians which very often prevailed in France—perhaps with the exception of the extreme left—did not develop in the short-lived German Republic.

¹⁸⁵ See the Gutachtliche Äusserung [by the Minister of the Interior and the Minister of Justice] über die Zwangs- und Strafbefugnisse der parlamentarischen Untersuchungsausschüsse. *Verhandlungen des Reichstags. III. Wahlperiode (1924) Anlage zu den Stenographischen Berichten No. 2690, p. 2.* The argument was still that Article 34 of the constitution did not mention the statute containing the contempt powers. Heck, *supra*, note 152, had rightly maintained that the "appropriate" application of the Code of Penal Procedure included the application of the supplementary provisions of a statute which was only technically different. The authoritative interpretation decided otherwise.

¹⁸⁶ See Hachenburg, *Juristische Rundschau*, 31 *Deutsche Juristen Zeitung* 498 (1926). While no punishment of contumacious witnesses was possible, the police power of parliament was once used to expel a member of the committee from the sitting. See *Drucksachen des Preussischen Landtags No. 58, Sp. 80* (1925).

¹⁸⁷ See *infra*, note 290.

¹⁸⁸ See the Gutachtliche Äusserung, *supra*, note 185, and, similarly, Lucas, *Die Strafgewalt parlamentarischer Untersuchungsausschüsse*, 2 *Juristische Rundschau* 336 et seq. (1926); Anschütz, *Die Verfassung des Deutschen Reichs vom 11 August 1919* 139 (1926).

Whereas the Code of Penal Procedure prescribes the compulsory oath for witnesses to be taken before testimony is given, the parliamentary committees very often refrained completely from imposing the oath, or at least deferred it until after the completion of testimony.¹⁸⁹ In certain investigations of the Prussian parliament, it became even the general practice to forego the oath.¹⁹⁰ The hesitation at imposing the oath usually originated in the scruple to have the oath taken by a witness who could, possibly on the same facts, be the defendant in criminal proceedings. There also prevailed an uncertainty as to whether a witness threatened by criminal prosecution could refuse to answer altogether.¹⁹¹

The largely varying practices resulting from such a situation were certainly not favorable to an effective discovery of the truth. While one investigating committee decided that the witness could not refuse to answer any question, its chairman spoke out, saying that he considered such a procedure "torture."¹⁹² A member of another committee declared that failure to have witnesses swear to their statements meant that the committee would be confronted with the "most terrible lies."¹⁹³ One might wonder whether the very numerous committees which almost never imposed the oath did not have to reckon with the untruthfulness of testimony.

Repeatedly it was maintained that a law laying down uniform and precise rules for the extent of investigating powers should be enacted,¹⁹⁴ but the proposals never reached even the state of a bill.¹⁹⁵

¹⁸⁹ See, for a discussion of the questions involved, the debate in the session of February 3, 1925, on the so-called Staatsbankausschuss. 1 Drucksachen des Preuss. Landtags, 2 Wahlperiode 1925 No. 319, 434; and session of May 7, 1925, 2 *ibid.* No. 580, 1379-81.

¹⁹⁰ See, e.g., the investigation into the so-called Vehm murders, 9 *ibid.* No. 3345, 880.

¹⁹¹ That there was a duty to testify in such cases was maintained by Rosenberg, *Parlamentarische und gerichtliche Untersuchungen*, 30 *Deutsche Juristen Zeitung* 637 (1925); the opposite conclusion was drawn by Warmuth, *Staatsgerichtshof und parlamentarischer Untersuchungsausschuss* 35 (1929); Lammers, *supra*, note 129, at p. 471; Hatschek, *supra*, note 132, at p. 703; Finger, *supra*, note 169, at p. 262. For similar difficulties arising in France, see *supra* at notes 87 and 88.

¹⁹² 2 Drucksachen des Preuss. Landtags, 2 Wahlperiode 1925, No. 580, 1379; No. 580, pp. 3-1531. Against the decision of the committee also Herz, *Auskunftspersonen vor den Untersuchungsausschüssen*, *Vossische Zeitung*, March 18, 1926.

¹⁹³ See Leidig, 34-2 J. T. 131.

¹⁹⁴ See Heck, *supra*, note 152, at p. 83; Jacobi, 34-2 J.T. 97 (1926). The dangers arising from the formlessness of the proceedings before the committees for the discovery of the truth are depicted by Chrzescinski, *Untersuchungsausschüsse*, 30 *Deutsche Juristen Zeitung* 1078 (1925).

¹⁹⁵ In view of the foregoing, the unsubstantiated statement made by Blachly-Oatman, *The Government and Administration of Germany* 633 (1928), that the German committees had rather broad inquisitorial powers and that witnesses were "not so thoroughly immune from effective inquisition as is sometimes the case in the United States," appears erroneous.

The limits of every investigative power in a political situation like that prevailing in the Weimar Republic were demonstrated by the behavior of some witnesses during the investigation into the so-called Vehm murders. They declared before the committee that they would not hesitate to swear to a false statement before a despised parliamentary institution if that was necessary for the weal of their organizations—the right-wing conspiratorial clubs to which they had avowed loyalty.¹⁹⁶

II. SEARCH, SEIZURE, AND ARREST

Sometimes the uncovering of particularly elusive information might not be possible by the hearing of witnesses alone. In cases where the courts would resort to seizure, search, or arrest for the securing of evidence, are parliamentary commissions entitled to use similar means? In both France and Germany this question was of particularly great importance because no general contempt powers could be exercised to "send for papers."

In *France*, search and seizure have been practiced by two of the committees characterized above as having been born out of an emergency situation.¹⁹⁷ The committee of the Chamber of Deputies which investigated the activities of Charles X's ministers obtained, not without difficulty, all the rights of which the *juge d'instruction*¹⁹⁸ was possessed. The majority of the deputies voted for the granting of such powers because the committee had to fulfill a special task very similar to that of the *juge d'instruction*: its investigations were destined to prepare the accusation of the ministers to be judged by the upper house.¹⁹⁹ In its report, the committee related the rather modest use it had made of the rights obtained by it.²⁰⁰ Somewhat freer use of the right to seize papers and search for evidence was made by the committee of the Constituent Assembly investigating the insurrection of June, 1848. It is true that the

¹⁹⁶ The episode is related by Schetter, 34.2 J.T. 140 (1926). Since the Weimar Constitution had constituted the investigating committees "authorities" (see Anschütz, *supra*, note 188, at p. 139) the witnesses faced indictment for perjury. But under the aspect of truth discovery, it was decisive that the witnesses were not deterred by such a possibility. They either relied on the usually favorable bias of the courts toward defendants belonging to right-wing organizations, or were willing to take the risk of their loyalty to groups hostile to the existing state. For the problem of conflicting loyalties in the modern state, see Barker, *Reflections on Government* 22 (1942).

¹⁹⁷ See above, at notes 18 and 19.

¹⁹⁸ The functions of the *juge d'instruction* correspond, in this stage of criminal proceedings, by and large, to those of the district attorney in the United States.

¹⁹⁹ Article 55 of the Constitutional Charter, Session of August 20, 1830, *Moniteur Universel* 937 (1830).

²⁰⁰ Session of September 23, 1830, *ibid.* 1147 et seq.

committee, in order to obtain such evidence, had coöpted a judge charged to execute the necessary measures.²⁰¹

Besides these two extraordinary inquiries, in only one case did a parliamentary committee order the seizure of evidence. When the first Panama Committee wished to examine twenty-six checks which the courts had refused to seize, the committee induced the police to proceed with an administrative seizure provided for by Article 10 of the Code of Criminal Procedure.²⁰² Such a situation, however, did not repeat itself. Not only was the legality of the granting of these competences denied by writers on constitutional law,²⁰³ but whenever a request was made to secure to a committee all investigating powers necessary for the discovery of the truth, it was decried as the most dangerous infringement of separation of powers as well as of the liberty of the citizen.²⁰⁴ To defeat the bill proposed by the Chamber in 1914 to include such rights, a Senator asserted that the enactment of this law would bring back the worst days of French history and would threaten the security and freedom of every citizen.²⁰⁵ No better fate was reserved to later attempts which were made to supplement the statute of 1914 by granting these rights.²⁰⁶ During one of these discussions, a deputy showed how fallacious it was to invoke Montesquieu constantly: he, who had always declared that virtue is of the first importance in a state, could not be appealed to for support by those who wanted to deny the necessary powers for the uncovering of public scandals.²⁰⁷

²⁰¹ Session of August 3, 1848, 2 *Compte Rendu des Séances de l'Assemblée Nationale* 844; and August 25, 1848, 3 *ibid.* 467. For a letter of the attorney general on this occasion, see Pierre, *Traité de droit politique, électoral et parlementaire* 706 (5th ed. 1919).

