

**Hannah Vs. Larche**

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**Court :** US Supreme Court

**Decided On :** Jun-20-1960

**Appeal No. :** 363 U.S. 420

**Appellant :** Hannah

**Respondent :** Larche

**Judgement :**

Hannah v. Larche - 363 U.S. 420 (1960)

U.S. Supreme Court Hannah v. Larche, 363 U.S. 420 (1960)

**Hannah v. Larche**

**No. 549**

**Argued January 18-19, 1960**

**Decided June 20, 1960 \***

**363 U.S. 420**

*APPEAL FROM THE UNITED STATES DISTRICT COURT*

*FOR THE WESTERN DISTRICT OF LOUISIANA*

## SYLLABUS

The Civil Rights Act of 1957 created in the Executive Branch of the Government a Commission on Civil Rights to investigate written, sworn allegations that persons have been discriminatorily deprived of their right to vote on account of their color, race, religion, or national origin, to study and collect information "concerning legal developments constituting a denial of equal protection of the laws," and to report to the President and Congress. The Commission is authorized to subpoena witnesses and documents and to conduct hearings. The Act prescribes certain rules of procedure; but nothing in the Act requires the Commission to afford persons accused of discrimination the right to be apprised as to the specific charges against them or as to the identity of their accusers, or the right to confront and cross-examine witnesses appearing at Commission hearings; and the Commission prescribed supplementary rules of procedure which deny such rights in hearings conducted by it.

## HELD

1. In the light of the legislative history of the Act, the Commission was authorized by Congress to adopt such rules of procedure. Pp. [363 U. S. 430](#) -439.
2. Since the Commission makes no adjudications, but acts solely as an investigative and factfinding agency, these rules of procedure do not violate the Due Process Clause of the Fifth Amendment. *Morgan v. United States*, [304 U. S. 1](#) ; *Joint Anti-Fascist Refugee Committee v. McGrath*, [341 U. S. 123](#) ; *Greene v. McElroy*, [360 U. S. 474](#) , distinguished. Pp. [363 U. S. 440](#) -452.
3. Such rules of procedure do not violate the Sixth Amendment, since that Amendment is specifically limited to "criminal prosecutions," and the proceedings of the Commission do not fall in that category. P. [363 U. S. 440](#) n. 16.

4. The Civil Rights Act of 1957 is appropriate legislation under the Fifteenth Amendment. P. [363 U. S. 452](#) .

5. Section 7 of the Administrative Procedure Act is not applicable to hearings conducted by this Commission. Pp. [363 U. S. 452](#) -453.

177 F.Supp. 816 reversed.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases involve the validity of certain Rules of Procedure adopted by the Commission on Civil Rights, which was established by Congress in 1957. [ [Footnote 1](#) ] Civil Rights Act of 1957, 71 Stat. 634, 42 U.S.C. 1975-1975e. They arise out of the Commission's investigation of alleged Negro voting deprivations in the State of Louisiana. The appellees in No. 549 are registrars of voters in the State of Louisiana, and the respondents in No. 550 are private citizens of Louisiana. [ [Footnote 2](#) ] After having been summoned to

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appear before a hearing which the Commission proposed to conduct in Shreveport, Louisiana, these registrars and private citizens requested the United States District Court for the Western District of Louisiana to enjoin the Commission from holding its anticipated hearing. It was alleged, among other things, that the Commission's Rules of Procedure governing the conduct of its investigations were unconstitutional. The specific rules challenged are those which provide that the identity of persons submitting complaints to the Commission need not be disclosed, and that those summoned to testify before the Commission, including persons against whom complaints have been filed, may not cross-examine other witnesses called by the Commission. The District Court held that the Commission was not authorized to adopt the Rules of Procedure here in question, and therefore issued an injunction which prohibits the Commission from holding any hearings in the Western District of Louisiana as long as the challenged procedures remain in force. The Commission requested this Court to review the District Court's decision. [ [Footnote 3](#) ] We granted the Commission's motion to advance

the cases, and oral argument was accordingly scheduled on the jurisdiction on appeal in No. 549, on the petition for certiorari in No. 550, and on the merits of both cases.

Having heard oral argument as scheduled, we now take jurisdiction in No. 549 and grant certiorari in No.

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550. The specific questions which we must decide are (1) whether the Commission was authorized by Congress to adopt the Rules of Procedure challenged by the respondents, and (2) if so, whether those procedures violate the Due Process Clause of the Fifth Amendment.

A description of the events leading up to this litigation is necessary not only to place the legal questions in their proper factual context, but also to indicate the significance of the Commission's proposed Shreveport hearing. During the months prior to its decision to convene the hearing, the Commission had received some sixty-seven complaints from individual Negroes who alleged that they had been discriminatorily deprived of their right to vote. Based upon these complaints, and pursuant to its statutory mandate to "investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin," [ [Footnote 4](#) ] the Commission began its investigation into the Louisiana voting situation by making several *ex parte* attempts to acquire information. Thus, in March, 1959, a member of the Commission's staff interviewed the Voting Registrars of Claiborne, Caddo, and Webster Parishes, but obtained little relevant information. During one of these interviews, the staff member is alleged to have informed Mrs. Lannie Linton, the Registrar of Claiborne Parish, that the Commission had on file four sworn statements charging her with depriving Negroes of their voting rights solely because of their race. Subsequent to this interview, Mr. W. M. Shaw, Mrs. Linton's personal attorney, wrote a letter to Mr. Gordon M. Tiffany, the Staff Director of the Commission, in which it was asserted that Mrs. Linton knew the sworn complaints lodged against

her to be false. The letter also indicated that Mrs. Linton wished to prefer perjury charges against the affiants, and Mr. Shaw therefore demanded that the Commission forward to him copies of the affidavits so that a proper presentment could be made to the grand jury. On April 14, 1959, Mr. Tiffany replied to Mr. Shaw's letter and indicated that the Commission had denied the request for copies of the sworn affidavits. Mr. Shaw was also informed of the following official statement adopted by the Commission:

"The Commission, from its first meeting forward, having considered all complaints submitted to it as confidential because such confidentiality is essential in carrying out the statutory duties of the Commission, the Staff Director is hereby instructed not to disclose the names of complainants or other information contained in complaints to anyone except members of the Commission and members of the staff assigned to process, study, or investigate such complaints."

A copy of Mr. Tiffany's letter was sent to Mr. Jack P. F. Gremillion, the Attorney General of Louisiana, who had previously informed the Commission that, under Louisiana law, the Attorney General is the legal adviser for all voting registrars in any hearing or investigation before a federal commission.

Another attempt to obtain information occurred on May 13, 1959, when Mr. Tiffany, upon Commission authorization, sent a list of 315 written interrogatories to Mr. Gremillion. These interrogatories requested very detailed and specific information, and were to be answered by the voting registrars of nineteen Louisiana parishes. Although Mr. Gremillion and the Governor of Louisiana had previously assented to the idea of written interrogatories, on May 28, 1959, Mr. Gremillion sent a letter to

Mr. Tiffany indicating that the voting registrars refused to answer the interrogatories. The reasons given for the refusal were that many of the questions seemed unrelated to the functions of voting registrars, that the questions were neither accompanied by specific complaints nor related to specific complaints, and

that the time and research required to answer the questions placed an unreasonable burden upon the voting registrars.

