
Nicholas C Stewart
The Kennedy-Hoffa Showdown:
Why Congressional Investigations Need Greater Powers and Procedural Leeway than
Prosecutions

I. Introduction
II. Case Study: Kennedy Versus Hoffa
   A. Impetus for Investigation
   B. Investigating “The Enemy Within”
   C. The Payoff
III. Congressional Investigations
   A. Proper Purposes
   B. Powers
   C. Protections
      1. Constitutional
      2. Non-constitutional
   D. The McClellan Committee
      1. Protections
      2. Powers
      3. Purposes
IV. Comparing Investigations and Prosecutions
   A. Dangers
   B. Why Investigations Need Greater Powers And Leeway Than Prosecutions
      1. Recalcitrant Organizations or Witnesses
      2. Complex Subject Matter
      3. Far-Reaching Implications
      4. Legislative Not Judicial Function
V. Conclusion
I. Introduction

Mr. Hoffa. To the best of my recollection, I must recall on my memory, I cannot remember.
Mr. Kennedy. “To the best of my recollection I must recall on my memory that I cannot remember,” is that your answer?

***

Mr. Kennedy. You have had the worst case of amnesia in the last 2 days I have ever heard of.¹

This was just one of the many exchanges shared by James R. Hoffa and Robert F. Kennedy. At the time, the former was the President of the International Brotherhood of Teamsters (“Teamsters”) and the latter, chief counsel for the U.S. Senate Select Committee on Improper Activities in Labor and Management (“McClellan Committee”). Their war of words and wills would become one of the most famous in congressional history, the result of a wide-scale investigation into a troubling new issue known as labor racketeering.

Although Kennedy and the McClellan Committee investigated a number of unions,² they found in Hoffa and his Teamsters “an especially rewarding field.”³ Few other unions felt the ills of labor racketeering as deeply or presented a better case for reform. However, gathering the information necessary to craft a legislative reform package was easier said than done. With the

¹ ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 157 (Mariner Times 1978).
² See Sam Nunn, The Impact of the Senate Permanent subcommittee on Investigations on Federal policy, 21 GA. L. REV. 17, 28 (1986) (“[The Committee also investigated the] Bakery and Confectionary Workers International Union of America, the International Union of Operating Engineers, the United Textile Workers of America, the Allied Industrial Workers of America, the Hotel Employees and Restaurant Employees International Union and the Sheet Metal Workers International Association.”).
³ SCHLESINGER, JR., supra note 1, at 138
Teamsters, most records were destroyed and most witnesses exercised their Fifth Amendment right against self-incrimination.⁴

In his efforts to pry out the truth, Kennedy chose an aggressive approach and, in the process, ignited a great deal of controversy. Some considered Kennedy a “fearless young crusader exposing wickedness,” while others saw “a merciless prosecutor, battering witnesses and overriding constitutional rights.”⁵ These opposing viewpoints, this article asserts, are best understood as part of a larger debate – the extent to which we deprive targets of congressional investigations protections enjoyed by their criminal defendant counterparts.

This article examines the reasons for the discrepancy, concluding ultimately that different ends require different means. For introductory purposes, we observe that criminal prosecutions involve a limited number of parties and seek to redress past wrongs. Congressional investigations, however, have farther-reaching implications, as they aim (through the passage of new or amending legislation) to address past wrongs, as well as to prevent ongoing and future harm. As a result, challenges unique to lawmaking – like building consensus nationally and across party lines – must be overcome.

That is why Arthur Schlesinger, Jr. rightly noted that “[a]n assessment of Kennedy’s performance requires an understanding of the congressional investigative power.”⁶ Committees possess a rare degree of flexibility exactly because their end goal is legislative, rather than punitive. Without a broad range of investigative tools, lawmakers may not have the requisite information to craft a targeted and sophisticated response. Moreover, they may lose the

⁵ Schlesinger, Jr., supra note 1, at 185.
⁶ Id.
momentum required to enact meaningful reform, as stalling witnesses, insufficient evidence, and partisan politicking cause their legislative proposals to fade from the public eye.

For all their practical necessity, however, this article recognizes the dangers inherent in broad powers and procedural leeway. No doubt congressional hearings can be a productive forum, but they can also be a stage on which lawmakers castigate opponents and, thereby, endanger the reputations and liberty interests of committee witnesses. Moreover, this type of grandstanding has the potential to generate punitive rather than curative legislation.

The McClellan Committee typifies the dangers of broad investigative powers. Kennedy’s hard-nosed probing tarnished reputations, led to some thinly-supported indictments, and inspired an overly-broad legislative proposal. Indeed, his work demonstrates why improvements are needed. It also shows us that extensive tools are, in certain instances, required to root out problems and pass high-profile legislation.

Part II provides a factual background on the Kennedy-Hoffa feud. Armed with our case study, we explore in Part III the relationship among (1) the purposes of congressional investigations (namely lawmaking), (2) the powers enjoyed by committees to achieve these purposes, and (3) the protections afforded committee witnesses. Finally in Part IV, we compare investigations and criminal prosecutions. Acknowledging their similarities, we spend the lion’s share of our analysis on their differences, determining that the goals of an investigation require greater powers and procedural leeway.

II. Case Study: Kennedy Versus Hoffa

A. Impetus for Investigation

We start by canvassing the history of the labor movement, so that we may better understand the strength of the embedded forces confronting lawmakers in the 1950s and 60s.
Modern American labor law traces its origins to the 1930s. More directly, the passage of the National Labor Relations Act (“Wagner Act”) in 1935 paved the way for collective organization, encouraging the “free flow of commerce” by “protecting . . . workers[’] full freedom of association, self-organization and designation of representatives . . . .”\(^7\) Together with the World War II economic boom, the labor movement blossomed, expanding its membership from “three million employees in 1932 to over fifteen million during the war.”\(^8\) However, after the “great organizing battles of the 1930s” and the Great War, the movement stagnated; its idealism “largely spent.”\(^9\)

The labor movement was not alone; the economy was also entering a slow down. The desire of unions to retain their high wartime wages opened up a significant rift between employers and employees.\(^10\) Perceiving an opportunity to consolidate power, union leaders took the initiative and led severe strikes, which lowered not only the bottom lines of employers, but also the public image of unions.\(^11\) As a result, the American people “believed [they] were being denied [important goods] by the greed of union workers [and] the unfettered power of union leaders.”\(^12\)

In 1947, public outrage was sufficiently high that a Republican-controlled Congress, in collaboration with Southern Democrats, was able to pass the Labor-Management Relations Act (“Taft-Hartley Act”). The law admonished what its drafters considered to be the wrong-headed thinking of the Wagner Act, proclaiming that “strikes and other forms of industrial unrest” often

---

\(^8\) Nelson, supra note 4, at 530 (footnote omitted).
\(^9\) SCHLESINGER, JR., supra note 1, at 137.
\(^10\) See Nelson, supra note 4, at 530 (footnote omitted).
\(^11\) See id.
\(^12\) R. ALTON LEE, EISENHOWER & LANDRUM-GRIFFIN: A STUDY IN LABOR-MANAGEMENT POLITICS 4-5 (1990).
obstruct commerce and thereby “impair the [public] interest . . . .”\textsuperscript{13} As a result, the drafters concluded that many of these burdensome practices should be restricted.\textsuperscript{14}

Over the next decade, union officials and management continued to spar over Taft-Hartley. Union officials sought amendments to dampen its effects, while management tried to “use the outcry against [union] corruption” to strengthen its provisions and further “weaken the unions.”\textsuperscript{15} Against this backdrop, the McClellan Committee began its work.