²⁰² See Pierre, *supra*, note 201, at p. 706.

²⁰³ See Michon, *supra*, note 162, at p. 61, who speaks of "monstrous" rights. Similarly Arnitz, *supra*, note 170, at p. 150; Coustis de la Rivière, *Les Commissions parlementaires d'enquête et la séparation des pouvoirs* 91 (1926). Even Bonnard, *Les Pouvoirs judiciaires des commissions d'enquête parlementaire et la loi du 23 mars 1914*, 31 *Revue du Droit Public* 386, at p. 407 (1914), who, differing with Coustis de la Rivière, considered the statute of 1914 acceptable, thought that an enlargement of the powers of investigation beyond that statute would be unconstitutional because of violation of the separation of powers.

²⁰⁴ See, e.g., for the first Panama inquiry, the sessions of December 5 and 15, 1892, *J. O. Débats Ch.* 1753 and 1817 (1892); for the first Rochette inquiry, the session of July 11, 1910, *ibid.* 2499 (1910).

²⁰⁵ Session of March 20, 1914, *J. O. Débats Sén.* 448 (1914).

²⁰⁶ The Socialist Renaudel remarked during the inquiry into the Oustric scandal that the statute of 1914 was not sufficient to shed the necessary light on the facts investigated. The right-wing politician Mandel then proposed to put the case before the Chamber. See *Le Temps*, January 7, 1931.

²⁰⁷ See Lagrange, in the session of February 16, 1934, *J. O. Débats Ch.* 495 (1934).

In *Germany* it was extremely controversial whether the application of the provisions of the Code of Penal Procedure to parliamentary inquiry included such rights as search, seizure, and arrest.²⁰⁸ From the wording of Article 34 of the constitution one would have gathered rather that it was originally intended to grant these competences. Otherwise, the explicit provision that the secrecy of mail, telegraph, and telephone services remain inviolate would have been unnecessary. The controversies about the correct interpretation of Article 34, however, remained altogether on a purely theoretical plane. The inquiry committees in Germany never resorted to search and seizure, and the issue thus was never raised.²⁰⁹ The committee on the war guilt question had published an appeal to deliver all papers, records, and documents which could be of interest for the questions investigated.²¹⁰ It had refrained from indicating the powers it would use to take possession of such evidence, and actually never used any.

There are numerous parliamentary precedents which show that at all times *Congressional* committees searched for evidence in books, records, and files by the issuance of a subpoena duces tecum.²¹¹ It has never been doubted that Congress or its committees had the right to do so. It was also settled relatively early that no secrecy of telegraphic and mail communications prevailed against the desire to discover the truth, and this even if state law made telegraphic messages confidential. In 1876-77 an investigation into election practices in the Southern states caused the sergeant-at-arms to arrest the manager of the Western Union Telegraph Company in New Orleans and keep him in custody until he agreed to produce all telegrams sent or received by eight individuals during a certain period.²¹²

The only controversial question in regard to documentary evidence was the extent to which the designation of desired documents had to be precise. Congress and its committees never saw a necessity to be specific where they had no knowledge of the peculiar nature of the papers held by

²⁰⁸ The question was answered in the affirmative by Hatschek, *supra*, note 132, at p. 697. Poetzsch-Heffter, *supra*, note 164, at p. 183, would grant the right to seize and search, but not to arrest. Against the granting of arrest as well as seizure and search, Lammers, *supra*, note 129, at p. 472; Anschütz, *supra*, note 188, at p. 141; Alsberg, 34.1 J. T. 342.

²⁰⁹ See Alsberg, 34.1 J. T. 342.

²¹⁰ See Heck, *supra*, note 152, at p. 64.

²¹¹ To treat the subpoena duces tecum together with search and seizure is justified by the fact that in France and Germany the effect obtained by the common law subpoena could often be realized only by search and seizure.

²¹² See 44th Cong. 2d sess., Record 325, 328-330, 352, 358.

a witness.²¹³ When, on one occasion, the wholesale demand of a committee for "papers," especially telegrams, was denounced, a member of the investigating committee replied, "The reason why we had to go pretty broadly in our selection was that the corrupt rascals engaged in this nefarious business used all manner of feigned names. . . . Every government on earth has always held for itself the right to examine papers for its own protection."²¹⁴ Nor did the House consider itself bound by rules which apply in the courts between parties litigant as to the production of private papers, their pertinency and relevancy. "To maintain that . . . would so hamper the power of investigation which this House possesses with reference to matters of public concernment as to render it almost nugatory."²¹⁵

It had always been at least the prevailing opinion in Congress that the Fourth Amendment, preserving the citizen against unreasonable searches and seizures, did not protect against even the most broadly worded request of Congress for papers and records.²¹⁶ The issue was raised once more in recent times during one of the investigations into lobbying activities. A senator approved of certain subpoenas which had demanded production of all telegrams sent during a certain period "relating to the so-called holding company bill"; he objected only to those which flatly demanded all telegrams "relative to the subject matter under consideration," e.g., lobbying. But even on this point, the senator was rebuked by Senator Norris, who, nevertheless, has always stood for the defense of the rights of the citizen: "Where the Fourth Amendment is raised as an objection, ought we not, while not nullifying the amendment, consider it in the light of the fact that if we are very strict in our construction, the Fourth Amendment might be used as an absolute barrier to the production of evidence which every honest man would concede ought to be produced and thus be used as a yoke instead of a protection to the innocent? It might become the instrument of great injustice instead of protecting the innocent."²¹⁷

The attitude of the courts towards the constant Congressional practice has never been clearly proclaimed. In the case of an inquiry conducted by

²¹³ See 24th Cong. 1st Sess. House. Rep. No. 193, p. 2.

²¹⁴ 40th Congr. 2d sess. Globe, 2580-1.

²¹⁵ 44th Cong. 2d sess. Record 328. *Ibid.*: "The papers are required to be stated or specified with only that degree of certainty which is practicable. . . ."

²¹⁶ See, e.g., 44th Cong. 1st sess. Record 2008-2019. For a general appraisal of Congressional practice in this respect, see Eberling, *Congressional Investigations* 286-7 (1928). Cf. also *ibid.*, the interesting letter by Senator Walsh.

²¹⁷ 74th Cong. 2d sess. Record 4089-94.

the Interstate Commerce Commission (whose investigative powers had at times been more carefully watched by the Supreme Court than those of Congressional committees), the application of narrow rules requiring a "strict correspondence . . . between allegation and proof" was rejected.²¹⁸ On the other hand, a dictum took the view that the Fourth Amendment does apply in such investigations, and that some "particularity" is demanded.²¹⁹ More recently a subpoena ordering from the Western Union Company all telegrams received or sent by a law firm during a period of ten months was held unlawful as interfering with the Fourth Amendment.²²⁰ It is doubtful whether this view would be upheld by the Supreme Court of the United States.²²¹ It is likely that, in analogy to what has been held in regard to testimonial evidence, no search for evidence will be deemed "unreasonable" wherever an investigating committee has jurisdiction.²²² One of the most recent cases deciding the issue of Congressional investigation shows clearly that the Supreme Court leaves unchallenged most "inquisitorial" methods of search undertaken by Congressional committees.²²³

III. EVIDENCE FROM ADMINISTRATORS AND OFFICIAL FILES

The right to hear as witnesses not only private persons but administrative agents as well has always been claimed by the *French* parliament.²²⁴ For in the majority of cases control over the executive, one of the main goals of political inquiry, can be exercised most efficiently by gathering the facts from the administrators themselves.

Eminent constitutional writers have maintained in theory that the duty of every civil servant to appear and testify to the best of his knowl-

²¹⁸ *Interstate Commerce Commission v. Baird*, 194 U.S. 25, 44 (1904).

²¹⁹ *Hale v. Henkel*, 201 U.S. 43, 76, 77 (1906).

²²⁰ *Strawn v. Western Union Telegraph Co.*, D.C. Sup. Ct., unreported, see 3 U.S. Law Week 646 (1936); *New York Times*, March 12, 1936, 1:4.

²²¹ For a sound criticism of the decision, see 36 Col. L. Rev. 841 (1936).

²²² See Dimock, *Congressional Investigating Committees* 154 (1929).