In response to this refusal, on May 29, 1959, Mr. Tiffany sent a telegram to Mr. Gremillion informing the latter that the interrogatories were based upon specific allegations received by the Commission, and reaffirming the Commission's position that the identity of specific complainants would not be disclosed. Mr. Tiffany's letter contained a further request that the interrogatories be answered and sent to the Commission by June 5, 1959. On June 2, 1959, Mr. Gremillion wrote a letter to Mr. Tiffany reiterating the registrars' refusal, and again requesting that the names of complainants be disclosed.

Finally, as a result of this exchange of correspondence, and because the Commission's attempts to obtain information *ex parte* had been frustrated, the Commission, acting pursuant to Section 105(f) of the Civil Rights Act of 1957, [ [Footnote 5](#) ] decided to hold the Shreveport hearing commencing on July 13, 1959.

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Notice of the scheduled hearing was sent to Mr. Gremillion, and, between June 29 and July 6, subpoenas *duces tecum* were served on the respondents in No. 549, ordering them to appear at the hearing and to bring with them various voting and registration records within their custody and control. Subpoenas were also served upon the respondents in No. 550. These private citizens were apparently summoned to explain their activities with regard to alleged deprivations of Negro voting rights. [ [Footnote 6](#) ]

On July 8, 1959, Mr. Tiffany wrote to Mr. Gremillion, enclosing copies of the Civil Rights Act and of the Commission's Rules of Procedure. [ [Footnote 7](#) ] Mr. Gremillion's attention was also drawn to Section 102(h) of the Civil Rights Act, which permits witnesses to submit, subject to the discretion of the Commission, brief and pertinent sworn statements for inclusion in the record. [ [Footnote 8](#) ]

Two days later, on July 10, 1959, the respondents in No. 549 and No. 550 filed two separate complaints in the District

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Court for the Western District of Louisiana. Both complaints alleged that the respondents would suffer irreparable harm by virtue of the Commission's refusal to furnish the names of persons who had filed allegations of voting deprivations, as well as the contents of the allegations, and by its further refusal to permit the respondents to confront and cross-examine the persons making such allegations. In addition, both complaints alleged that the Commission's refusals not only violated numerous provisions of the Federal Constitution, but also constituted "*ultra vires*" acts not authorized either by Congress or the Chief Executive. The respondents in No. 549 also alleged that they could not comply with the subpoenas *duces tecum* because Louisiana law prohibited voting registrars from removing their voting records except "upon an order of a competent court," and because the Commission was not such a "court." Finally, the complaint in No. 549 alleged that the Civil Rights Act was unconstitutional because it did not constitute "appropriate legislation within the meaning of Section (2) of the XV Amendment."

Both complaints sought a temporary restraining order and a permanent injunction prohibiting the members of the Commission (a) from compelling the "testimony from or the production of any records" by the respondents until copies of the sworn charges, together with the names and addresses of the persons filing such charges were given to the respondents; [ [Footnote 9](#) ] (b) from "conducting any hearing pursuant to the rules and regulations adopted by" the Commission; and (c) from "conspiring together . . . or with any other person . . . to deny complainants their rights and privileges as citizens" of Louisiana or the

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United States

"or to deny to complainants their right to be confronted by their accusers, to know the nature and character of the charges made against them,"

and to be represented by counsel. The complaint in No. 549 also sought a declaratory judgment that the Civil Rights Act of 1957 was unconstitutional.

On the day that the complaints were filed, the district judge held a combined hearing on the prayers for temporary restraining orders. On July 12, 1959, he found that the respondents would suffer irreparable harm if the hearings were held as scheduled, and he therefore issued the requested temporary restraining orders and rules to show cause why a preliminary injunction should not be granted. *Larche v. Hannah*, 176 F.Supp. 791. The order prohibited the Commission from holding any hearings which concerned the respondents or others similarly situated until a determination was made on the motion for a preliminary injunction.

Inasmuch as the complaint in No. 549 attacked the constitutionality of the Civil Rights Act, a three-judge court was convened pursuant to 28 U.S.C. 2282. Since the complaint in No. 550 did not challenge the constitutionality of the Civil Rights Act of 1957, that case was scheduled to be heard by a single district judge. That district judge was also a member of the three-judge panel in No. 549, and a combined hearing was therefore held on both cases on August 7, 1959.

On October 7, 1959, a divided three-judge District Court filed an opinion in No. 549. *Larche v. Hannah*, 177 F.Supp. 816. The court held that the Civil Rights Act of 1957 was constitutional, since it "very definitely constitutes appropriate legislation" authorized by the Fourteenth and Fifteenth Amendments and Article I, Section 2, of the Federal Constitution. *Id.* at 821. The court then held that, since the respondents' allegations with regard to appraisal, confrontation, and cross-examination

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raised a "serious constitutional issue," this Court's decision in *Greene v. McElroy*, [360 U. S. 474](#) , required a preliminary determination as to whether Congress specifically authorized the Commission

"to adopt rules for investigations . . . which would deprive parties investigated of their rights of confrontation and cross-examination and their right to be apprised of

the charges against them."

177 F.Supp. at 822. The court found that Congress had not so authorized the Commission, and an injunction was therefore issued. In deciding the case on the issue of authorization, the court never reached the "serious constitutional issue" raised by the respondents' allegations. [ [Footnote 10](#) ] The injunction prohibits the Commission from holding any hearing in the Western District of Louisiana wherein the registrars, "accused of depriving others of the right to vote, would be denied the right of appraisal, confrontation, and cross-examination." [ [Footnote 11](#) ] The single district

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judge rendered a decision in No. 550 incorporating by reference the opinion of the three-judge District Court, and an injunction, identical in substance to that entered in No. 549, was issued.

I

We held last Term in *Greene v. McElroy, supra*, that, when action taken by an inferior governmental agency was accomplished by procedures which raise serious constitutional questions, an initial inquiry will be made to determine whether or not

"the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use."

*Id.* at [360 U. S. 507](#) . The considerations which prompted us in *Greene* to analyze the question of authorization before reaching the constitutional issues presented are no less pertinent in this case. Obviously, if the Civil Rights Commission was not authorized to adopt the procedures complained of by the respondents, the case could be disposed of without a premature determination of serious constitutional questions. See *Vitarelli v. Seaton*, [359 U. S. 535](#) ; *Kent v. Dulles*, [357 U. S. 116](#) ; *Watkins v. United States*, [354 U. S. 178](#) ; *Peters v.*

We therefore consider first the question of authorization. As indicated above, the Commission specifically refused to disclose to the respondents the identity of persons who had submitted sworn complaints to the Commission and the specific charges contained in those complaints. Moreover, the respondents were informed by the Commission that they would not be permitted to cross-examine

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any witnesses at the hearing. The respondents contend, and the court below held, that Congress did not authorize the adoption of procedural rules which would deprive those being investigated by the Commission of the rights to appraisal, confrontation, and cross-examination. The court's holding is best summarized by the following language from its opinion:

"[W]e find nothing in the Act which expressly authorizes or permits the Commission's refusal to inform persons, under investigation for criminal conduct, of the nature, cause, and source of the accusations against them, and there is nothing in the Act authorizing the Commission to deprive these persons of the right of confrontation and cross-examination."