There were at least four reasons behind the Committee’s formation. First, labor racketeering was a novel issue in need of further investigation.\textsuperscript{16} Amid the stagnation of the 1950s, “[h]oodlums and mobsters” began infiltrating union ranks, “attracted by the spectacular growth of trade-union welfare and pension funds . . . [and] the convenience of unions as a cover for exercises in bribery and shakedown . . . .”\textsuperscript{17} Eventually, this apparent “invasion of the American labor movement” drew the attention of the public and Congress.\textsuperscript{18} Second, despite a growing awareness of the influence of organized crime, some of the biggest unions – including the American Federation of Labor and the Congress of Industrial Organizations – were

\begin{footnotes}
\item[14] See id. The drafters reasoned that “the national government should be an impartial referee rather than a union supporter in labor-management conflict.” LEE, supra note 12, at 6.
\item[16] See SCHLESINGER, JR., supra note 1, at 137.
\item[18] SCHLESINGER, JR., supra note 1, at 137. According to the Committee, corruption “affected [only] a . . . small percentage of unions”; however, as Kennedy suggested, it was “pervasive,” “sinister,” and increasingly infectious. LEE, supra note 12, at 169; ROBERT KENNEDY, \textbf{THE ENEMY WITHIN: THE MCCCLELLAN COMMITTEE’S CRUSADE AGAINST JIMMY HOFFA AND CORRUPT LABOR UNIONS} 240 (Harper & Row 1960).
\end{footnotes}
uninterested in policing their own ranks.\footnote{See SCHLESINGER, JR., \textit{supra} note 1, at 137.} Third, previous congressional forays into the matter were short lived, leading newspapermen like Clark Mollenhoff to persistently “importune Kennedy about setting the Investigations Subcommittee on the trail of labor racketeers.”\footnote{\textit{Id.} at 137-38. “[M]ore than anyone else,” Mollenhoff “was responsible for the existence of the Committee[.]” THE ENEMY WITHIN, \textit{supra} note 18, at 237.}

Fourth, federal and state laws regulating unions were inadequate, neither providing “effective standards for the management of burgeoning . . . [welfare and pension] funds.”\footnote{SCHLESINGER, JR., \textit{supra} note 1, at 137. The Director of the Federal Bureau of Investigation refused to “admit the existence of . . . organized crime . . . .” \textit{Id.} at 169. Some observers believed Director J. Edgar Hoover was “afraid to step on the toes of local officials . . . .” \textit{Id.} “[L]ocal authorities,” however, could not not “handle nation-wide syndicates.” \textit{Id.} (footnote omitted).}

In light of these various pressures, Kennedy was determined to push Congress into the breach, concerned that “[i]f we do not on a national scale attack organized criminals with weapons and techniques as effective as their own,” they “will destroy us.”\footnote{\textit{Id.} (footnote omitted)}

\section*{B. Investigating “The Enemy Within”}

Kennedy’s efforts succeeded, as he secured Senator John McClellan’s (D-AK) approval of a congressional inquiry into labor racketeering. The McClellan Committee’s mandate was to:

\begin{quote}
[C]onduct an investigation and study of the extent to which criminal and other improper practices or activities are, or have been engaged in the field of labor-management relations or in groups of organizations of employees or employers, to the detriment of the interests of the public, employers or employees, and to determine whether any changes are required in the laws . . . in order to protect such interests against the occurrence of such practices or activities.\footnote{Hearings Before the Senate Select Committee on Improper Activities in the Labor or Management Field (pts. 1-58), 85th Cong., 1st & 2d Sess., 86th Cong., 1st Sess. 1 (1957-1959).}
\end{quote}

For all its breadth, though, the Committee’s gaze soon came to a rest on the Teamsters. Indeed, more than half the congressional hearings concerned the union and its two successive
presidents – Dave Beck and Hoffa.  At first, proving Beck’s wrongdoing was tough. Most records were destroyed, and Beck pled the Fifth Amendment sixty-five times. However, the Committee overcame these obstacles with Hoffa’s help. Driven by his hunger for power, Hoffa fed the Committee invaluable information and witnesses. With Beck out of the way, Hoffa cleared the path for his own presidency. Cooperation, however, did not immunize Hoffa from the Committee’s scrutiny. The McClellan Committee saw Hoffa as “a greater menace . . . than Beck because . . . he was allied with criminals and stimulated the movement of organized crime into the labor movement.”

The real enemy, in Kennedy’s eyes, was Hoffa. “[N]o organization, union[,] or business,” Kennedy wrote, “has a greater effect on the community life in this country.” As a result, “the life of every person in the United States . . . is in the hands of Hoffa and his Teamsters.” No doubt this was hyperbole, but Kennedy was trying to raise an alarm. He

---

24 See Santos, supra note 16, at 451 n.22. In Santos’s view, “[t]he type of unionism practiced by the Teamsters . . . demonstrated the compelling need for federal regulation of the internal affairs of unions.” Id. at 451 (footnote omitted).
25 See Nelson, supra note 4, at 534.
26 Federal investigator Walter Sheridan concluded that “‘Hoffa had ‘decided to try to use Kennedy to eliminate Beck.’” SCHLESINGER JR., supra note 1, at 152 (footnote omitted).
27 LEE, supra note 12, at 55 (footnote omitted). These illicit tendencies betrayed Hoffa from the very beginning. Always looking for the upper hand, he was caught in 1957 trying to bribe a lawyer to “penetrat[e] the McClellan [C]ommittee and report[,] back on the progress of the Teamsters investigation.” SCHLESINGER, JR., supra note 1, at 152. The ensuing prosecution, however, left something to be desired. Poor government lawyering and exceptional defense work led to an acquittal. See id. at 155. Leaving most observers dumbfounded, the acquittal became a galvanizing force for Kennedy and the Committee. See id. A fortnight after the news broke, Kennedy announced a new round of Teamsters hearings. See id.
28 Id. (footnote omitted).
29 Id. at 163 (footnote omitted). Kennedy believed that Hoffa was heading “‘a conspiracy of evil,’ a conspiracy that had seized control of ‘the most powerful institution in this country – aside from the United States Government itself.’” Id. (quoting Robert F. Kennedy, An Urgent Reform Plan, LIFE (June 1, 1959)).
30 See SCHLESINGER, JR., supra note 1, at 163.
firmly believed that because of Hoffa’s fame and insidious criminal ties, \(^{31}\) the labor movement, “a movement of the oppressed,” \(^{32}\) was at risk. \(^{33}\)