²²³ *Jurney v. MacCracken*, 294 U.S. 125, 144 (1935); see *supra* at note 35. The committee obtained evidence for its investigation as well as for the contempt proceeding against the witness by the aid of inspectors of the Post Office Department, who searched through waste and pasted together the bits of documents which had been torn to pieces by the client of the witness. (See Sen. Doc. No. 162, 73d Cong. 2d sess., 106-116).

²²⁴ See, e.g., the report of the Panama Committee, J. O. Doc. Ch. 42 (1893): "The parliamentary committee is a delegation of the Chamber and it has always been recognized that it was the duty of parliament to control the activities of the executive. While exercising those functions, we have the right to put questions to you" (a high judicial official).

edge before the committees resulted from the general relationship between the executive and the supervising parliament.²²⁵

But since the days of the July Monarchy, the government has demanded the right to determine procedure in the hearings of officials before parliamentary committees. The committee which in 1842 attempted to investigate the illegal influence exerted by the administration upon certain electors at the polls informed various departments that it had decided to hear several civil servants as witnesses. The Minister of the Interior protested against such a decision in the name of separation of powers: the constitution had vested only the king with executive power. While he, the minister, was willing to provide the committee with all information concerning the activities of the administration, he would never permit his subordinates to enter into direct contact with the parliament. Eventually a compromise solution was reached: the minister himself presented the administrators to the committee. "[T]herewith] the principle of the separation of powers and of responsibility will be observed. . . . My presence will serve to mark the limits of the two powers."²²⁶

Although it is not easy to understand what constitutional bearing the presence of the Minister could possibly have had,²²⁷ the compromise reached in 1842 determined the relations between investigating committees and administration for almost a century to come.²²⁸ Not that the minister was present at every hearing. But it was a settled rule that the committee never established direct contact with the administrators; where they tried to do so, strong protests were raised.²²⁹ The government, by circular letter or by individual instruction, directed the officials as to what to say and what not to say.²³⁰ According to the orders they had received, the wit-

²²⁵ See, e.g., 4 Duguit, *Traité de droit constitutionnel* 396 (1924); and Manuel de droit constitutionnel 457 (1918).

²²⁶ See *Moniteur Universel Supplément* to No. 117 (1843), April 27, 1843, II-III.

²²⁷ See also Arnitz, *supra*, note 170 at p. 69.

²²⁸ A different procedure was adopted only in those emergency situations where extraordinary powers had been granted the committees. See *supra*, notes 18-21. The Committee of 1848 had been granted the right to enter all government offices freely (see Michon, *supra*, note 162, at p. 134). The committee investigating war supplies in 1871 obtained without delay all official information and documents which it deemed necessary. See sessions of April 7, 1871, J. O. 446 (1871) and March 4, 1872, *ibid.* 1565 (1872).

²²⁹ See, e.g., the letter quoted by Pierre, *supra*, note 201, at p. 697, addressed on January 19, 1888, by the Minister of the Interior in the name of the "good functioning of the administration" to a committee which had invited various officials to testify.

²³⁰ For a curious and typical circular of the Minister of Justice in 1878, see *ibid.* 695: "Of course the judiciary is interested in furthering the investigation . . . but . . . it also has special duties of discretion and reserve. . . ." For other circulars, see e.g., J. O. 3-4, 51-52, 67 (1878).

nesses sometimes took the oath, sometimes refused. Under oath they not infrequently declared themselves unable to go beyond a certain point in their testimony.²³¹ On other occasions, a public official stated that although the government had authorized him to testify freely, his own conception of professional secrecy forbade him to lift the veil from administrative or judicial activities.²³²

The parliamentary committees usually did not insist in such cases.²³³ Certainly it would have been possible to set the mechanism of ministerial responsibility into motion against the government. But it then became a question of political expediency whether it was advisable to overthrow a government because it had not authorized a sub-prefect or an attorney general to make a certain statement. There were, finally, some investigations for which the civil servants obtained full authorization to testify without restraint.²³⁴

While Congress, in its investigations of the executive branch of government, had to reckon with some of the difficulties which the French parliament tried vainly to overcome, its record is on the whole far more successful. As early as 1792, three years after the Constitution went into effect, the acting secretaries of the Treasury and War appeared before a Congressional committee inquiring into the causes of General St. Clair's expedition.²³⁵ In 1818, the objection that an inquiry by the House into the conduct of clerks in the executive department would be an infringement upon the executive's power was disregarded.²³⁶ In 1834 a committee report assumed for Congress as the "great inquest of the Nation . . . power to inspect all departments of the Federal Government."²³⁷ While it was the rule to address the head of the department, this was by no means always observed. In the many instances in which Congress directly

²³¹ See the minutes of several committees related by Pierre, *supra*, note 201, at p. p696-7, and *Supplément* 816 (1924).

²³² An example is offered by the behavior of Attorney General Fabre in the first Rochette investigation. See *supra*, at note 44.

²³³ See, e.g., the way in which the second Panama inquiry finally gave up the attempt to hear the gravely compromised Attorney General Quesnay de Beaupaire, who had refused to testify, after lengthy animadversions against the committee's alleged violation of the separation of powers. J. O. Doc. Ch. 41-42 (1898).

²³⁴ See, e.g., for the investigation concerning the events of February 6, 1934, 1 *Rapport Général fait au nom de la commission d'enquête chargée de rechercher les causes et les origines des événements du 6 février 1934*. Annexes, No. 3383, p. 1345.

²³⁵ 3 *Annals of Congress* (2d Cong.) 490, 1106.

²³⁶ 3 *Hinds' Precedents* 85 (1907).

²³⁷ *Ibid.* 92.

addressed another official, such as the military in the field, for instance, no objection was raised on the part of the principals.²³⁸

The most marked differences between the situation prevailing in France and that in the United States are to be found in the incomparably greater number of investigations in this country calling for the appearance of government officials, and in the very sweeping character of some of these investigations, which sometimes called for scrutiny of the entire activities of one or several departments.²³⁹ Almost all the resolutions ordering such investigations granted the power to send for persons and papers. Numerous subpoenas were issued to government officials in each instance.²⁴⁰

As compared with the great number of these investigations, the conflicts which have arisen between executive and Congress have been relatively infrequent—and have become more and more so²⁴¹—however violent the disputes might have been at times. From President Jackson's refusal in 1837 to direct government officials to furnish certain information (he swore to resist the requests made by Congress as he would resist "the establishment of a Spanish inquisition")²⁴² to President Coolidge's opposition in 1924 to the methods employed by the Senate investigating the Bureau of Internal Revenue (he entered a "solemn protest" against what he called "a government of lawlessness"),²⁴³ the struggle centered around the perennial issue of parliamentary control versus administrative efficiency. Very often when the government was reluctant to yield to Congressional demands, it gave as a reason for its attitude the necessity of

²³⁸ See, e.g., the cases related *ibid.* 189, 199.

²³⁹ The wide range of Congressional activity in this respect is demonstrated by the enumeration given by Eberling, *supra*, note 216, at p. 270-272 and by Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 *Harv. L. Rev.* 153, at 184-192, 207 (1926). The question whether the frequency of such investigations is always an advantage or is in part due to certain shortcomings of the American constitutional system (see Galloway, *The Investigative Function of Congress*, 21 *Am. Pol. Sci. Rev.* 50, at 60 (1927)) cannot be adequately dealt with here. See, however, *infra*, at notes 304 et seq.

²⁴⁰ See 6 *Cannon's Precedents* 596 (1935), and Eberling, *supra*, note 216, at p. 271.

²⁴¹ During the period covered by McGarry, *The Development of Congressional Investigative Power* (1940)—the ten years from the 71st to the 75th Congress—in the course of 146 investigations not one executive officer refused to submit information to an investigating committee. *Ibid.* 103, fn. 20.

²⁴² 24th Cong. 2d sess. *Debates Vol. XIII*, Appendix 202. Other parts of Jackson's explanation are very similar to the statement of the French Minister of Justice reported above at note 230: "I shall on the one hand cause every facility consistent with law and justice to be given at the investigation of specific charges; and, on the other, shall repudiate all attempts to invade the just rights of the executive departments and of the individuals composing the same."