177 F.Supp. at 822.

After thoroughly analyzing the Rules of Procedure contained in the Civil Rights Act of 1957 and the legislative history which led to the adoption of that Act, we are of the opinion that the court below erred in its conclusion and that Congress did authorize the Commission to adopt the procedures here in question.

It could not be said that Congress ignored the procedures which the Commission was to follow in conducting its hearings. Section 102 of the Civil Rights Act of 1957 lists a number of procedural rights intended to safeguard witnesses from potential abuses. Briefly summarized, the relevant subdivisions of Section 102 provide that the Chairman shall make an opening statement as to the subject of the hearing; that a copy of the Commission's rules shall be made available to witnesses; that

witnesses "may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights"; that potentially defamatory, degrading, or incriminating testimony shall be received in executive session, and

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that any person defamed, degraded, or incriminated by such testimony shall have an opportunity to appear voluntarily as a witness and to request the Commission to subpoena additional witnesses; that testimony taken in executive session shall be released only upon the consent of the Commission; and that witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. [[Footnote 12](#) ]

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The absence of any reference to appraisal, confrontation, and cross-examination, in addition to the fact that counsel's role is specifically limited to advising witnesses of their constitutional rights, creates a presumption that Congress did not intend witnesses appearing before the Commission to have the rights claimed by respondents. This initial presumption is strengthened beyond any

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reasonable doubt by an investigation of the legislative history of the Act.

The complete story of the 1957 Act begins with the 1956 House Civil Rights Bill, H.R. 627. That bill was reported out of the House Judiciary Committee without any reference to the procedures to be used by the Commission in conducting its hearings. H.R.Rep. No. 2187, 84th Cong., 2d Sess. During the floor debate, Representative Dies of Texas introduced extensive amendments designed to regulate the procedure of Commission hearings. 102 Cong.Rec. 13542. Those amendments would have guaranteed to witnesses appearing before the Commission all of the rights claimed by the respondents in these cases. The amendments provided, in pertinent part, that a person who might be adversely affected by the testimony of another

"shall be fully advised by the

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Commission as to the matters into which the Commission proposes to inquire and the adverse material which is proposed to be presented;"

that a person adversely affected by evidence or testimony given at a public hearing could "appear and testify or file a sworn statement in his own behalf"; that such a person could also "have the adverse witness recalled" within a stated time; and that he or his counsel could cross-examine adverse witnesses. [ [Footnote 13](#) ]

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The bill, as finally passed by the House, contained all of the amendments proposed by Representative Dies. 102 Cong.Rec. 13998-13999. However, before further action could be taken, the bill died in the Senate. Although many proposals relating to civil rights were introduced in the 1957 Session of Congress, two bills became the prominent contenders for support. One was S. 83, a bill introduced by Senator Dirksen containing the same procedural provisions that the amended House bill in 1956 had contained. The other bill, H.R. 6127, was introduced by Representative Celler, Chairman of the House Judiciary Committee, and this bill incorporated the so-called House "fair play" rules as the procedures which should govern the conduct of Commission hearings. [ [Footnote 14](#) ] After extensive debate and hearings, H.R. 6127

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was finally passed by both Houses of Congress, and the House "fair play" rules, which make no provision for advance notice, confrontation, or cross-examination, were adopted in preference to the more protective rules suggested in S. 83. [ [Footnote 15](#) ]

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The legislative background of the Civil Rights Act not only provides evidence of congressional authorization, but it also distinguishes these cases from *Greene v. McElroy, supra*, upon which the court below relied so heavily. In *Greene*, there was no express authorization by Congress or the President for the Department of Defense to adopt the type of security clearance program there involved. Nor was there any legislative history or executive directive indicating that the Secretary of Defense was authorized to establish a security clearance program which could deprive a person of his government employment on the basis of secret and undisclosed information. Therefore, we concluded in *Greene* that, because of the serious constitutional problems presented, mere acquiescence by the President or the Congress would not be sufficient to constitute authorization

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for the security clearance procedures adopted by the Secretary of Defense. The facts of this case present a sharp contrast to those before the Court in *Greene*. Here, we have substantially more than the mere acquiescence upon which the Government relied in *Greene*. There was a conscious, intentional selection by Congress of one bill, providing for none of the procedures demanded by respondents, over another bill, which provided for all of those procedures. We have no doubt that Congress' consideration and rejection of the procedures here at issue constituted an authorization to the Commission to conduct its hearings according to the Rules of Procedure it has adopted, and to deny to witnesses the rights of appraisal, confrontation, and cross-examination.

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II

The existence of authorization inevitably requires us to determine whether the Commission's Rules of Procedure are consistent with the Due Process Clause of the Fifth Amendment. [ [Footnote 16](#) ]

Since the requirements of due process frequently vary with the type of proceeding involved, *e.g.*, compare *Opp Cotton Mills, Inc. v. Administrator*, [312 U. S. 126](#) , [312 U. S. 152](#) , with *Interstate Commerce Comm'n v. Louisville & N. R. Co.*, [227 U. S. 88](#) , [227 U. S. 91](#) , we think it is necessary at the outset to ascertain both the nature and function of this Commission. Section 104 of the Civil Rights Act of 1957 specifies the duties to be performed by the Commission. Those duties consist of (1) investigating written, sworn allegations that anyone has been discriminatorily deprived of his right to vote; (2) studying and collecting information "concerning legal developments constituting a denial of equal protection of the laws under the Constitution"; and (3) reporting to the President and Congress on its activities, findings, and recommendations. [ [Footnote 17](#) ] As is apparent

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from this brief sketch of the statutory duties imposed upon the Commission, its function is purely investigative and factfinding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

The specific constitutional question, therefore, is whether persons whose conduct is under investigation by a governmental agency of this nature are entitled, by virtue of the Due Process Clause, to know the specific charges that are being investigated, as well as the identity of the complainants, [ [Footnote 18](#) ] and to have the right to cross-examine

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those complainants and other witnesses. Although these procedures are very desirable in some situations, for the reasons which we shall now indicate, we are of the opinion that they are not constitutionally required in the proceedings of this

Commission.

"Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general factfinding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play which through the years have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents need not be conferred upon those appearing before purely investigative agencies, of which the Commission on Civil Rights is one.

It is probably sufficient merely to indicate that the rights claimed by respondents are normally associated only with adjudicatory proceedings, and that, since the Commission does not adjudicate, it need not be bound by adjudicatory procedures. Yet the respondents contend, and the court below implied, that such procedures

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are required since the Commission's proceedings might irreparably harm those being investigated by subjecting them to public opprobrium and scorn, the distinct likelihood of losing their jobs, and the possibility of criminal prosecutions. That any of these consequences will result is purely conjectural. There is nothing in the record to indicate that such will be the case, or that past Commission hearings have had any harmful effects upon witnesses appearing before the Commission.

However, even if such collateral consequences were to flow from the Commission's investigations, they would not be the result of any affirmative determinations made by the Commission, and they would not affect the legitimacy of the Commission's investigative function. [ [Footnote 19](#) ]

On the other hand, the investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings, and if persons who might be indirectly affected by an investigation were given an absolute right to cross-examine every witness called to testify. Factfinding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable. Even a person not called as a witness could demand the right to appear at the hearing, cross-examine any witness whose testimony or sworn affidavit allegedly defamed or incriminated him, and call an unlimited number of witnesses of

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his own selection. [ [Footnote 20](#) ] This type of proceeding would make a shambles of the investigation and stifle the agency in its gathering of facts.