So after Beck’s downfall, and with millions of Americans watching on national television, Kennedy started anew, squaring off with hostile and unsavory witnesses, probing deep into the criminal underworld and its connections with labor. The most dramatic and compelling confrontations involved Kennedy and his target, Hoffa. Both men were “aggressive, competitive, hard-driving, authoritarian, suspicious, temperate, at times congenial and at others curt.” \(^{34}\) On one side of the table, Hoffa would often affix Kennedy with “a deep, strange, penetrating expression of intense hatred . . . the look of a man obsessed by his enmity.” \(^{35}\) Kennedy returned the favor, perceiving “the devil in Hoffa, something absolutely insatiable and wildly vindictive . . . .” \(^{36}\)

C. The Payoff

The sheer size of the labor investigation makes it “impossible to detail all of the [Committee’s factual] findings . . . .” \(^{37}\) It is possible, however, to quantify outcomes. All told, the two years of scrutiny produced 300 days of public hearings, 8,000 subpoenas, 2.5 million miles traveled in pursuit of evidence, and more than 1,500 witnesses, generating 20,432 pages of

\(^{31}\) See id. at 155.

\(^{32}\) Id. at 163.

\(^{33}\) For more detail on the mafia’s infiltration of the labor field, see SCHLESINGER, JR., supra note 1, at 166-69 and Nelson, supra note 4, at 527-42.

\(^{34}\) SCHLESINGER, JR., supra note 1, at 161 (internal citation marks and footnote omitted).

\(^{35}\) Id. (internal citation marks and footnote omitted).

\(^{36}\) Id. at 162 (internal citation marks and footnote omitted). Their intense personal duel led Kennedy, who was driving home late one night, to peer at Hoffa’s office. See id. at 161. Noticing Hoffa’s desk light shining brightly, Kennedy swung his car around, reasoning that “[i]f he’s still at work, we ought to be[.]” Id. Upon hearing this news, Hoffa “took special pleasure in leaving his office light blazing away” when “his day’s work was done.” Id. (footnote omitted).

\(^{37}\) Santos, supra note 16, at 451 n.22.
testimony.\textsuperscript{38} While this “mass of concrete information on lawbreaking”\textsuperscript{39} helped bring down Beck, Hoffa would not be successfully prosecuted until 1964,\textsuperscript{40} four years after the Committee disbanded.\textsuperscript{41} Of course, that does not mean the Committee’s efforts were for naught; indeed, as discussed below, Congress is not a law enforcer or criminal adjudicator.\textsuperscript{42} Rather, the Committee’s original charge, to shed light on labor’s criminal ties and make necessitated changes in the law, was accomplished with the passage of the 1959 Labor-Management Reporting and Disclosure Act (“Landrum-Griffin Act”).\textsuperscript{43

III. Congressional Investigations

Having briefly discussed the history and federal response to labor racketeering, we now take a more detailed look at congressional investigations. Our focus is three-fold – what are the purposes of congressional investigations, what specific powers do they have, and what protections do they afford witnesses, including targets.\textsuperscript{44} We then apply this analysis to the Kennedy-Hoffa case study. Our discussion here is meant to produce a more nuanced comparison of investigations and prosecutions in Part IV.

\textsuperscript{38} See SCHLESINGER, JR., supra note 1, at 184, 186. The McClellan Committee began working in January 1957 and dissolved March 1960. See Nunn, supra note 2, at 27, 29.

\textsuperscript{39} SCHLESINGER, JR., supra note 1, at 285.

\textsuperscript{40} See Nelson, supra note 4, at 534 n.80.

\textsuperscript{41} See Nunn, supra note 2, at 29.

\textsuperscript{42} See James Hamilton et al., Congressional Investigations: Politics and Process, 44 AM. CRIM L. REV. 1115, 1122 (2007). Soon after the Committee disbanded, Kennedy asserted that more than twenty “labor leaders, management people, gangsters,” etc. were “convicted and sentenced to prison . . . as a[n indirect] result” of the Committee’s investigation. THE ENEMY WITHIN, supra note 18, at 321.

\textsuperscript{43} See SCHLESINGER, JR., supra note 1, at 183-84.

\textsuperscript{44} We refer to “witnesses” generally, rather than targets in particular. It is often difficult to determine who a committee is targeting, and procedurally, committees treat witnesses and targets similarly.
A. Proper Purposes

Along with a sizable amount of American jurisprudence, congressional investigations trace their origins to English law. Despite their historic nature, however, no provision in the Constitution authorizes Congress to conduct investigations. Nonetheless, the Supreme Court has held such an investigative power inheres in the legislative process,\(^45\) broadly providing that:

> It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

However, Congress does not have free investigatory rein. To exercise its authority, the legislative branch must have a valid legislative purpose, a concept which includes not only the prefatory steps of increasing information about the workings of government\(^46\) and checking the executive branch,\(^47\) but also the cumulative step of passing new or amending legislation. In an extensive article on congressional investigations, James Hamilton and his fellow authors conclude that, at their best, committee inquiries “expose wrongdoing” and “bring to light social conditions that require corrections.”\(^48\)

B. Powers

To fulfill their purposes, congressional committees have a vast investigatory toolkit, composed of the powers to (1) issue subpoenas, (2) take testimony, (3) grant immunity, and (4)


\(^{46}\) As required by the Legislative Reorganization Acts of 1946 and 1970, Congress must “review and study, on a continuing basis, the application, administration, and execution” of its laws. FREDERICK M. KAISER ET AL., CONG. RESEARCH SERV., CONG. OVERSIGHT MANUAL 8 (revised May 1, 2007) (emphasis and internal quotation marks omitted), available at http://www.fas.org/sgp/crs/misc/RL30240.pdf.