²⁴³ 68th Cong. 1st sess. *Record*, 6087.

upholding the separation of powers.²⁴⁴ Congress usually scolded the executive department for its refusal to comply with the requests of its investigating committees in strong terms; sometimes proposals were brought forward to have a government official arrested;²⁴⁵ but when the executive department chose to cling to its position, no action was taken by either House.²⁴⁶

When the law of 1914 had been enacted in *France*, it was generally held that it could be used also to enforce the complete testimony of civil servants.²⁴⁷ As a matter of fact, the wording of the new law was broad enough to include all groups of witnesses: it had indeed been enacted especially to break down the reluctance of two high officials. But even when it was being discussed by the Senate, and one senator expressed concern about the possible encroachment of parliamentary inquiry upon the realm of administration, his fears were appeased with the remark that the new statute would by no means interfere with professional secrecy.²⁴⁸ Actually the few committees to whom the rights of the law of 1914 were granted never used them against officials.²⁴⁹

Whenever possible, the government tried to prevent an investigation which could involve too close an examination of administrative acts.²⁵⁰

²⁴⁴ See, e.g., President Buchanan, 36th Cong. 1st sess., *Globe*, 1435, and President Coolidge on the occasion mentioned in note 243. For a criticism of Coolidge's arguments, see Jenks, *The Control of Administration by Congress*, 2 *Am. Rev.* 601 (1924): "The theory of the legislative, judicial and executive functions springs unfledged from his [Coolidge's] own creative intellect." On the other hand, it has rightly been asserted by constitutional writers that frequent and thorough investigations into the executive departments were necessary just because of the relatively rigid separations of function under the American system. See Rogers, *The American Senate 191-213* (1926), and Galloway, *Investigation, Governmental*, 8 *Encyc. Soc. Sci.* 256 (1937).

²⁴⁵ For an incident occurring in 1860, see 3 *Hinds' Precedents* 24 (1907).

²⁴⁶ One of the most striking examples is offered by the conflict between President Jackson and the House. Before abandoning its requests, the House had maintained that "the right to investigate abuses without full powers to procure information and evidence would present the anomaly of the existence of a right without means of enforcing it." See *ibid.* 183; for another instance, see *ibid.* 191.

²⁴⁷ Bonnard, *supra*, note 203, at p. 403, and Coustis de la Rivière, *supra*, note 203, at p. 37, 43.

²⁴⁸ See session of March 20, 1914, *J. O. Débats Sén.* 450 (1914).

²⁴⁹ Joseph-Barthélémy and Duez, *Traité de droit constitutionnel* 550 (1933), explain that generally only the discretion of the minister decides whether or not a civil servant testifies before a committee (and whether or not administrative files are communicated); the authors maintain, however, that this situation changes when the competences of the 1914 statute are granted an investigation. In practice such a difference did not exist in regard to civil servants. Characteristically enough, the authors are not able to point to a single precedent which would support their thesis.

²⁵⁰ Very typical was the discussion in the session of December 14, 1916, *J. O. Débats Ch.* 3665 (1916). The Minister of Finance most urgently recommended that no inquiry be started

When an inquiry was unavoidable, the government continued to direct its officials in their declarations before the parliamentary committees, even when it authorized them to testify.

A contrasting attitude was taken on several occasions by high officials in the *United States* when they themselves requested an investigation by the House.²⁵¹

As to the transmission of administrative files to the investigating committees, the situation in *France* was similar to that prevailing for the hearing of officials. Only by invoking ministerial responsibility could a reluctant government be forced to make the records available. Very often the committees had to complain of that "admirable solidarity of the ministries that induces the non-delivery of documents which are almost always believed to be secret and confidential."²⁵²

What in the French Republic seems to have been the rule is certainly the exception in the *United States*. In 1886 the Senate Committee on the Judiciary could state that "after a somewhat careful research . . . there is scarcely in the history of this Government until now any instance of a refusal by a head of a department, or even of the President himself, to communicate official facts and information as distinguished from private and unofficial papers."²⁵³ In one of the instances in which a subpoena duces tecum had been issued in order to obtain official records from the State of Louisiana, reluctant state officials were held in the custody of the sergeant-at-arms for a month.²⁵⁴ What has been noted for the appearance of government officials holds true as well for official documents: in relatively few instances did conflicts that arose end in the failure of the Senate or House to obtain the requested information.²⁵⁵ It can therefore

which would gather evidence from public officials and documents for the purpose of cutting down on spending not essential for the war. In this case the government was overruled. But one of the deputies of the vanquished minority cried out in indignation, "You have reestablished the Convention!" To such an extent did it seem revolutionary to subject the government to a closer-than-usual scrutiny.

²⁵¹ See, e.g., the request made in 1800 by the Secretary of the Treasury (6th Cong. 2d sess., *Annals* 786-8; by President Monroe in 1825 (18th Cong. 2d sess., *Debates* 170); in 1826 by Vice-President Calhoun (19th Cong. 2d sess., *Debates* 574, 576). Other, similar cases are mentioned by Galloway, *supra*, note 244, at p. 256. In more recent times, it is true, such requests for investigation have not been frequent.

²⁵² J. O. Documents Ch. 557 (1931).

²⁵³ 49th Cong. 1st sess. Record 1585, et seq. For an impressive list of precedents on the right to demand papers in the executive files, see 52d Cong. 2d sess., 7 Senate Misc. Doc. 366.

²⁵⁴ 44th Cong. 2d sess. Record 668, 2143.

²⁵⁵ See, for instance, the conflict between President Coolidge and the Senate, mentioned above at note 243. While there is no instance in recent times where documentary evidence from official files was withheld from Congressional investigations (see above at note 241),

be said that the situation was almost the reverse of that in France. While there official documents "almost always" were believed secret and confidential, here they are almost always communicated to the Congressional investigating committees.

The practices prevailing in *France* undoubtedly did essentially hamper the parliamentary effort to get to the true facts. Partly, information concerning administrative deeds was simply lacking. Partly, the facts could not be seen "through parliamentary eyes"—an essential pre-condition of effective parliamentary investigation—but were colored by government and bureaucracy. Even an investigation which could draw upon the maximum rights given by the law to parliamentary inquiries was unable to drive a wedge into the wall behind which officialdom and administrative secrecy hid.

The often-stressed fact that the actual powers in the Third Republic belonged to the "triumphant bureaucracy," and that only seemingly had the center of gravity in the governmental system shifted in the direction of parliament,²⁵⁶ is thus confirmed by the situation in the field of parliamentary investigation.

It has been shown above that during the conflict of 1863-64 in *Prussia* the very question as to what evidence could be gathered by an investigating committee from government officials and documents eventually led to the breakdown of parliamentary inquiry.²⁵⁷ The government reasoned that the right to enter directly into contact with the parliament had always been denied to civil servants.²⁵⁸ While the parliamentary committee declared that "the government should be eager to further the discovery of the truth," the Minister of the Interior saw in the requests of the parliament only a violation of the separation of powers.²⁵⁹ For

McGeary, *supra*, note 241, at p. 103, fn. 20, mentions a few instances where the executive departments refused transmittal of records on a resolution of inquiry—another Congressional technique of gathering information.

²⁵⁶ Very rightly, Franck, *The Forces of Collaboration*, 21 *Foreign Affairs* 44, at p. 45 (1942), remarks that "the high civil bureaucracy had really become a caste, somewhat similar to the Prussian Junkers." See also Sharp, *The French Civil Service. Bureaucracy in Transition* c. 6 et seq. *passim* (1931). Erroneously, R. K. Gooch, *Eugène Pierre*, 41 *Pol. Sci. Q.* 438 (1926), believes in an actual shift of power toward the parliament. For the general problem of the relation between parliament and the executive in post-war Europe, see Loewenstein, *The Balance between Legislative and Executive Power: A Study in Comparative Constitutional Law*, 5 *Univ. Chi. L. Rev.* 582-3 (1938).

²⁵⁷ See *supra*, at notes 140 and 141.

²⁵⁸ See von Rönne, *supra*, note 132, at p. 294.

²⁵⁹ *Haus der Abgeordneten. Session of January 25, 1864. 2 Stenographische Berichte* 938-9.

similar considerations, the government refused also to bring to the knowledge of the committee the official files it had requested.²⁶⁰

In later years, although the parliamentary inquiry was no longer practiced, the Prussian government maintained that any contact between parliamentary commissions and the administration was possibly solely when established by the government itself.²⁶¹ When one of the vain attempts was made to introduce the right of parliamentary inquiry into the constitution of the German Reich, a liberal deputy who opposed the bill stated that it would endanger the authority of the administrative hierarchy if the parliament could address a subordinate directly.²⁶²

With the introduction of Article 34 of the Weimar Constitution, the question arose whether Section 54 should be included among the provisions of the Code of Penal Procedure to be applied to parliamentary commissions. This section provides that where the duty of official secrecy was involved, civil servants could testify only with the authorization of their hierarchical superiors. As it was generally doubtful as to which questions involved official secrecy, practically no government official testified before the courts without the authorization of his principals. According to the code, this authorization could be withheld only when harm to the state could arise from the testimony. However, the decision as to what was to be considered harmful was entirely in the discretion of the administration, and could be challenged only by complaint to those of higher rank.²⁶³

As it was the very aim of political inquiry to secure an efficient control by the parliament over the executive, it should have been regarded as nonsensical to maintain the full extent of official secrecy with the aid of a Code article whose application could hardly be regarded as "appropriate."²⁶⁴ But by the majority of writers, as well as in practice, it was not doubted that a civil servant testifying before a parliamentary investigating committee had to obtain the authorization of his superior.²⁶⁵

²⁶⁰ 1 Bericht der XII Kommission, etc. (see note 138) 10-12.