In addition to these persuasive considerations, we think it is highly significant that the Commission's procedures are not historically foreign to other forms of investigation under our system. Far from being unique, the Rules of Procedure adopted by the Commission are similar to those which, as shown by the Appendix to this opinion, [ [Footnote 21](#) ] have traditionally governed the proceedings of the vast majority of governmental investigating agencies.

A frequently used type of investigative agency is the legislative committee. The investigative function of such committees is as old as the Republic. [ [Footnote 22](#) ] The volumes written about legislative investigations have proliferated almost as rapidly as the legislative committees themselves, and the courts have on more than one occasion been confronted with the legal problems presented by such committees. [ [Footnote 23](#) ] The procedures adopted by legislative investigating

committees have varied over the course of years. Yet the history of these committees clearly demonstrates that only infrequently have witnesses appearing before congressional committees been afforded the procedural rights normally associated with an adjudicative proceeding. In the vast majority of instances, congressional committees have not given witnesses detailed notice or an opportunity to confront, cross-examine and call other witnesses. [ [Footnote 24](#) ]

The history of investigations conducted by the executive branch of the Government is also marked by a decided absence of those procedures here in issue. [ [Footnote 25](#) ] The best example is provided by the administrative regulatory agencies. Although these agencies normally make determinations of a *quasi*-judicial nature, they also frequently conduct purely factfinding investigations. When doing the former, they are governed by the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001-1011, and the parties to the adjudication are accorded the traditional safeguards of a trial. However, when

these agencies are conducting nonadjudicative, factfinding investigations, rights such as appraisal, confrontation, and cross-examination generally do not obtain.

A typical agency is the Federal Trade Commission. Its rules draw a clear distinction between adjudicative proceedings and investigative proceedings. 16 CFR, 1958 Supp. 1.34. Although the latter are frequently initiated by complaints from undisclosed informants, *id.*, 1.11, 1.15, and although the Commission may use the information obtained during investigations to initiate adjudicative proceedings, *id.*, 1.42, nevertheless persons summoned to appear before investigative proceedings are entitled only to a general notice of "the purpose and scope of the investigation," *id.*, 1.33, and, while they may have the advice of counsel, "counsel may not, as a matter of right, otherwise participate in the investigation." *Id.*, 1.40. The reason for these rules is obvious. The Federal Trade Commission could not conduct an efficient investigation if persons being

investigated were permitted to convert the investigation into a trial. We have found no authorities suggesting that the rules governing Federal Trade Commission investigations violate the Constitution, and this is understandable, since any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding, just as any person investigated by the Civil Rights Commission will have all of these safeguards, should some type of adjudicative proceeding subsequently be instituted.

Another regulatory agency which distinguishes between adjudicative and investigative proceedings is the Securities and Exchange Commission. This Commission conducts numerous investigations, many of which are initiated by complaints from private parties. 17 CFR 202.4. Although the Commission's Rules provide that parties to adjudicative proceedings shall be given detailed

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notice of the matters to be determined, *id.*, 1959 Supp., 201.3, and a right to cross-examine witnesses appearing at the hearing, *id.*, 201.5, those provisions of the Rules are made specifically inapplicable to investigations, *id.*, 201.20, [ [Footnote 26](#) ] even though the Commission is required to

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initiate civil or criminal proceedings if an investigation discloses violations of law. [ [Footnote 27](#) ] Undoubtedly, the reason for this distinction is to prevent the sterilization of investigations by burdening them with trial-like procedures.

Another type of executive agency which frequently conducts investigations is the presidential commission. Although a survey of these commissions presents no definite pattern of practice, each commission has generally been permitted to adopt whatever rules of procedure seem appropriate to it, [ [Footnote 28](#) ] and it is clear that many of the most famous presidential commissions have adopted rules similar to those governing the proceedings of the Civil Rights Commission. [ [Footnote 29](#) ] For example, the Roberts Commission, established in 1941 to

ascertain the facts relating to the Japanese attack upon Pearl Harbor and to determine whether the success of the attack resulted from any derelictions of duty on the part of American military personnel, did not permit any of the parties involved in the investigation to cross-examine other witnesses. In fact, many of the persons whose conduct was being investigated were not represented by counsel and were not present during the interrogation of other witnesses. Hearings before the Joint Committee on the Investigation of the Pearl Harbor Attack, 79th Cong., 1st Sess., pts. 22-25.

Having considered the procedures traditionally followed by executive and legislative investigating agencies, we think it would be profitable at this point to discuss the oldest and perhaps the best known of all investigative bodies, the grand jury. It has never been considered necessary to grant a witness summoned before the grand

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jury the right to refuse to testify merely because he did not have access to the identity and testimony of prior witnesses. Nor has it ever been considered essential that a person being investigated by the grand jury be permitted to come before that body and cross-examine witnesses who may have accused him of wrongdoing. Undoubtedly, the procedural rights claimed by the respondents have not been extended to grand jury hearings because of the disruptive influence their injection would have on the proceedings, and also because the grand jury merely investigates and reports. It does not try.

We think it is fairly clear from this survey of various phases of governmental investigation that witnesses appearing before investigating agencies, whether legislative, executive, or judicial, have generally not been accorded the rights of appraisal, confrontation, or cross-examination. Although we do not suggest that the grand jury and the congressional investigating committee are identical in all respects to the Civil Rights Commission, [ [Footnote 30](#) ] we mention them, in addition to the executive agencies and commissions created by Congress, to show that the rules of this Commission are not alien to those which have historically

governed the procedure of investigations conducted by agencies in the three major branches of our Government. The logic behind this historical practice was recognized and described by Mr. Justice Cardozo's landmark opinion in *Norwegian Nitrogen Products Co. v. United States*, [288 U. S. 294](#) . In that

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case, the Court was concerned with the type of hearing that the Tariff Commission was required to hold when conducting its investigations. Specifically, the Court was asked to decide whether the Tariff Act of 1922, 42 Stat. 858, gave witnesses appearing before the Commission the right to examine confidential information in the Commission files and to cross-examine other witnesses testifying at Commission hearings. Although the Court did not phrase its holding in terms of due process, we think that the following language from Mr. Justice Cardozo's opinion is significant:

"The Tariff Commission advises; these others ordain. There is indeed this common bond that all alike are instruments in a governmental process which, according to the accepted classification, is legislative, not judicial. . . . Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditional forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President may be accepted, modified, or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights."

288 U.S. at [288 U. S. 318](#) . And, in referring to the traditional practice of investigating bodies, Mr. Justice Cardozo had this to say:

"[W]ithin the meaning of this act, the 'hearing' assured to one affected by a change of duty does not include a privilege to ransack the records of the Commission, and to subject its confidential agents to an examination as to all that they have learned.

*There*

*was no thought to revolutionize the practice of investigating bodies generally, and of this one in particular. "*

*Id.* at [288 U. S. 319](#) . (Emphasis supplied.)