\(^{48}\) Hamilton et al., *supra* note 42, at 1118.
hold witnesses in contempt. We briefly discuss each power because, as we will see, critics of congressional investigations often base their detractions here.\textsuperscript{49}

First, committees possess great discretion to authorize and issue subpoenas.\textsuperscript{50} “Assuming that . . . Congress is acting pursuant to a valid legislative purpose” and “follow[s]” its own promulgated rules, “a court may not enjoin the issuance of a congressional subpoena.”\textsuperscript{51} That is because the Speech or Debate Clause of the Constitution\textsuperscript{52} extends to legislators absolute immunity for “actions falling within the ‘sphere of legitimate legislative activity.’”\textsuperscript{53}

Second, congressional committees are empowered to compel witness appearances, administer oaths, and take testimony.\textsuperscript{54} Sworn witnesses who testify falsely may be prosecuted for perjury, while un-sworn witnesses who testify falsely may be prosecuted for obstruction of justice.\textsuperscript{55} Third, an intractable witness who refuses to answer questions or produce documents on Fifth Amendment grounds can throw a wrench into an investigation. However, congressional committees may obtain a court order compelling a witness’s cooperation, in exchange for immunity against future prosecution.\textsuperscript{56} The immunity accorded is most often “limited” in that

\textsuperscript{49} See generally THE ENEMY WITHIN, supra note 18, at 300-18 (discussing the Committee’s work in light of critic’s detractions).
\textsuperscript{50} See Hamilton et al., supra note 42, at 1125.
\textsuperscript{51} Id. at 1126.
\textsuperscript{52} U.S. Const. art. I, § 6, cl. 1.
\textsuperscript{53} Hamilton et al., supra note 42, at 1126 (footnote omitted) (quoting Eastland, 421 U.S. at 501).
\textsuperscript{54} Congressional investigations admit into the record far more evidence than courts, including hearsay testimony and witness opinion. See THE ENEMY WITHIN, supra note 18, at 306.
\textsuperscript{55} See Hamilton et al., supra note 42, at 1128. In fact, any conduct that “wrongfully impedes a congressional inquiry” may be prosecuted for obstruction of justice. Id. at 1129 (footnote omitted).
\textsuperscript{56} See id. at 1129-30.
witnesses may still be prosecuted for offenses about which they testify, “so long as neither the compelled testimony nor information derived from it are used in the prosecution.”

Fourth, although lacking a constitutional underpinning, Congress’s contempt power is implicit in its legislative function. Without the authority to compel a witness’s cooperation, “Congress’s other investigative powers would have little practical meaning . . . .” However, witnesses may only be held in contempt for interfering with legitimate legislative duties. Moreover, their imprisonment may not extend beyond the legislative session. Some commentators believe these aforementioned powers are so sweeping that, for witnesses, the question is not whether this is going to be a bad day; it is how bad. As the Supreme Court has explained, “a casual conflict with the rights of particular individuals . . . [is no reason] against the exercise of such [investigatory] powers.”

---

57 Id. at 1130 (footnote omitted). This is known as “use” immunity. Id. Although lawmakers must meet a number of procedural requirements before granting such immunity, suffice to say the Attorney General “cannot interfere with an immunity order . . . beyond delaying its issuance.” Id.

58 See id. at 1132.

59 Id.

60 Id. (citing Marshall v. Gordon, 243 U.S. 521, 542 (1917)).

61 Id. (citing, inter alia, Marshall, 243 U.S. at 542). In exercising its self-help power, both Houses of Congress may issue criminal contempt orders. Only the Senate, however, issues civil order, which allow both noncompliant witnesses and committees “to test the legality of their positions without the extreme consequences of the criminal contempt process.” Id. at 1137. While interesting questions, sounding in the doctrine of separation of powers, are raised when Congress targets the executive branch, they are of no moment for our purposes.


C. Protections

Congress’s powers are indeed broad. Yet, there are certain, albeit “meager,” restrictions that protect witnesses against excessive government zeal. We have mentioned a few above, namely the legislative purpose doctrine and the procedural obstacles associated with conferring immunity and holding witnesses in contempt. Hamilton et al. divide the additional restrictions into two categories: constitutional and non-constitutional.

1. Constitutional

It would be easy to spend considerable time on the history of the constitutional protections afforded witnesses. However, our discussion may be limited, as we only need a basic knowledge of such protections to analyze the leeway afforded congressional committees. While it does not appear immediately germane to congressional investigations, the First Amendment has been invoked as a defense to government compulsion. In particular, courts sometimes balance an individual’s interest in freedom of speech, press, political association and communication of ideas against the government’s interest in legislating.

The Court has also held that the Fourth Amendment’s protection against unreasonable searches and seizures limits Congress’s subpoena power. However, the Court tends to defer to

---

65 See Hamilton et al, supra note 42, at 1138.
66 Watkins, 354 U.S. at 188 (“The Bill of Rights is applicable to investigations as to all forms of governmental action.”)
67 See generally Barenblatt, 360 U.S. 109 (1959); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963); Sweezy v. New Hampshire, 354 U.S. 234 (1957). The Court has yet to find an individual’s interest in freedom of speech, etc., outweighs the government’s interest in legislating. However, the Court’s serious treatment of the matter has likely made some committee members think twice before seeking enforcement of subpoenas. Hamilton et al., supra note 42, at 1144 (citing Edward Walsh, Committee Subpoenas Prove Hard to Enforce, WASH. POST, Oct. 28, 1997, at A4).
Congress, unless a subpoena is “especially egregious,” owing to its breadth. The Fifth Amendment right against self-incrimination may be the most effective constitutional bulwark. But, it may be waived if a witness neglects to claim it, withdraws an earlier invocation, or testifies to related matters.

2. Non-constitutional

First, committees may only pursue matters within the jurisdiction of their parent house or authorizing resolutions, and, on a procedural level, committees must abide by their own pre-set rules. Second, testimony or records that Congress seeks must be “pertinent to the matter under investigation.” Third, relying on the fact that many committees recognize the attorney-client privilege, Hamilton et al. argue that courts today would acknowledge its place in congressional investigations.

---

68 In McPhaul v. United States 364 U.S. 372 (1960), for instance, the Supreme Court “upheld a subcommittee subpoena calling for ‘all records, correspondence and memoranda pertaining to the organization of [or] affiliation with other organizations and all monies received or expended by the Civil Rights Congress.’” Hamilton et al., supra note 42, 1140.

69 Id.


71 See Hamilton et al., supra note 42, at 1139. The privilege does not allow witnesses, however, to avoid questions regarding the wrongdoing of others, nor does it cover “books and records kept ‘in a representative rather than in a personal capacity . . . .’” McPaul, 364 U.S. at 380 (quoting, inter alia, United States v. White, 322 U.S. 694, 699 (1944)).

72 See id. at 1144-50. We follow in the footsteps of Hamilton et al., who parse out non-constitutional protections into three categories: rules, pertinency, and attorney-client privilege.