²⁶¹ See von Bitter, 1 Handwörterbuch der preussischen Verwaltung 939 (1906).

²⁶² Session of June 5, 1868, 1 Stenographische Berichte über die Verhandlungen des Nord-deutschen Bundes 259 (1868).

²⁶³ See Löwe-Rosenberg, Die Strafprozessordnung für das deutsche Reich 165-7 (1925).

²⁶⁴ See Finger, *supra*, note 169, at p. 262. Alsberg, 34.1 J. T. 378-9, rightly points out that strict adherence to the principle of official secrecy would forbid parliamentary inquiry to play the role which the father of the institution, Max Weber, had assigned to it.

²⁶⁵ See Heck, *supra*, note 152, at p. 59; Stier-Somlo, in 6 Handwörterbuch der Rechtswissenschaft 287 (1929); Jacobi, 34.2 J. T. 99; Alsberg, 34.1 J. T. 343. In pre-republican times a writer, though in favor of an effective investigation, had maintained that, even as before the

The inquiry committees which wished to hear a public official had no rightful claim for the granting of an authorization to testify.²⁶⁶ In most cases, however, the authorization was obtained because the parliament was able to resort to ministerial responsibility.²⁶⁷ When compared with the situation in France, the stronger party discipline which prevailed in the German Republic seems to have allowed for a somewhat greater penetration of parliamentary investigations into the realm of administrative secrecy.²⁶⁸

Nevertheless, the way in which the hearing of government officials was practiced in republican Germany left a wide field still untouched by parliamentary investigation. Certain matters, such as all questions pertaining to foreign policy or military life, were simply taboo. The committees usually refrained from even requesting the appearance of officials of the Ministry of Foreign Affairs and the Ministry of Defense. Very often committees and administration alike avoided the introduction of evidence in matters which would have brought the bureaucratic apparatus as such into the limelight of public discussion. In other cases in which the committees wanted to elucidate the facts, authorization to testify was flatly denied; the parliament judged it politically inopportune, however, to fight the issue to the end.²⁶⁹

A certain differentiation in the treatment of departments to be investigated has also been observed in the *United States*. While the Senate addresses the heads of all departments with direct requests for transmittal of papers and records, such requests are "as a matter of courtesy" never extended to the Secretary of State.²⁷⁰ Moreover, it is customary, whenever an investigating committee wants to obtain information from the President or the Secretary of State, to ask for it with the additional clause "if not incompatible with the public interest." This formula, which invites the

courts, a civil servant would usually not testify about matters where official secrecy was involved; such testimony could not be expected during a proceeding such as a parliamentary investigation, where the common interest in truth discovery was not equally strong. See Zweig, *supra*, note 135, at p. 323.

²⁶⁶ This had been explicitly stated before the Prussian Staatsbank-Committee, 6 Drucksachen des Preuss. Landtags. 2 Wahlperiode 1925 Sitzung No. 1222, 2565.

²⁶⁷ See Alsberg, *supra*, note 264, at p. 379, who stresses the fact that in this matter open conflicts such as occurred in France had been avoided in Germany.

²⁶⁸ To this point see, also, Heck, *supra*, note 152, at p. 61.

²⁶⁹ See 9 Drucksachen des Preuss. Landtags. 2 Wahlperiode 1925 No. 3345, 751; and Jacobi, *supra*, note 265, at p. 99.

²⁷⁰ Speaker Spooner, on January 23, 1906. See 3 Hinds' Precedents 198 (1907).

executive to exercise discretion, is usually not observed with other departments.²⁷¹

Even where the authorization was granted in *Germany*, the statement delivered by the testifying officials had previously been discussed with their hierarchical superiors in every detail. Never did the witnesses depart from the instructions given them, even when the committee wished to go beyond that limit. The result was not only that such statements did not always exactly further the discovery of the "truth." Even more important was the fact that by such practices, exactly as in France, parliamentary investigation did not meet the administrative reality face to face. It could never gather the facts at the source, but was always presented with a picture drawn by the central authorities.

It has been suggested that the distinctly sporadic character of parliamentary investigations and the fact that the inquiries never developed into a significant feature of Weimar democracy, reflected the confidence of the parliament in the integrity and efficiency of the executive and judicial branches of government.²⁷² In view of the foregoing, it means, rather, that the bureaucratic traditions of Germany and Prussia had, all through the years of the German Republic, been strong enough to prevent parliamentary investigation from becoming an efficient weapon of legislative control and a sweeping means of fact discovery.

The question of the extent to which the government was obliged to make official files and papers available to the inquiry committees was equally controversial,²⁷³ in spite of the broad wording of the constitutional provisions as to this point. In practice as well, conflicts sometimes arose over the question of official records. While in general the government and the administration complied with the requests of a

²⁷¹ 6 Cannon's Precedents 604 (1935); also 3 Hinds' Precedents 187, 193 (1907). For a situation in which President Hoover refused to communicate documents concerning the London naval treaties because to do so would violate an "invariable practice of nations," see 6 Cannon's Precedents 596. It seems, however, that sometimes the "if not incompatible . . ." form is employed also for other departments. See, e.g., for the Treasury, 6 Cannon's Precedents 584-587. (In one of the cases mentioned, the Secretary's answer was that he did deem the communication incompatible with the public interest.)

²⁷² Morstein-Marx, *supra*, note 152, at p. 1141.

²⁷³ For a discretionary decision of the government concerning the transmission of records, see Lammers, *supra*, note 129, at p. 473; Poetzsch-Heffter, *Handkommentar zur Reichsverfassung* 183-84 (3d ed. 1928). For an unlimited right to require the files: Hatschek, *supra*, note 132, Vol. 1, 698; Anschütz, *supra*, note 189, at p. 140; Heck, *supra*, note 152, at p. 68; Alsborg, 42.1 J. T. 346. Köllreutter, *supra*, note 184 at p. 257, thought that in some states with particularly great political tension, it would be suicidal for the government to give administrative and judicial files into the hands of a party fundamentally hostile to the existing state such as the National Socialists.

parliamentary committee to inspect the files, such requests were sometimes denied.²⁷⁴ When the reform of the parliamentary inquiry was discussed in 1926, a judge, who was also the chairman of important inquiry committees, declared that it was necessary to give the committees greater access to the files.²⁷⁵ A special difficulty arose from the fact that it was not considered a duty of the authorities of the Reich or of the states to comply with requests made by a committee of one of the other German States.²⁷⁶

In the *United States* it has sometimes been regretted that the courts have never passed explicitly on the unsettled question of how far Congress can go in obtaining information from the executive branch of the government.²⁷⁷ Certainly here also the absence of judicial decisions results from the fact that so few conflicts actually arose. While in the case of testimony of private citizens the conflicting interests clashed at least sometimes, differences between the legislature and the executive were settled by the retreat of one of them.

Furthermore the reluctance of either branch of government to bring their dissensions before the judicial department certainly contributed to the reaching of a compromise solution each time a conflict came up. The question might hardly be regarded as a judicable one. The balance between the need for administrative efficiency (which might sometimes require a certain amount of secrecy) and the ardor of parliament to supervise through investigation, will always be unstable. It has to be sought anew with every changing of a variously determined situation.²⁷⁸ From a comparison of the results obtained in the United States on the one hand, and France and Germany on the other, it seems, however, that where the legislature can rely on powerful investigating powers developed by parliamentary precedent, this balance is more easily and more happily established.

Rather often it proved a special handicap for the discovery of the truth that the same facts which were being investigated by a parliamentary committee were also the object of court proceedings. The very

²⁷⁴ See 1 Drucksachen des Preuss. Landtags. 2 Wahlperiode 1925 No. 248, 295.

²⁷⁵ Schetter, 34.2 J. T. 141.