Thus, the purely investigative nature of the Commission's proceedings, the burden that the claimed rights would place upon those proceedings, and the traditional procedure of investigating agencies in general leads us to conclude that the Commission's Rules of Procedure comport with the requirements of due process. [ [Footnote 31](#) ]

Nor do the authorities cited by respondents support their position. They rely primarily upon *Morgan v. United States*, [304 U. S. 1](#) ; *Joint Anti-Fascist Refugee Committee v. McGrath*, [341 U. S. 123](#) ; and *Greene v. McElroy*, *supra*. Those cases are all distinguishable in that the government agency involved in each was found by the Court to have made determinations in the nature of adjudications affecting legal rights. Thus, in *Morgan*, the action of the Secretary of Agriculture in fixing the maximum rates to be charged by market agencies at stockyards was challenged. In voiding the order of the Secretary for his failure to conduct a trial-like hearing, the Court referred to the adjudicatory nature of the proceeding:

"Congress, in requiring a 'full hearing,' had regard to judicial standards -- not in any technical sense, but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature."

304 U.S. at [304 U. S. 19](#) .

Likewise, in *Joint Anti-Fascist Refugee Committee v. McGrath*, [341 U. S. 123](#) , [341 U. S. 140](#) -141, this Court held that the Attorney General's action constituted an adjudication. Finally, our decision last year in *Greene v. McElroy* lends little support to the respondents' position. The governmental action there reviewed was certainly of a judicial nature. The various Security Clearance Boards involved in

*Greene* were not conducting an investigation; they were determining whether *Greene* could have a security clearance -- a license in a real sense, and one that had a significant impact upon his employment. By contrast, the Civil Rights Commission does not make any binding orders or issue "clearances" or licenses having legal effect. Rather, it investigates and reports, leaving affirmative action, if there is to be any, to other governmental agencies, where there must be action *de novo*.

The respondents have also contended that the Civil Rights Act of 1957 is inappropriate legislation under the Fifteenth Amendment. We have considered this argument, and we find it to be without merit. It would unduly lengthen this opinion to add anything to the District Court's disposition of this claim. See 177 F.Supp. at 819-821.

Respondents' final argument is that the Commission's hearings should be governed by Section 7 of the Administrative Procedure Act, 60 Stat. 241, 5 U.S.C. 1006, which specifies the hearing procedures to be used by agencies falling within the coverage of the Act. One of those procedures is the right of every party to conduct "such cross-examination as may be required for a full and true disclosure of the facts." However, what the respondents fail to recognize is that Section 7, by its terms, applies only to proceedings under Section 4, 60 Stat. 238, 5 U.S.C. 1003 (rulemaking), and Section 5, 60 Stat.

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239, 5 U.S.C. 1004 (adjudications), of the Act. As we have already indicated, the Civil Rights Commission performs none of the functions specified in those sections.

From what we have said, it is obvious that the District Court erred in both cases in enjoining the Commission from holding its Shreveport hearing. The court's judgments are, accordingly reversed, and the cases are remanded with direction to vacate the injunctions.

*Reversed and remanded.*

[For opinion of MR. JUSTICE FRANKFURTER, concurring in the result, *see post*, p. [363 U. S. 486](#) .]

[For concurring opinion of MR. JUSTICE HARLAN, joined by MR. JUSTICE CLARK, *see post*, p. [363 U. S. 493](#) .]

[For dissenting opinion of MR. JUSTICE DOUGLAS, joined by MR. JUSTICE BLACK, *see post*, p. [363 U. S. 493](#) .]

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\* Together with No. 550, *Hannah et al. v. Slawson et al.*, on petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

[ [Footnote 1](#) ]

Although the Civil Rights Act of 1957 provided that the Commission should cease to exist within two years after its creation, 71 Stat. 635, 42 U.S.C. 1975c, in 1959, Congress extended the Commission's life for an additional two years. 73 Stat. 724.

[ [Footnote 2](#) ]

The appellants in No. 549 and the petitioners in No. 550 are the individual members of the Civil Rights Commission. Hereinafter, they will be referred to as "the Commission." The appellees in No. 549 and the respondents in No. 550 will both hereinafter be referred to as "respondents."

[ [Footnote 3](#) ]

Because No. 549 was heard and decided by a three-judge District Court, a direct appeal to this Court was sought by the Commission pursuant to 28 U.S.C. 1253. The Commission also filed an appeal in No. 550 with the United States Court of Appeals for the Fifth Circuit. However, before the Court of Appeals could render a decision in No. 550, the Commission filed a petition for certiorari pursuant to Rule 20 of this Court.

[ [Footnote 4](#) ]

Section 104 of the Civil Rights Act of 1957, 71 Stat. 635, 42 U.S.C. 1975c(a)(1).

[ [Footnote 5](#) ]

Section 105(f) of the Civil Rights Act authorizes the Commission to hold hearings and to subpoena witnesses. That section provides:

"(f) *Hearings; issuance of subpoenas.* "

"The Commission, or, on the authorization of the Commission, any subcommittee of two or more members at least one of whom shall be of each major political party may, for the purpose of carrying out the provisions of this Act, hold such hearings and act at such times and places as the Commission or such authorized subcommittee may deem advisable. Subpoenas for the attendance and testimony of witnesses or the production of written or other matter may be issued in accordance with the rules of the Commission as contained in section 1975a(j) and (k) of this title, over the signature of the Chairman of the Commission or of such subcommittee, and may be served by any person designated by such Chairman."

71 Stat. 636, 42 U.S.C. 1975d(f).

[ [Footnote 6](#) ]

The role of private citizens in depriving Negroes of their right to vote was one of the questions involved in *United States v. McElveen*, 180 F.Supp. 10 (E.D.La.), *aff'd* as to defendant Thomas, *United States v. Thomas*, [362 U. S. 58](#) .

[ [Footnote 7](#) ]

Rule 3(i) of the Commission's Rules of Procedure, adopted on July 1, 1958, prohibits witnesses or their counsel from cross-examining other witnesses. That Rule reads:

"Interrogation of witnesses at hearings shall be conducted only by members of the Commission or by authorized staff personnel."

[ [Footnote 8](#) ]

The full text of Section 102(h) of the Civil Rights Act reads as follows:

"(h) *Submission of written statements.* "

"In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinency of testimony and evidence adduced at its hearings."

71 Stat. 634, 42 U.S.C. 1975a(h).

[ [Footnote 9](#) ]

Under the Civil Rights Act, the Commission not only has the power to issue subpoenas under Section 105(f), but, as is customary when Congress confers the subpoena power on an investigative agency, the Commission is also authorized to enforce its subpoenas by enlisting the aid of the federal courts. 71 Stat. 636, 42 U.S.C. 1975d(g).

[ [Footnote 10](#) ]

Judge Wisdom, who dissented, was of the opinion that the procedures adopted by the Commission were authorized by Congress, and that those procedures were also constitutional. 177 F.Supp. at 828.

[ [Footnote 11](#) ]

The court's injunction reads as follows:

"For reasons assigned in the Court's written opinion of October 6, 1959,"

"It is ordered, adjudged and decreed that defendants and their agents, servants, employees and attorneys are enjoined and restrained from conducting the proposed hearing in Shreveport, Louisiana, wherein plaintiff registrars, accused of depriving others of the right to vote, would be denied the right of appraisal, confrontation and cross examination."