73 See id. at 1144-45 (citing, inter alia, Barenblatt, 360 U.S. at 122-23 and Watkins, 354 U.S. at 201).

74 See id. at 1145.

75 Id. at 1146. However, witnesses who refuse to answer questions or produce documents on these grounds do so at their own risk; contempt sanctions may result if a court finds the information sufficiently pertinent. See Watkins, 354 U.S. at 208.

76 See Hamilton et al., supra note 42, 1150. Committees in the late 1970s and early 1980s rejected such claims. See id. at 1148 (citing Subcomm. On Oversight and Investigations of the
D. The McClellan Committee

Below, we apply the three-prong analysis outlined immediately supra – purposes, powers, and protections – to our Kennedy-Hoffa case study and draw some initial comparisons between investigations and prosecutions.77 Observe, however, that we proceed in reverse order.

1. Protections

When it came to protections, the McClellan Committee and its chief counsel took numerous steps to avoid the excesses of the McCarthy era. Doubting whether the now defunct Committee on Government Operations had jurisdiction to investigate labor racketeering, Kennedy sought and obtained special authorization. Moreover, the Committee’s rules – though more flexible than a court’s – were designed to provide fair treatment and due process of law.78 In particular, witnesses were afforded the right to counsel, the right to submit questions for cross-examination, and “[o]ne-senator hearings, a device beloved by McCarthy, were banned.”79

---

77 The powers and protections discussed supra might “bear a striking resemblance to court proceedings . . . .” Kalah Auchincloss, Congressional Investigations and the Role of Privilege, 43 AM. CRIM L. REV. 165, 178 (2006). However, as discussed infra, congressional hearings are a unique creature. We pause here to mention a few distinctions, in preparation for Parts III and IV of our analysis.

First, investigations usually last many months, involve hundreds of witnesses, and explore multi-faceted issues with national implications. Their interrogations are short, disjointed and often occasion for political grandstanding. They do not recognize federal rules of evidence or procedure, meaning “anything goes.” Blalack, supra note 64, at 2. However, where committees level their attention is often determined by political gamesmanship. See Hamilton et al., supra note 42, at 1176. And, importantly, committee members act as both judge and prosecutor. See William V. O’Reilly, If Congress Calls, Know the Rules: When an Executive Is Asked to Testify Before a Committee, Don’t Treat It Like a Trial, LEGAL TIMES, Jan. 12, 2009.

78 See Lee, supra note 12, at 54; Schlesinger, supra note 1, at 187.

79 SCHLESINGER, JR., supra note 1, at 187. A number of other protections were afforded witnesses that did not exist in the courtroom. According to Kennedy, the McClellan Committee:
2. **Powers**

Much of the controversy surrounding the McClellan Committee involved its exercise of examining powers. It is hard to claim the hearings were slovenly prepared.

For every witness who was called before the Committee . . . we interviewed at least thirty-five. For every hour a witness testified on the stand before the Committee, he was interviewed on an average of five hours. For every document that was introduced, five thousand were studied. For every hearing held, there were approximately eight months of intensive investigation.

We should add that despite serving over 8,000 subpoenas, Kennedy’s staff, “the largest investigative team ever to operate from Capitol Hill,” never faced allegations of abusing the Committee’s subpoena power.\(^8^0\) Moreover, rarely did Kennedy ask questions without first knowing the answer. \(^8^1\)

\(^{80}\) See *Id.* at 186 (international quotation marks and footnote omitted).

\(^{81}\) See *Id.* at 187. Kennedy admitted that, *on rare occasions*, he did not always have “positive proof . . . .” *The Enemy Within*, *supra* note 18, at 314. Nevertheless, he felt justified asking questions supported by a minimal threshold of information. *See id.* at 314-15.
The Committee’s thoroughness, however, did not ward off critics. Some accused
Kennedy of “brow-beating” and “badgering” witnesses, fueling comparisons to Senator Joseph
McCarthy. After all, before joining the McClellan Committee, Kennedy had worked for the
House Committee on Un-American Activities. However, various commentators disputed this
description, arguing that Kennedy was a fair investigator. They noted that “[f]ar from
browbeating Hoffa, it was more of a case of Hoffa browbeating [Kennedy].”

Critics do have a few valid points, though. Kennedy often used the Fifth Amendment as
a weapon. For example, the “notorious [e]xtortionist” and labor racketeer, John Dioguardi,
was compelled to utter the Fifth 140 times. And Beck, it is said, “collapse[d] under the heavy
weight of fifth amendment responses . . . .” This tactic, of course, is not available to criminal
prosecutors.

Altogether, 343 out of 1526 witnesses declined to answer congressional queries on self-
incrimination grounds. However, in some cases, Kennedy “persisted in questioning witnesses

---

82 SCHLESINGER, JR., supra note 1, at 149 (internal quotation marks and citations omitted). One
assistant professor found himself “‘sickened by . . . your humiliating, badgering questioning of
the witnesses. . . . Perhaps another Kennedy will contribute . . . Profiles in Bullying.’” Id.
(George M. Belknap to RFK, March 8, 1957, JFK Papers).
83 See id. at 187 (citing Dan Wakefield, Bob, ESQUIRE, April 1962). Journalist Robert Riggs
went so far as to say Kennedy was winning “‘a reputation as one of the most competent
investigators any Congressional committee ever had.’” Id. at 150 (citing LOUISVILLE COURIER-
JOURNAL, March 24, 1957).
84 Id. at 187. One commentator believed that when the questioning became tough, Chairmen
McClellan would step in, “thus saving Bobby from embarrassment.” Id. (citing VICTOR LASKY,
ROBERT F. KENNEDY: THE MYTH AND THE MAN 127 (New York 1971)).
85 SCHLESINGER, JR., supra note 1, at 188 (citing Alexander M. Bickel, Robert F. Kennedy: The
Case Against Him for Attorney General, NEW REPUBLIC, January 9, 1961).
86 The Sharks, supra note 17.
87 Paul Jacobs, Extracurricular Activities of the McClellan Committee, 51 CAL. L. REV. 296, 298
(1963).
88 See SCHLESINGER, JR., supra note 1, at 189.
whom he knew had debarred themselves . . . ’’89 While he defended the privilege as “one of the distinguishing marks between democracy and dictatorship,” Kennedy was troubled by those who invoked it.90 “I can think of very few witnesses,’” Kennedy wrote, “who availed themselves of it who in my estimation were free of wrongdoing.’’91

In addition, despite their acute awareness of McCarthyism abuses, the Committee would often attempt to establish guilt by association. In one case, a committee questioner highlighted a union official’s onetime association with the Communist party – again, impermissible at trial.92

Driven by his unshakeable confidence in Hoffa’s guilt, Kennedy also offered anti-Hoffa Teamsters information to bolster their private civil suit against the union. The plaintiffs were trying to stop what they considered a “rigged”93 convention, in which Hoffa surely would (and did) win the presidency.94

3. **Purposes**

   Questionable conduct notwithstanding, the Committee did expose wrongdoing.