²⁷⁶ See 2 Drucksachen des Preuss. Landtags. 2 Wahlperiode 1925 No. 580, 1383.

²⁷⁷ See Dimock, *supra*, note 222, at p. 27-8. See also McGeary, *supra*, note 241, at p. 102. The wide formula by which the decision in the *McGrain v. Daugherty* case delimited legitimate investigation (see *supra*, text after note 111) includes all investigations into the various branches of the executive departments.

²⁷⁸ For the general problem of investigation into the executive branch, especially of city and state government, see 42 Col. L. R. 1217, et seq. (1942).

nature of political inquiries, dealing very frequently with collusion between the political and financial spheres, explains that the majority of facts investigated were also brought before the courts. In theory it has always been recognized that political inquiry and criminal proceedings were organized for different ends and therefore did not interfere with each other even when investigating the same facts.²⁷⁹ Practically, however, both in France and in Germany the investigating powers of parliamentary committees were challenged and often narrowed down whenever the courts opened simultaneous proceedings.

In *France* the parliament was sometimes invited by the government to adjourn its investigation until simultaneous criminal proceedings were terminated. It happened that the parliament complied with the government's suggestion, shy as it was of committing what was usually represented as a violation of the separation of powers.²⁸⁰ When simultaneous proceedings were launched, the committees were frequently faced with the refusal of the courts to communicate their files.²⁸¹ The judiciary thereby had the possibility of depriving the parliament of most essential elements of evidence. It had indeed been asserted that in some instances the government provoked the opening of criminal proceedings with the very intention of confining the investigation to the courts and rendering the inquiry by the parliament impracticable.²⁸² The latter then had only

²⁷⁹ See, for France: Michon, *supra*, note 162, at p. 90; Duguít, *supra*, note 225, Vol. 4, 394; for Germany: Kammergericht, March 19, 1920, quoted above at note 183; W. Rosenberg, *Parlamentarische und Gerichtliche Untersuchung*, in 30 *Deutsche Juristen Zeitung* 630 (1925); Lewald, *supra*, note 159, at p. 314. Joseph-Barthélémy, *Essai sur le travail parlementaire et le système des commissions* 251 (1934), does not deny that the simultaneousness of inquiry and court proceeding is perfectly legal, but he finds such a situation nonetheless "shocking."

²⁸⁰ See, e.g., the session of the Chamber on May 19, 1913, J. O. Débats Ch. 1458-60. The parliament reserved the right to open an inquiry after the closing of the criminal proceedings. Actually the investigation was never started. That the issue of the separation of powers was wrongly raised in such instances is recognized by Michon, *supra*, note 162, at p. 117. For other conflicts between the Chamber and the government on the subject of simultaneous criminal proceedings, see Pierre, *Supplément* 799-800 (1924).

²⁸¹ The committees saw themselves denied knowledge of the files while the matter was still pending before the courts, as well as when the proceedings were dropped after an investigation. An instance of the latter kind is offered by the refusal to submit the court files concerning the Bonapartist propaganda in 1874-5. The chairman of the parliamentary committee stated that the inquiry was unable to fulfill the mission assigned to it. See session of February 26, 1875, J. O. Débats Ch. 1482 (1875). The motive invoked by the recalcitrant Attorney General was again the separation of powers. See Michon, *supra*, note 162, at p. 109. In cases of still pending court proceedings, the refusal was sometimes motivated with Article 38 of the law of July 29, 1881, concerning the publication of the contents of criminal files by the press. About the fallaciousness of such argumentation, see Duguít, *supra*, note 225, Vol. 4, 395.

²⁸² The Viscomte de Villebois-Mareuil, in the session of the Chamber on July 11, 1910, J. O. Débats Ch. 2500 (1910).

the possibility of denying to the government a vote of confidence.²⁸³ But as this was not always politically wise, the committee was on several occasions satisfied if the Minister of Justice made at least part of the files available.²⁸⁴ Although in other cases the entire files were handed over to the committees,²⁸⁵ there can be no doubt that the competition between courts and committees for the discovery of the truth resulted in an actual and often essential deterioration of the results of parliamentary investigation.

In the *German* republic, attacks against the right of inquiry were motivated mostly by the alleged evils of simultaneous parliamentary investigations and court proceedings. In 1925 the bi-annual meeting of the association of German judges made the subject of political inquiry committees the central problem of its debates. One of the judges called the simultaneousness of both types of investigation a "danger for criminal proceedings at large . . . a monstrous collusion."²⁸⁶ Another declared, to the sound of applause, that the political inquiry committees had become a "first-class scandal . . . a sabotage of the law," and called for the fight against the "new parliamentary tyrannical justice."²⁸⁷ Both these speakers placed themselves in the category of liberals. In a motion carried by a great majority, the convention asserted that parliamentary investigations of facts subject to court proceedings did not further the discovery of the truth but actually hampered it.²⁸⁸

The same complaints were voiced from the tribune of the Reichstag, where parliamentary investigations were considered a "danger for the regular course of law."²⁸⁹ A bill was brought forward in the Reichstag

²⁸³ See session of February 26, 1875, J. O. Débats Ch. 1482-83 (1875), and session of November 28, 1892, *ibid.* 1742 (1892); also Pierre, *supra*, note 201, at p. 704. For a complete account of the controversies between courts and committees during the Panama investigations, see Coumoul, *Traité du pouvoir judiciaire. De son rôle constitutionnel et de sa réforme organique* 232, 235, 241 (1911).

²⁸⁴ See a letter addressed by the Minister of Justice, Barthou, to Jaurès on July 19, 1910, published by Pierre, *supra*, note 201, *Supplément* 801 (1924). For a conflict during the Oustric investigation which was later partially overcome, see *Le Temps*, January 7, 1931.

²⁸⁵ See, e.g., the so-called Humbert inquiry, quoted by Pierre, *supra*, note 201. *Supplément* 798 (1924).

²⁸⁶ Wunderlich, *Die Stellung des Deutschen Richters* (Referat auf dem Sechsten Deutschen Richtertag in Augsburg, September 1925). 17 *Deutsche Richterzeitung Beilage*, 25 (1925).

²⁸⁷ Mueller-Meiningen, *ibid.* 44, and the same, *Was dem Deutschen Richter nottut*, 30 *Deutsche Juristen Zeitung* 531, et seq. (1925).

²⁸⁸ 17 *Deutsche Richterzeitung* 478 (1925).

²⁸⁹ See session of February 16, 1926, 389 *Verhandlungen III Wahlperiode* 5602. Similarly November 9, 1926, 391 *ibid.* 7987 C, and March 11, 1925 384 *ibid.* 1011 A.

which aimed, by a modification of Article 34, at the suspension of every kind of parliamentary investigation while criminal proceedings covering the same facts were pending.²⁹⁰ Had this bill been passed, the parliamentary inquiry in the large majority of cases would have been rendered impossible, or at least futile. One of the fundamental rights of parliament would have been lost before the suspension of the Weimar Constitution in 1933.

The Pennsylvania legislature recently endeavored to enact a statute which would have had an exactly contrary effect. It wanted to make it the duty of courts to suspend grand jury investigation of misdemeanors in public office until after the House of Representatives of Pennsylvania, if it chose to investigate the charges, should have completed its investigation. Although this statute was held unconstitutional,²⁹¹ it is characteristic that in Germany a bill was brought forward to assure the predominance of court proceedings, while the Pennsylvania statute aimed to secure an effective parliamentary investigation.

IV. THE RESULTS OF PARLIAMENTARY INVESTIGATIONS—CONCLUSIONS

However great the differences in the development of parliamentary investigation in the various countries have been, at times almost identical complaints of disappointing results have been voiced in the United States and in France.

Woodrow Wilson spoke of the "irksome, ungracious investigations" and their "spasmodic endeavors" affording a mere "glimpse of the inside of a small province of federal administration."²⁹² By others, Congressional investigations were called "fruitless of results of permanent value";²⁹³ the "little that these investigations yield" does not make "blind and incestuous" Congressional opinion clear-sighted.²⁹⁴ Investigations by Congress were also castigated as a "gossip broadcasting station, a scaven-

²⁹⁰ March 11, 1926, 407 *Verhandlungen des Reichstag, III Wahlperiode 1924, Anlagen zu dem Stenographischen Berichte No. 2050*. A similar move was recommended by Stier Somlo, *Ein Gruss dem 34. Deutschen Juristentag*, 55 *Juristische Wochenschrift* 214 (1926), and by Ötker, *Untersuchung durch einen Reichstagsausschuss während schwebenden Strafverfahrens*, 91 *Der Gerichtssaal* 428, et seq. (1925).