"This injunction does not prohibit all hearings pursuant to Public Law 85-315, 85th Congress, but only those hearings proposed to be held in the Western District of Louisiana wherein the accused are denied the right of appraisal, confrontation and cross examination."

"Thus done and signed in Chambers on this the 9 day of November, 1959."

The breadth of this injunction is indicated by the fact that the Commission is not only prohibited from compelling respondents' appearance at the hearing, but it is also enjoined from conducting any hearing in the Western District of Louisiana under existing rules of procedure, whether or not the respondents are called as witnesses.

[ [Footnote 12](#) ]

The complete text of Section 102 reads as follows:

" 1975a. *Rules of procedure.* "

"(a) *Opening statement.* "

"The Chairman or one designated by him to act as Chairman at a hearing of the Commission shall announce in an opening statement the subject of the hearing."

"(b) *Copy of rules.* "

"A copy of the Commission's rules shall be made available to the witness before the Commission."

"(c) *Attendance of counsel.* "

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

"(d) *Censure and exclusion of counsel.* "

"The Chairman or Acting Chairman may punish breaches of order and decorum and unprofessional ethics on the part of counsel, by censure and exclusion from the hearings."

"(e) *Defamatory, degrading or incriminating evidence.* "

"If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpoena additional witnesses."

"(f) *Requests for additional witnesses.* "

"Except as provided in this section and section 1975d(f) of this title, the Chairman shall receive and the Commission shall dispose of requests to subpoena additional witnesses."

"(g) *Release of evidence taken in executive session.* "

"No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the Commission. Whoever releases or uses in public without the consent of the Commission evidence or testimony taken in executive session shall be fined not more than \$1,000, or imprisoned for not more than one year."

"(h) *Submission of written statements.* "

"In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinency of testimony and evidence adduced at its hearings."

"(i) *Transcripts.* "

"Upon payment of the cost therefore, a witness may obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when

authorized by the Commission."

"(j) *Witness fees.* "

"A witness attending any session of the Commission shall receive \$4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Witnesses who attend at points so far removed from this respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of \$12 per day for expenses of subsistence, including the time necessarily occupied in going to and returning from the place of attendance. Mileage payments shall be tendered to the witness upon service of a subpoena issued on behalf of the Commission or any subcommittee thereof."

"(k) *Restriction on issuance of subpoena.* "

"The Commission shall not issue any subpoena for the attendance and testimony of witnesses or for the production of written or other matter which would require the presence of the party subpoenaed at a hearing to be held outside of the State, wherein the witness is found or resides or transacts business."

71 Stat. 634, 42 U.S.C. 1975a.

In addition to the procedural safeguards provided by Section 102 of the Act, the Commission's Rules of Procedure grant additional protection. Thus, Rule 3(f) of the Commission's Rules of Procedure provides:

"(f) An accurate transcript shall be made of the testimony of all witnesses in all hearings, either public or executive sessions, of the Commission or of any subcommittee thereof. Each witness shall have the right to inspect the record of his own testimony. A transcript copy of his testimony may be purchased by a witness pursuant to Rule 2(i) above. Transcript copies of public sessions may be obtained by the public upon payment of the cost thereof."

And Rule 3(j) provides:

"(j) If the Commission pursuant to Rule 2(e), or any subcommittee thereof, determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall advise such person that such evidence has been given and it shall afford such person an opportunity to read the pertinent testimony and to appear as a voluntary witness or to file a sworn statement in his behalf."

[ [Footnote 13](#) ]

The amendments, introduced by Representative Dies, read, in pertinent part, as follows:

"(q) A person shall be considered to be adversely affected by evidence or testimony of a witness if the Commission determines that: (i) the evidence or testimony would constitute libel or slander if not presented before the Commission or (ii) the evidence or testimony alleges crime or misconduct or tends to disgrace or otherwise to expose the person to public contempt, hatred, or scorn."

"(r) Insofar as practicable, any person whose activities are the subject of investigation by the Commission, or about whom adverse information is proposed to be presented at a public hearing of the Commission, shall be fully advised by the Commission as to the matters into which the Commission proposes to inquire and the adverse material which is proposed to be presented. Insofar as practicable, all material reflecting adversely on the character or reputation of any individual which is proposed to be presented at a public hearing of the Commission shall be first reviewed in executive session to determine its reliability and probative value, and shall not be presented at a public hearing except pursuant to majority vote of the Commission."

"(s) If a person is adversely affected by evidence or testimony given in a public hearing, that person shall have the right: (i) to appear and testify or file a sworn statement in his own behalf, (ii) to have the adverse witness recalled upon application made within thirty days after introduction of such evidence or determination of the adverse witness' testimony, (iii) to be represented by counsel

as heretofore provided, (iv) to cross-examine (in person or by counsel) such adverse witness, and (v) subject to the discretion of the Commission, to obtain the issuance by the Commission of subpoenas for witnesses, documents, and other evidence in his defense. Such opportunity for rebuttal shall be afforded promptly and, so far as practicable, such hearing shall be conducted at the same place and under the same circumstances as the hearing at which adverse testimony was presented."

"Cross-examination shall be limited to one hour for each witness, unless the Commission by majority vote extends the time for each witness or group of witnesses."

"(t) If a person is adversely affected by evidence or testimony given in executive session or by material in the Commission files or records, and if public release of such evidence, testimony, or material is contemplated such person shall have, prior to the public release of such evidence or testimony or material or any disclosure of or comment upon it by members of the Commission or Commission staff or taking of similar evidence or testimony in a public hearing, the rights heretofore conferred and the right to inspect at least as much of the evidence or testimony of the adverse witness or material as will be made public or the subject of a public hearing."

"(u) Any witness (except a member of the press who testifies in his professional capacity) who gives testimony before the Commission in an open hearing which reflects adversely on the character or reputation of another person may be required by the Commission to disclose his sources of information, unless to do so would endanger the national security."

102 Cong.Rec. 13542-13543.

[ [Footnote 14](#) ]

The complete text of the House "fair play" rules may be found in H.Res. 151, 84th Cong., 1st Sess.

[ [Footnote 15](#) ]

That Congress focused upon the issues here involved and recognized the distinctions between H.R. 6127 and S. 83 is attested to by the following extracts from the floor debate and committee hearings:

In testifying before both the House and Senate Subcommittees considering the various proposed civil rights bills, Attorney General Brownell supported the adoption of the House "fair play" rules instead of the more restrictive procedures outlined in S. 83. Thus, at the Senate hearings, the Attorney General made the following statement:

"Now there is one other addition to S. 83 that I would like to make special reference to, and that is the provision for rules of procedure contained in section 102 on pages 2 to 10 of S. 83."

"These rules of procedure are considerably more restrictive than those imposed on regular committees of the House and Senate. There is much in them which clearly would be desirable. We have not at yet had any experience with the use of rules such as those proposed here, and we cannot predict the extent to which they might be used to obstruct the work of the Commission."

" \* \* \* \*"

"Yet I feel that the task to be given to this Commission is of such great public importance that it would be a mistake to make it the vehicle for experimenting with new rules which may have to be tested out under the courts and this is only a 2-year Commission, and you might have to spend those 2 years studying the rules instead of getting at the facts."