   Sufficient information had been collected to convince Kennedy and others that:

   Hoffa had stifled democratic procedures within the union, had ordered the beating and very possibly the murder of union rebels,

---

89 Id. at 188. Kennedy believed that a witness who invoked the Fifth “is frequently giving important information to Congress and to the public.” THE ENEMY WITHIN, supra note 18, at 314.
90 SCHLESINGER, JR., supra note 1, at 189.
91 Id. (quoting Robert Kennedy).
92 Jacobs, supra note 87, at 297.
93 Id. at 309. In 1959, Solicitor General Archibald Cox noted that “‘there were widespread violations of the constitution and bylaws of the International Brotherhood of Teamster in the choice of delegates for the 1957 convention . . . .’” Id. (quoting Archibald Cox, The Role of Law in Preserving Union Democracy, LABOR IN A FREE SOCIETY 67 (1959)). Nonetheless, “‘many of them were technical and no one seriously believe[d] that the majority of the members desired a different president.’” Id. (quoting The Role of Law in Preserving Union Democracy at 67)
94 See id. Ultimately, the plaintiffs’ injunction was stayed and the union elected Hoffa president, but a board of monitors was appointed to supervise the union’s affairs. See id. at 302. Subsequently, Kennedy supported the board’s efforts to oust Hoffa. See id. at 310.
had misused union funds to the amount of at least $9.5 million, had taken money and other favors from employers to promote personal business deals, had brought in gangsters to consolidate his control and had tampered with the judicial process in order to escape prosecution.\(^{95}\)

This kind of corruption affected only a small number of unions. However, the Committee uncovered evidence that “the underworld was increasing its efforts to seize control of legitimate businesses and unions . . . .”\(^{96}\) “[T]he gangsters of today,” Kennedy wrote, “work in a highly organized fashion and are far more powerful now than at any time in the history of our country.”\(^{97}\) Worse still, “[t]hey grow stronger every day.”\(^{98}\) The Committee did not rest with shocking disclosures. It also helped pass the Landrum-Griffin Act, a corrective law whose “machinery,” according to Schlesinger, “made a vital contribution in later years to union democracy . . . .”\(^{99}\)

IV. Comparing Investigations and Prosecutions

Above, we discussed what kinds of powers and protections are enjoyed by congressional committees and witnesses, respectively. We then applied our analysis to the McClellan Committee. In the process, we created a case study for our following discussion on whether . . . the dangers and rationales associated with such investigations.

\(^{95}\) SCHLESINGER, JR., supra note 1, at 162 (asterisk and footnote omitted) (citing Senate Select Committee, Final Report, 86 Cong., 2 Sess. (March 28, 1960), 570-731; THE ENEMY WITHIN, supra note 18, at 158-59)

\(^{96}\) THE ENEMY WITHIN, supra note 18, at 240.

\(^{97}\) Id.

\(^{98}\) Id.

A. Dangers

We comment upon five relevant dangers. First is the specter that certain committee members will be more concerned with reputation-building than problem-solving.\textsuperscript{100} For example, both Senators John Kennedy (D-MA) and Barry Goldwater (R-AZ) used the committee hearings to advance their presidential ambitions.\textsuperscript{101} Of course, that does not mean all their efforts were improper, only suspect.

Second and relatedly, there is a danger that investigations will be employed as a partisan tool.\textsuperscript{102} The McClellan Committee nearly disbanded over this kind of internal partisan wrangling.\textsuperscript{103} When Kennedy resisted investigating the United Auto Workers (“UAW”) and its president, Walter Reuther, Goldwater alleged a Democratic “‘coverup.’”\textsuperscript{104} Goldwater, who preferred Hoffa’s peculiar brand of unionism as a business philosophy\textsuperscript{105} and detested Reuther’s leftist leanings, claimed Kennedy was “going easy on [Reuther] in order to get the [UAW] behind his brother in 1960.”\textsuperscript{106} In the face of mounting public pressure, Robert Kennedy acceded to Goldwater’s demands.\textsuperscript{107}

The third danger is harm being inflicted on the innocent.\textsuperscript{108} Labor racketeering, in particular, “lent itself to exploitation for the purposes of generating political publicity and

\textsuperscript{100} See Hamilton et al., supra note 42, at 1118.
\textsuperscript{101} See Lee, supra note 12, at 72.
\textsuperscript{102} See Hamilton et al., supra note 42, at 1118.
\textsuperscript{103} See The Enemy Within, supra note 18, at 266.
\textsuperscript{104} Lee, supra note 12, at 71 (quoting Senator Barry Goldwater).
\textsuperscript{106} Schlesinger, Jr., supra note 1, at 170-71.
\textsuperscript{107} Goldwater later admitted his error – the hearing, which backfired politically, cost “$50,000 and was ‘a most fruitless’ investigation.” Lee, supra note 12, at 71 (quoting Senator John McClellan, but note that Goldwater agreed with the sentiment).
\textsuperscript{108} See Hamilton et al., supra note 42, at 1118.
manipulating public opinion.”¹⁰⁹ As a result, questioners sometimes invoked McCarthy-era character attacks.¹¹⁰ However, as mentioned above, the Committee earnestly tried to avoid past abuses, “checking and rechecking testimony . . . [to] lessen[ ] tremendously the possibility of damaging an innocent person’s reputation.”¹¹¹

Fourth, intensive investigations may provoke public disquietude and, subsequently, legislative overreactions.¹¹² The Landrum-Griffin Act is a fitting example. Taking advantage of the national uproar, Republican Members of the House of Representatives initially proposed a broad and unjustifiably punitive bill.¹¹³ As Kennedy noted, the measure went “‘beyond the

¹⁰⁹ Santos, supra note 16, at 450 (footnote omitted).
¹¹⁰ See Jacobs, supra note 87, at 297.
¹¹¹ The Enemy Within, supra note 18, at 304. In response to allegations of abuse, historian Arthur Schlesinger observed that “[t]he committee was plainly dealing with questions on which legislation could be (and was) had[.]” Schlesinger, Jr., supra note 1, at 188.
¹¹² Lee, supra note 12, at 86.
¹¹³ See id. In the Senate, John Kennedy proposed two less sweeping bills. The first was cosponsored by Republican Irving Ives, passed the Senate, but died in the House. See id. at 183. The next year, Kennedy reintroduced the bill, with Republican Sam Ervin as cosponsor. See Cox, supra note 15, at 822. At Among other things, Kennedy-Ervin “required union officials to guarantee regular elections with secret ballots, to file financial reports with the Labor Department[,] and to disclose financial transactions that might involve conflicts of interest.” Schlesinger, Jr., supra note 1, at 183. According to a Senate Report, the bill “carr[ied] our four of the five recommendations of the rackets committee interim report; the fifth one supposedly had been resolved by the Welfare and Pension Plan Disclosure Act of 1958.” Lee, supra note 12, at 106 (citing Senate Report 187). After approving certain significant amendments, the Senate passed the bill. See Cox, supra note 15, at 822.