²⁹¹ *Dauphin County Grand Jury Investigation Proceedings* (No. 2) 332 Pa. 342 (1938). The court held that both jury and legislative investigations are proper and must be carried out simultaneously if they happen to coincide in time. The hope was expressed that the officials of both legislature and court would be mindful of their public responsibility and carry on these simultaneous inquiries in a spirit of mutual cooperation.

²⁹² *Congressional Government* 271 (1925 ed.).

²⁹³ Ford, *Representative Government* 224 (1924).

²⁹⁴ Lippmann, *Public Opinion* 290, 288 (1922).

ger of the private drains responsible for public malady."²⁹⁵ When the opening of a new investigation into lobbying activities was being discussed in the Senate, a Senator indignantly remarked, "I say that in my opinion 95 per cent of these investigations are absolutely worthless and nothing has been accomplished by them."²⁹⁶ A diligent student of both American and French political institutions maintained that Congressional investigations compare unfavorably in speedy efficiency even with inquiries of the French Chamber.²⁹⁷

In France, as early as 1909, a deputy declared himself unable to vote for an inquiry committee because for twenty years he had been witnessing the failure of too many investigations. At the opening of every investigation, he said, hopes were evoked that finally an end would be brought to scandals, incompetencies and waste; but each time, in spite of the good will of the committee members, the investigations collapsed, therewith increasing the general disappointment.²⁹⁸ Twenty years later, Tardieu, at one time the most intelligent critic of French parliamentarism, mockingly spoke of many a fruitless investigation, and added that frequently "as far as the discovery of the truth is concerned, the committees when they disband cannot boast of results equal to those they expected when they started their investigations."²⁹⁹ In 1934 a high official of the Ministry of Justice was reported to have said to a witness who was to appear before an inquiry committee, "Do you really still pay attention to parliamentary investigations? That's all vanished with yesteryear's snows."³⁰⁰ The "sterility of the parliamentary inquiries was attested,"³⁰¹ the disappointing results evidenced by the committee reports generally conceded.³⁰² The

²⁹⁵ Jenks, *supra*, note 244, at 599.

²⁹⁶ 74th Cong. 1st sess., Record 6339.

²⁹⁷ Sharp, *The Government of the French Republic* 303 (1938). Professor Sharp sees his contention evidenced by the fact that it took much longer to detect and drive from office the "Ohio gang" under the Harding administration than it did to remove an entire government some members of which had been only slightly involved in the Stavinsky affair. It seems to the writer that these undeniable differences are due to the fact that in France a simple vote of the majority compels the government to resign. As a matter of fact the Chautemps government had to go before the parliamentary investigation started.

²⁹⁸ Gauthier de Clagny in the session of March 25, 1909, J. O. Débats Ch. 854 (1909). "There is but one remedy," a deputy interrupted the speaker, "the revision of the constitution." He did not elaborate, however, as to what revision he deemed necessary.

²⁹⁹ Session of November 21, 1930, J. O. Débats Ch. 3529 (1930).

³⁰⁰ Session of February 16, 1934, *ibid.* 489 (1934).

³⁰¹ By Barthélémy, *supra* note 80, at 250.

³⁰² See Arnitz, *supra*, note 170, at p. 6 and 259; Michon, *supra*, note 162, at p. 160. Very often the final report on the investigation was published only in part or not at all. See, e.g., for the Oustric scandal, J. O. Doc. Ch. No. 4756, p. 550 (1931) and 702 (1932); for the investigation

more optimistic note struck by the report on the Stavisky investigation, praising the "undeniable usefulness" of investigation and dismissing the attacks against the institution as unsubstantiated, remained an exception.³⁰³

But this similarity of language should not induce us to think that the evils complained of or the reasons for disappointing results are identical in the various countries under discussion. The very frequency of Congressional investigations might be responsible to a certain extent for the disappointing results complained of. While it is hardly justified to maintain that investigation should be nothing but a "last resort" means of obtaining information,³⁰⁴ it must be admitted that it is possible to devise—outside of the often clumsy, tedious, and slow process of investigation—satisfactory means of observing and correcting the executive,³⁰⁵ and of gathering material for reformatory legislation.³⁰⁶ But there will always be a wide range of questions for which the investigating process with its extensive hearings and its sifting of evidence will prove indispensable. Certainly "government by investigation is not government,"³⁰⁷ but government without investigation might easily turn out to be democratic government no longer. Where democratic process is maintained, it will always be the role of the minority to reveal whatever shortcomings and

into the elections of 1924, *ibid.* Annexe No. 2098 (1925).—The belatedness of the committee reports also had to be considered as jeopardizing the usefulness of Congressional investigations. See Galloway, *supra*, note 239, at p. 66.

³⁰³ See, however, *Rapport Lafont* 5. It is true that the Stavisky inquiry, as well as the investigation into the events of February 1934 had, owing to the political situation, obtained somewhat better results than the others.

³⁰⁴ This opinion is expressed by Dimock, *supra*, note 221, at p. 26. Quite to the contrary, Senator Nye, after the many investigations in which he had participated, asserted that "we should have not less, but more legislative investigations." See his radio address of May 23, 1933, printed in 73d Cong. 1st sess., Record 4182-3.

³⁰⁵ See Luce, *Legislative Procedure*, 174 (1922); Galloway, *supra*, note 244, at p. 257. It has often been complained that under the American constitutional system legislative and executive almost never meet face to face, and that therefore the former is often at a loss to secure the necessary information without resorting to investigation. See Wilson, *Congressional Government* 271 (1925 ed.); Rogers, *supra*, note 244, at p. 196. The contention that Congress fares less well in regard to obtaining information than do the European legislatures is opposed by Willoughby, *Principles of Legislative Organization and Administration* 176 (1934).

³⁰⁶ To discuss the possible alternatives to legislative investigation in certain cases is outside the scope of this paper. See, for a comprehensive enumeration, McGeary, *supra*, note 241, at p. 121-140, and Galloway, *supra*, note 244, at p. 252, 257.

³⁰⁷ This was uttered by Secretary of the Treasury Mellon, during the Senate's investigation into the practices of the Bureau of Internal Revenue (see *supra*, note 243), 68th Cong. 1st sess., Record 6098.

failures of the majority in power are believed to exist; in order to verify such a belief, investigatory proceedings must be resorted to.

It has sometimes been said that the partisan spirit characteristic of such investigations diminishes considerably the value of the committee findings. It is true that at the bottom of most inquiries is found, not a Faustian striving for perfection, but the desire of one party to discredit its competitors as much as possible by fastening upon them some political scandal. This frequently turns the investigations into "fishing expeditions," collecting material for electioneering purposes, pushing inquiries into realms which lie far outside the limits of the avowed legislative aim, and neglecting the collection of evidence which might provide essential information but which would be useless against the political adversary. That procedures led in such a spirit and with such methods are frequently far from serving the disclosure of the truth has been an oft-heard complaint. It is also true that public opinion faces frequent investigations of this kind with increasing bewilderment and that their findings, usually divided on party lines, command but little respect and make the public weary of reiterated scandals.³⁰⁸

Now, it is not necessarily true that an investigation conducted for partisan purposes cannot further the discovery of the truth. While that end may be only incidental for some of the committee members, such investigations also bring to the surface pertinent facts which would otherwise be hidden. If sheer animosity and excited partisanship lead the investigators, the searchlights they turn on persons and events under investigation might often provide a distorted picture which must be corrected before the taking of proper decision.³⁰⁹ But they still shed light in corners which otherwise would escape every scrutiny.³¹⁰

³⁰⁸ Jenks, *supra*, note 244, at p. 599-600; Dimock, *supra*, note 222, at p. 164; Ford, *supra*, note 293, at p. 224. See also Wigmore, 19 Ill. L. Rev. 452 at 453 (1925), speaking about the investigations of 1923-24: "The Senate . . . fell rather in popular estimate to the level of professional searchers of the municipal dunghills."

³⁰⁹ The criticism aroused by the so-called "un-American activities" investigations certainly merits special attention. See, e.g., Cushman, *Safeguarding Our Civil Liberties* 6-8 (1940), and *Legislative Investigations*, International Juridical Association Monthly Bulletin 73, 78-84 (1941) (evidently this article has never been concluded). But although the aims and methods of this type of investigation were under attack, this did not lead to a call for the curtailment of investigating activities and powers in general.