Hearings before Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 85th Cong., 1st Sess. 14-15. See *also* Hearings before Subcommittee No. 5 of the House Judiciary Committee, 85th Cong., 1st Sess. 593.

The lack of any right to cross-examine witnesses was commented upon by members of both the House and the Senate:

Statement of Senator Talmadge during the Senate floor debate, 103 Cong.Rec. 11504:

"No provision is made for notification of persons against whom charges are to be made."

"No provision is made for persons adversely affected by testimony taken by the Commission to be present when they are accused or later to confront and cross-examine their accusers."

Statement of Senator Stennis during Senate floor debate, 103 Cong.Rec. 13835:

"Defamatory testimony tending to defame, degrade, or incriminate any person cannot be heard by the person slandered, since the testimony must be taken in executive session. There is no requirement in the proposed statute that the person injured by defamatory testimony shall have an opportunity to examine the nature of the adverse testimony. He has no right of confrontation nor cross-examination, and his request to subpoena witnesses on his behalf falls within the arbitrary discretion of the Commission. There is no right to subpoena witnesses."

Statement of Representative Kilday during House floor debate, 103 Cong.Rec. 8673:

"The bill provides that witnesses may be accompanied by counsel, for what purpose? 'For the purpose of advising them concerning their constitutional rights.' That is all. Even though the Commission or its own counsel develops only a portion of a transaction, and that adverse to the witness, his lawyer cannot ask a single question to develop the remainder of the transaction or the portion favorable to him."

Statement of Representative Frazier during Hearings before the House Rules Committee, 85th Cong., 1st Sess. 176:

"The authors of this proposal contemplate that it will yield thousands of complaints and even more thousands of subpoenas will be issued. The various allegations will, in the first instance, be incontrovertible and wholly *ex parte*, and the principal concerned, against whom the charges are made, when summoned as a witness, is given no opportunity to cross-examine. True, the person summoned as a witness may have counsel (sec. 102), but only for the purpose of advising him of his constitutional rights."

That the bill contained the House "fair play" rules is demonstrated by the following statement of Representative Celler, the author of the bill:

" *The rules of procedure of the Commission are the same as those which govern the committees of the House.* For example, the chairman is required to make an opening statement as to the subject of the hearing. Witnesses are furnished with a copy of the Commission's rules, and may be accompanied by counsel. The chairman is authorized to punish breaches of order by censure and exclusion. Protection is furnished to witnesses when it appears that a person may be the subject of derogatory information by requiring such evidence to be received in executive session, and affording the person affected the right to appear and testify, and further to submit a request for subpoena of additional witnesses."

103 Cong.Rec. 8491. (Emphasis supplied.)

[ [Footnote 16](#) ]

Although the respondents contend that the procedures adopted by the Commission also violate their rights under the Sixth Amendment, their claim does not merit extensive discussion. That Amendment is specifically limited to "criminal prosecutions," and the proceedings of the Commission clearly do not fall within that category. See *United States v. Zucker*, [161 U. S. 475](#) , [161 U. S. 481](#) .

[ [Footnote 17](#) ]

The full text of Section 104 of the Act reads as follows:

" 1975c. *Duties; reports; termination.* "

"(a) The Commission shall --"

"(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based;"

"(2) study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and"

"(3) appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution."

"(b) The Commission shall submit interim reports to the President and to the Congress at such times as either the Commission or the President shall deem desirable, and shall submit to the President and to the Congress a final and comprehensive report of its activities, findings, and recommendations not later than two years from September 9, 1957."

"(c) Sixty days after the submission of its final report and recommendations, the Commission shall cease to exist."

71 Stat. 635, 42 U.S.C. 1975c.

[ [Footnote 18](#) ]

It should be noted that the respondents in these cases did have notice of the general nature of the inquiry. The only information withheld from them was the identity of specific complainants and the exact charges made by those complainants. Because most of the charges related to the denial of individual voting rights, it is apparent that the Commission could not have disclosed the exact charges without also revealing the names of the complainant.

[ [Footnote 19](#) ]

*Cf. Sinclair v. United States*, [279 U. S. 263](#) , [279 U. S. 295](#) , holding that Congress' legitimate right to investigate is not affected by the fact that information disclosed at the investigation may also be used in a subsequent criminal prosecution. *Cf. also McGrain v. Daugherty*, [273 U. S. 135](#) , [273 U. S. 179](#) - 180, holding that a regular congressional investigation is not rendered invalid merely because "it might possibly disclose crime or wrongdoing" on the part of witnesses summoned to appear at the investigation. *Id.* at [273 U. S. 180](#) .

[ [Footnote 20](#) ]

The injunction issue by the court below would certainly lead to this result since it prohibits the Commission from conducting any hearing under existing procedure, even though those being investigated are not summoned to testify.

[ [Footnote 21](#) ]

A compilation of the rules of procedure governing the investigative proceedings of a representative group of administrative and executive agencies, presidential commissions, and congressional committees is set out in the Appendix to this opinion, *post*, p. [363 U. S. 454](#) .

[ [Footnote 22](#) ]

The first full-fledged congressional investigating committee was established in 1792 to "inquire into the causes of the failure of the late expedition under Major General St. Clair." 3 Annals of Cong. 493 (1792). The development and use of legislative investigation by the colonial governments is discussed in Eberling, Congressional Investigations, 13-30. The English origin of legislative investigation in this country is discussed in Dimock, Congressional Investigating Committees, 46-56.

[ [Footnote 23](#) ]

See, e.g., *Kilbourn v. Thompson*, [103 U. S. 168](#) ; *McGrain v. Daugherty*, [273 U. S. 135](#) ; *Sinclair v. United States*, [279 U. S. 263](#) ; *Christoffel v. United States*, [338 U. S. 84](#) ; *United States v. Bryan*, [339 U. S. 323](#) ; *United States v.*

*Fleischman*, [339 U. S. 349](#) ; *Watkins v. United States*, [354 U. S. 178](#) ; *Barenblatt v. United States*, [360 U. S. 109](#) .

[ [Footnote 24](#) ]

See Appendix, *post*, pp. [363 U. S. 478](#) -485. See also Dimock, Congressional Investigating Committees, 153; Eberling, Congressional Investigations, 283, 390; McGeary, The Developments of Congressional Investigative Power, 80; Liacos, Rights of Witnesses Before Congressional Committees, 33 B.U.L.Rev. 337, 359-361; American Bar Association, Special Committee on Individual Rights as Affected by National Security, Appendix to Report on Congressional Investigations 67-68.

The English practice is described in Clokie and Robinson, Royal Commissions of Inquiry; Finer, Congressional Investigations: The British System, 18 U. of Chi.L.Rev. 521; Keeton, Parliamentary Tribunals of Inquiry, in Vol. 12, Current Legal Problems 1959, 12.

[ [Footnote 25](#) ]

See Appendix, *post*, pp. [363 U. S. 454](#) -471. See also Gellhorn, Federal Administrative Proceedings, 108; Report of the Attorney General's Committee on Administrative Procedure, and the various Monographs written by that Committee.

[ [Footnote 26](#) ]

The Commission's practice with regard to investigations was described by the Attorney General's Committee on Administrative Procedure, Monograph, Securities Exchange Commission, 34-41. The following extract is pertinent here:

"Where formal investigations are utilized as preliminaries to decisive proceedings, the person being investigated is normally not sent a notice, which, in any event, is not public. The order for investigation, which includes the notice, is, however, exhibited to any person examined in the course of such investigation who so requests; since ordinarily the investigation will include the examination of the person suspected of violation, he will thus have actual notice of the investigation.