In the House, Republicans rejected Kennedy-Ervin and passed instead the Landrum-Griffin bill. Critics believed that Kennedy-Ervin was “too pro-union official” in part because “it was only a ‘disclosure’ rather than a ‘regulatory’ measure.” Nelson, supra note 4, at 538 (footnote omitted). Also notable is that President Dwight D. Eisenhower perceived Landrum-Griffin as his last opportunity to pass his labor reform proposal, which had been wallowing since his first year in office. See Lee, supra note 12, at 100. The Landrum-Griffin proposal, among other things, removed pro-union amendments, or “sweeteners,” to Tart-Hartley, while adding “new restrictions upon secondary boycotts and organizational picketing.” Cox, supra note 15, at 822-23 (footnote omitted).

In any event, at conference, Senator Kennedy helped frame a compromise that, while moderating Landrum-Griffin, left intact goodly Republican provisions. Schlesinger, Jr., supra note 1, at 184 (“Only heroic effort by John Kennedy in conference achieved a tolerable
Finally, attempting to rationalize broad investigative powers, Felix Frankfurter wrote that unlike criminal trials, hearings do not place a man’s liberty interest at stake. Perhaps as a sign of the times, the validity of his argument has waned. Today, “[m]any witnesses before Congress in high-profile matters . . . are or will be involved in parallel proceedings” – the collateral effects of which are particularly acute in the criminal context. Indeed, indictments have been issued and ongoing prosecutions reshaped by a witness’s congressional testimony.

B. Why Investigations Need Greater Powers And Leeway Than Prosecutions

If Justice Frankfurter’s was the only justification, the entire investigative paradigm might have to be rethought. There are at least four significant counterbalances, however, warranting the powers and procedural leeway possessed by Congress.

compromise between the House and Senate bills.”). As a result, Republicans got their regulatory wish – “[f]or the first time in American history,” Congress charged a federal agency, the Department of Labor, “with refereeing the internal operation of private organizations.” LEE, supra note 12, at 160; Nelson, supra note 4, at 541 (“Landrum-Griffin . . . dominate[d] Kennedy-Ervin in the conference committee.” (footnotes omitted)).

114 SCHLESINGER, JR., supra note 1, at 184 (quoting Robert F. Kennedy to Chester Bowles, Aug. 12, 1959, Bowles Papers). One may argue, understandably so, that the Landrum-Griffin Act did not go far enough in combating union corruption. With some unions, the corruption was simply too pervasive and required more than disclosure or regulation, but sustained prosecutorial intervention. Subsequent to the labor racketeering hearing, in 1963, the Senate authorized the McClellan Committee to conduct a full and complete study of organized crime, which supported the passage of the Racketeer Influenced and Corrupt Organizations (RICO) Act of 1970. See Lesley Bonney, Note, The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of RICO, 42 CATH. U. L. REV. 579, 587-88 (1993).

115 See SCHLESINGER, JR., supra note 1, at 185 (citing Felix Frankfurter, Hands off the Investigation, NEW REPUBLIC, May 21, 1924).

116 Hamilton et al., supra note 42, at 1171.

117 See id. at 1172.

118 Id.
1. **Recalcitrant Organizations or Witnesses**

Often, congressional investigations encounter unparalleled resistance. “‘There is no power on earth that can tear away the veil behind which powerful and audacious and unscrupulous groups operate,’” Senator Hugo Black wrote, “‘save the sovereign legislative power armed with the right of subpoena and search.’” Our case study lends credence to his asseveration.

Effective questioning requires thorough pre-hearing investigation. However, criminal ties made Hoffa more difficult than most witnesses. Investigating him meant trolling the dimly-lit world of organized crime in search of willing sources with credible information. The Committee found most records altered and potential witnesses silent. Moreover, Hoffa had at his disposal an exceptional legal team thanks to the Teamsters’s coffers.

Making Hoffa even more intractable was his prior investigative experience. Having faced congressional inquiries before, he had devised strategies to secure favorable results. One technique involved pleading a “faulty memory,” instead of the Fifth. For instance, Hoffa would “repeatedly den[y] certain testimony that had been given, thus killing much time locating

---

120 Kennedy was concerned with Hoffa and his Teamsters not solely because of their union activities. He acknowledged that “‘we are always going to have stealing and payoffs’” as well as “‘strike violence.’” The Teamsters, he believed, were involved in something “far more sinister.” *Id.* (quoting John Martin, *Hoffa*, 749-50).
121 See VICTOR NAVASKY, KENNEDY JUSTICE 395 (1971).
123 *Id.* at 60.
and rereading the questioned record.”124 His goal was to stall the investigation so that it gets abandoned from want of interest – a concern not generally shared by trial courts.125

These kinds of tactics made Kennedy believe “‘the right to ask a question and the right to demand an answer are essential to the democratic process. . . .’”126 Perhaps, some of the Committee’s witnesses would agree. After all, not one person appealed to the courts for protection.127

2. Complex Subject Matter

Committees are also confronted by unusually opaque and heretofore unexamined subject matter. At the same time, committee members often lack the specialized training necessary to hit the ground running, unlike prosecutors in an economic crimes unit, for example. Nevertheless, due to the danger of an investigation stalling, committee members must become fast experts, processing a sizable amount of information in a fairly short period of time.

Labor racketeering, for example, was a largely untraversed field until the investigation of the McClellan Committee. Neither past investigations nor the Federal Bureau of Investigation provided any help; forcing Kennedy, in the sentiments of Schlesinger, to proceed into this jungle without guide or experience.128 However, Kennedy as chief counsel was able to lead the investigation to a successful conclusion and the passage of legislation, in part because of the broad powers and substantial leeway at his disposal.

124 Id.; see also JAMES W. HILTY, ROBERT KENNEDY: BROTHER PROTECTOR 113-16 (Temple University Press 1997).
125 See Lee, supra note 12, at 59-60.
126 THE ENEMY WITHIN, supra note 18, at 311 (quoting Supreme Court Justice WILLIAM DOUGLAS, WE THE JUDGES 160 (Doubleday 1956)).
127 See SCHLESINGER, JR., supra note 1, at 188.
3. **Far-Reaching Implications**

While investigations are often initiated because of past wrongs, their end goal is to prevent future harm and, thus, they possess far broader implications than criminal trials. Specifically, congressional investigations usually address ongoing behavior, like labor racketeering. Trials, on the other hand, concern a single set of facts. Moreover, as investigations proceed, the number of parties involved can grow exponentially. Prosecutions, however, pertain to a more limited set of victims, witnesses and defendants. Finally, a congressional committee’s rulings and recommendations can result in a legal sea change. More often than not, a court’s dispositions are retrospective, interpreting the law rather than creating it. Because of the number of interests that stand to be affected, it is important that congressional committees get it right. Legislation is less likely to be narrowly-tailored or effective without accurate, prefatory information.