³¹⁰ It is characteristic that in France, where the results of investigation were particularly poor, the *esprit de corps* embracing almost all parliamentarians (see *supra*, note 184) often prevented the investigators from indulging too much in sharp "partisan spirit." See for a typical remark to that effect the report in the Snia-Viscosa affair, J. O. Doc. Ch. 551 (1931). In the United States it might not be impossible to correct some of the alleged "evils" of partisan investigation by the self-imposed adoption of certain procedural restraints. For some proposals which might prove valuable, see Morstein-Marx, *supra* note 152, at p. 1143.

It must be maintained, therefore, that in spite of the criticism which has sometimes been voiced, Congressional investigation does have positive results which were never obtained either in France or in Germany. Partly these results have not been perceived because their effect does not emerge into the open at all, or is neither direct nor immediate.³¹¹ Their preventive function is altogether immeasurable: the Damoclean sword of an impending investigation will often enough prove a sufficient deterrent from wrongdoing, should the natural impulses of an honest administration become weakened. The role which investigation has played and will play in shaping public opinion can hardly be overestimated and will always be most valuable for preparing new legislation.³¹² Finally, there have been important instances which show that sometimes by nothing short of an effective investigation can the overhauling of a defective administrative machinery be accomplished, whether the inquiry results in the removal of unworthy administrators from office³¹³ or in the rescuing of large public funds.

It would be impossible to cite for parliamentary inquiries organized under the German or the French Republic such immediate effects as were obtained—to cite only some of the more recent investigations—in the cases of Teapot Dome, the Daugherty brothers, the Continental Trading Co., and the securities and banking investigations.³¹⁴

The unsatisfactory results in both France and Germany³¹⁵ can easily be

³¹¹ See McGeary, *supra*, note 241, at p. 85; Willoughby, *supra*, note 305, at p. 178.

³¹² A good illustration of this point is provided by the following excerpt from the hearings which took place during the Fletcher inquiry into the stock exchanges and banking, quoted from Pecora, *Wall Street under Oath 186-7* (1939): Sen. Cousens: "So public opinion does have some effect upon Wall Street." Mr. Wiggins [of the Chase National Bank]: "I think it has a pretty good effect." . . . Sen. Cousens: "Then these hearings are a good thing, aren't they?" Mr. Wiggins: "I hope so, Senator." Mr. Pecora: "Do you think they educate public opinion with respect to the existence of certain evils in banking and stock market circles?" Mr. Wiggins: "I hope so."

³¹³ Rogers, *supra*, note 244, at p. 207, speaking of the consequences of the 1924 investigations: "It is sufficient to remark that three out of ten cabinet members were permitted or pressed to resign; that there were several indictments and two suicides."

³¹⁴ The enumeration is taken from Senator Nye's speech, quoted *supra*, note 304. The speech then went on to summarize forcefully the benefits of investigation: "They afford necessary knowledge basic to helpful legislation. They educate people to practices unfriendly to their best interest. They throw fear into men and interests who would by any means at their command move governments to selfish purposes. They command respect for government and for law. They tend to make government cleaner and more responsive to public needs and interests." Compare with such statements the remarks of French parliamentarians, *supra* *passim*, who always lamented about what the inquiries had been unable to achieve.

³¹⁵ While the results in Germany during the relatively short period in which parliamentary inquiry was actually practiced were somewhat more favorable than in France, they by no means corresponded to the hopes pinned on the new institution before the enactment of the constitutional provision. What the investigations actually achieved in terms of unveiling facts

explained by the insufficient powers obtained by the parliamentary committees. Investigations which were barred from the cognizance of pertinent facts by the reluctance of witnesses or of the executive were bound to lead nowhere. Committees which, in their efforts to discover the truth, were almost certain to be rebuked by the courts on whose aid they had to rely were anxious to avoid any conflict and thus, in their search for evidence, did not even go to the limits of their competences. Moreover, a procedure which was helpless against a witness who chose to insult the investigating committee hardly increased respect for parliamentary institutions, and therefore could not be relied upon to strengthen popular belief in effective democratic government.³¹⁶

On the other hand, Congressional investigations, also struggling very often against powerful odds,³¹⁷ could never have fulfilled the various tasks assigned to them, and would never have been able to obtain the knowledge underlying their final findings, had they not been endowed with the means of discovery afforded by the common law contempt powers, by the strength of parliamentary precedents, or by statutory provisions. Public opinion in the United States always backed the exercise of investigatory, indeed inquisitorial, powers. Most people were indignant when in 1924 Daugherty refused to answer, when Sinclair defied the investigating committee, and when Stewart attempted to follow suit.³¹⁸ And even writers who deplore those intrusions into the private sphere, which are accepted as a matter of course before the "bar of public opinion,"³¹⁹ do not often recommend an essential curtailment of the Congressional powers, and always reject the idea of discontinuing investigations altogether.³²⁰

was far from satisfactory. The results they sometimes yielded have been described to the writer by personalities closely connected with parliamentary activity in the Weimar period as ephemeral at best. See also Morstein-Marx, *supra*, note 154, at p. 1143.

³¹⁶ Under these conditions, it was deemed wise not to make parliamentary investigation too permanent a feature of constitutional life. Hence the sporadic character of the institution in Germany and France, especially when compared with the frequency of Congressional investigation. See Dimock, *supra*, note 222, at p. 44; Böhmert, *supra*, note 178, at p. 1; Morstein-Marx, *supra*, note 154, at p. 1141.

³¹⁷ See Frankfurter, *Hands off the Investigations*, 38 *New Republic* 329 (1924), stressing that in spite of those odds some of the investigations revealed "wrong-doing, incompetence and low public standards" in surprisingly little time.

³¹⁸ McBain, *Congress, Inquiries and the Constitution*, *New York Times*, March 11, 1928, IX 6: 1-8.

³¹⁹ See Judge Cochran in *Ex parte Daugherty*, 299 Fed. 620, 639 (S.D. Ohio, W.D. 1924).

³²⁰ Jenks (compare *supra*, notes 295, 308) calls, at 599, investigations a "natural remedy for an otherwise intolerable condition"; among the improvements he proposes, none deals with a diminution of investigating powers. "For the time being," he concludes, "Congressional investigation must be as unimpaired as its qualities will permit." Flynn, *Senate Inquisitors and Private Rights*, 161 *Harper's* 362 (1930), does not "want to decry the practice of Congressional

The situation in France and Germany was totally different. Not only where outright political issues were involved, as in the case of the Hidenburg-Ludendorff hearings, but almost always, the refusal, in the name of the right to privacy and secrecy, to disclose the true facts was upheld. Even the most impudent lies and the most alarming scandals were unable so to swing public opinion that it might force a strengthening of powers which, from the outset, had been much weaker than those obtained in the United States and England.

In France, courts and attorneys general bowed before witnesses who had affronted an investigating committee; constitutional writers did not shrink from elaborating spurious arguments to prove the righteousness of rebels; senators and deputies competed in warning against the dangers with which efficient inquiries threatened civil liberties. The republican Reichstag and the German Constitutional Court endeavored to narrow the scope and power of investigations. The administration of neither democracy tolerated the inspection of the legislature. The electorate remained unmoved and passive.

For Congress an investigation vested with adequate powers has always been so much identified with good government that its majority never scrupled, when need was, to tear down the barriers which the Bill of Rights set up against inquisitorial scrutiny. Courts steadily abandoned previous attempts to restrain Congressional investigation, and left wide open the gates to the realm of privacy.

When, after the war, thought will again be given to the problem of reconciling efficiency of government with freedom of individuals, it might well be remembered that to provide the organs of control with effective means of obtaining indispensable information is one of the prerequisites of a responsible government.³²¹ The European experience shows conclusively that where facts can be ascertained only by a curtailment of the citizen's individual freedom there should be no hesitation in paying that price, lest the freedom of all be endangered.

investigations. Many important and far-reaching reforms have been achieved through them." Lippmann (compare *supra*, note 294, at 288, 290, and *supra*, note 39, at 132) wishes neither to abolish the committees nor to submit to them. He requests that over "this conflict of interests" there shall preside "a vigilant, disinterested public opinion." But so far as public opinion has taken an interest in investigations, it has mostly striven for strong inquisitorial powers. Rogers, *supra*, note 244, at p. 206 remarks, after having been very critical of certain investigations: "If alternatives are no inquiry at all or an inquiry that is abused, then the choice must be for the latter."

³²¹ Although perfectionist devices of constitutional law alone will never prove to be a sufficient guarantee against tyranny, this lesson might be of special importance in so many European countries where the vicious circle leading from despotism to ardent republicanism and back to dictatorship must be broken.