4. **Legislative Not Judicial Function**

The above justifications culminate in our last point: congressional hearings serve a legislative rather than judicial function. Kennedy often echoed this argument, explaining that “[i]t is not sufficient to get rid of . . . Hoffa without passing a law to deal with the problem that has been uncovered.” Adjusting the legal landscape (through the passage of new or amending legislation) is different than prosecuting defendants. As mentioned supra, a committee member has to quickly grasp novel but complex issues. Then, after constructing a legislative proposal, he or she must build a consensus, often through appeals to fellow lawmakers and the public.

---

130 THE ENEMY WITHIN, supra note 18, at 320. Kennedy often importuned Americans that “mere disclosure of a sordid situation does no good unless it is cleaned up.” *An Urgent Reform Plan*, supra note 29.
Finally, if not brought to a vote in a timely fashion, the bill might be defeated by entrenched special interests.

The McClellan Committee, once again, is our example. Not only was labor racketeering an unfamiliar and perplexing subject, but public and congressional consensus was, at times, illusive. Given these challenges, Kennedy found a certain measure of “latitude” essential. He noted that the Committee’s “purpose was different from a court’s” – “[it] was seeking information to determine legislative needs, and the more information we had . . . the better the Committee and Congress could do its job.”

---

131 SCHLESINGER, JR., supra note 1, at 184 (stating that even after the hearings, “[p]ublic apathy still appeared to prevail.”).
132 THE ENEMY WITHIN, supra note 18, at 306.
133 Id. Kennedy strongly believed that there was room to improve the way Congress exercised its investigative function. Although quite distinct from the topic of this article, we pause to consider a few reformatory suggestions. First, like prosecutors, investigators have a substantial amount of discretion. The conduct and methodologies of an investigation vary with the committee. Kennedy took the view that committees should acquire “the same degree of proof in every case that we might need in a court of law.” THE ENEMY WITHIN, supra note 18, at 306. Such proof and prefatory corroboration of evidence requires searching and “sound investigative work,” but would, in the final analysis, placate a lot of critics. Id. To ensure as much, clear, authoritative, and instructive investigative rules should be adopted at the onset of a committee investigation.

Second, the protections enjoyed by witnesses should be substantive and respected. The McClellan Committee provided witnesses with more protections than some modern committees (see supra Part III.D.1 and note 79) and was still able to produce results. However, committee questioners, including Kennedy, often failed to abide one of the best protections afforded witnesses facing possible criminal prosecutions – the Fifth Amendment. Questioners should not require witnesses to, time and again, invoke the Fifth Amendment for the mere purpose of swaying public opinion – “‘[i]nvestigations conducted solely for . . . personal aggrandizement . . . to punish those investigated are indefensible.’” SCHLESINGER, JR., supra note 1, at 185 (quoting Watkins, 354 U.S. at 187) (internal quotation marks omitted). Instead, Congress should consider immunizing witnesses and conducting subsequent hearings in a closed-door, executive session, as such a tactic would leave intact the prospect of a successful criminal trial, should an interested prosecutor take up the case. Howard R. Sklamberg, Investigation Versus Prosecution: The Constitutional Limits on Congress’s Power to Immunize Witnesses, 78 N.C.L. REV. 153, 169-70 (1999).

Third, congressional investigators must remember that theirs is a legislative, rather than prosecutorial, role. As such, a committee should not question a witness for the sole objective of demonstrating that he or she is involved in or responsible for the ills under investigation, unless
Before we conclude, it is important to note that this article does not argue the ends of investigation ends justify any means. That line of reasoning would open the door to substantial government abuse. This author only claims that investigations have significant powers and afford their targets fewer protections than prosecutions because their ends (and the interests at stake) are quite different.

V. Conclusion

When it comes to congressional investigations, there is undoubtedly room for improvement. However, as Kennedy pointed out, “much of our most important legislation has grown out of the factual basis laid by Congressional investigations.” Moreover, investigations have invaluable byproducts, reminding us that wrongdoing – whether hidden or overt, legal or not – may have consequences. That is why Justice William Douglas believed “the such questioning serves a valid legislative purpose. Of course, under present interpretative standards, only the most egregious and evident abuses would risk any judicial backlash. Nonetheless, as the Supreme Court has made clear, the “power to investigate . . . is not unlimited”; Congress possess no “general power to inquire into private affairs.” Eastland, 421 U.S. at 504 n.15 (internal quotation marks and citation omitted). Courts should be willing to address, if asked, whether these oft-repeated judicial sentiments carry any practical weight and consequence.

Fourth, directly because investigations are legislative in nature, committees should not evaluate success, as Kennedy tended to do, by the number of indictments or criminal prosecutions that result from the hearings. Rather, perhaps at the onset of an investigation, committees should not only adopt procedural limitations, but also easily-consulted benchmarks of success, which remind questioners of their legislative end goal. For instance, before and after a witness testifies, a committee should be able to answer how the testimony may factor into the legislative process.

Finally, because most of these suggestions are hortatory and require Congress to exercise self-restraint, the press must play a continued role in ensuring that Americans possess the requisite information to make their feelings known and to keep their legislative representatives accountable. THE ENEMY WITHIN, supra note 18, at 313 (acknowledging that the press serve as “a sort of safety valve against the violation of civil rights”).

134 THE ENEMY WITHIN, supra note 18, at 311.
right to demand an answer spells in a crucial way the difference between the totalitarian and the democratic regime.”

In evaluating a committee’s performance, we must remember that its purposes are unique. As such, they call for a unique set of tools. Indeed, as the Supreme Court wrote nearly 200 years ago, the sovereign People created government bodies and the “interest and dignity” of the People “require the exertion of the powers” necessary to “attain[. . .] the ends” of those bodies. Perhaps Kennedy was mistaken when he said labor racketeering threatened the very “moral fiber of American society” in the 1950s. However, if the McClellan Committee teaches us anything, it is that when future threats do arise, we can be confident our representatives will have the power and leeway to answer.

---

135 Id. at 311 (quoting DOUGLAS, supra note 26, at 160).
136 Anderson v. Dunn, 19 U.S. at 226.
137 THE ENEMY WITHIN, supra note 18, at 325.