Since a person may, on the other hand, be wholly unaware of the fact that he is being investigated until his friends who are interviewed so inform him, and since this may sometimes give rise to antagonism and a feeling that the Commission is besmirching him behind his back, no reason is apparent why, simply as a matter of good will, the Commission should not in ordinary cases send a copy of its order for investigation to the person under investigation."

" \* \* \* \*"

"The Commission's Rules of Practice expressly provide that all such rules (governing notice, amendments, objections to evidence, briefs, and the like) are inapplicable to formal investigatory hearings in the absence of express provision to the contrary in the order and with the exception of rule II, which relates to appearance and practice by representatives before the Commission. The testimony given in such investigations is recorded. . . . *In the usual case, witnesses are granted the right to be accompanied by counsel, but the latter's role is limited simply to advising the witnesses in respect of their right against self-incrimination without claiming the benefits of the immunity clause of the pertinent statute (a right of which the presiding officer is, in any event, instructed to apprise the witnesses) and to making objections to question which assertedly exceed the scope of the order of investigation. "*

*Id.*, 37-38. (Emphasis supplied.) See also Loss, Securities Regulation (1951) 1152.

[ [Footnote 27](#) ]

Loss, Securities Regulation (1951), 1153. See also the statutes cited in the Appendix, *post*, p. [363 U. S. 463](#) .

[ [Footnote 28](#) ]

Marcy, Presidential Commissions, 97-101.

[ [Footnote 29](#) ]

See Appendix, *post*, pp. [363 U. S. 472](#) -479.

[ [Footnote 30](#) ]

However, the courts have on more than one occasion likened investigative agencies of the executive branch of Government to a grand jury. See, e.g., *United States v. Morton Salt Co.*, [338 U. S. 632](#) , [338 U. S. 642](#) ; *Oklahoma Press Pub. Co. v. Walling*, [327 U. S. 186](#) , [327 U. S. 216](#) ; *Consolidated Mines of Calif. v. Securities & Exchange Comm'n*, 97 F.2d 704, 708 (C.A. 9th Cir.); *Woolley v. United States*, 97 F.2d 258, 262 (C.A. 9th Cir.).

[ [Footnote 31](#) ]

The Commission cites *In re Groban*, [352 U. S. 330](#) , and *Anonymous Nos. 6 and 7 v. Baker*, [360 U. S. 287](#) , in support of its position. Each of us who participated in those cases adheres to the view to which he subscribed therein. However, because there are significant differences between the *Groban* and *Anonymous* cases and the instant litigation, and because the result we reach today is supported by the other considerations analyzed herein, the Court does not find it necessary to discuss either of those cases.

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APPENDIX TO OPINION OF THE COURT [ [Footnote 2/1](#) ]

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The right, if any, of persons

Extent of agency's sub- The type of notice required affected by an investiga-

Agency Scope of agency's investigative authority poena power in investi- to be  
given in investigative tion to cross-examine Miscellaneous comments  
gative proceedings [ [Footnote 2/3](#) ] others testifying at investi-  
gative proceedings [ [Footnote 2/4](#) ]

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*Executive and* The Commission is authorized to "make such The Commission  
may subpoena

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This is not specified by stat- This is not specified by stat- The Commission's Rules  
of Practice

*Administrative* studies and investigations, . . . and hold any person to appear and  
tes- ute. The Commission's Rules ute. The Commission's Rules draw a sharp  
distinction between

*Agencies* [ [Footnote 2/2](#) ] such meetings or hearings as . . . [it] tify or produce  
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formal hearings. For-

Atomic may deem necessary or proper to assist it "at any designated place."  
procedure to be followed in in- that those summoned to appear mal hearings are  
used only in "cases

Energy in exercising" any of its statutory func- 68 Stat. 948, 42 U.S.C. formal  
hearings shall be such before informal hearings be or adjudication," 10 CFR 2.708,

Commission tions. 68 Stat. 948, 42 U.S.C. 2201(c). 2201(c) as will best serve the  
purpose given the right to cross-ex- and parties to the hearings are gi-

of the hearing." 10 C.F.R. amine other witnesses. Rather, ven detailed notice of  
the subject

2.720. The Rules of Practice the Commission is given the of the hearing, *id.*,  
2.747. In-

do not require any specific type discretion to adopt those pro- formal hearings are  
used in investi-

of notice to be given in infor- cedures which "will best serve gations "for the  
purposes of obtain-

mal hearings. *Ibid.* the purpose of the hearing." ing necessary or useful informa-

10 CFR 2.720. tion, and affording participation

by interested persons, in the for-

mulation, amendment, or rescission

of rules and regulations." *Id.*,

2.708. The safeguards which are

accorded in the formal, adjudicative

hearings are not mentioned in the

Commission's Rule relating to infor-

mal hearings. *Id.*, 2.720.

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Federal Commun- (1) The Commission is authorized to inves- (1) The  
Commission may "sub-

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This is not specified by statute- This is not specified by statute- It should be noted that the Commission-

investigate any matters contained in a complaint, the attendance and testimony. The Commission's Rules of Practice. Nor do the Commission's Report on the Telephone In-

Commission. "in such manner and by such means as it may deem proper and the Rules of Practice do not specify the Rules of Practice refer to investigation made no mention of the

shall deem proper." 48 Stat. 1073, 47 U.S.C. shall, unless specifically provided otherwise, require the production of all books, type of notice to be given in cross-examination in investigation, if any, given to

U.S.C. 208. papers, schedules of charges, investigative proceedings. Therefore, those summoned to appear at the in-

(2) The Federal Communications Commission contracts, agreements, and However, the Rules do provide whether persons appearing at an investigation. Nor was there any ref-

was also authorized to conduct a special investigation of any matter that the "[p]rocedures to be followed in the investigation have the same force and effect as those prescribed for cross-examination. The

investigation of the American Telephone and Telegraph matter under investigation." followed by the Commission's order of cross-examination. The Commission did permit the Company

and Telegraph Company, and to obtain information. 48 Stat. 1096, 47 U.S.C. shall, unless specifically provided otherwise, require the production of all books, type of notice to be given in cross-examination in investigation, if any, given to

information concerning the company's history and 409(e). prescribed . . . [in the whether the Commission is of pointing out any inaccuracies in

structure, the services rendered by it, its (2) The Commission was also [Rules], be such as in the the opinion that cross-examination- factual data or statistics in the

failure to reduce rates, the effect of mon- given the subpoena power by opinion of the Commission will ation "will best serve the pur- reports introduced in the hearings

opolistic on the company, the methods of the statute authorizing the best serve the purposes of poses of such proceeding." 47 or in any testimony in connection

competition engaged in by the company, and investigation of the Ameri- . . . [any investigative] pro- CFR 1.10. It should also be therewith, provided that such

the company's attempts to influence public can Telephone and Telegraph ceeding." 47 C.F.R. 1.10. noted that even in that portion statements were confined to the

opinion by the use of propaganda. 49 Stat. Company. 49 Stat. 45. of the Commission's Rules rela- presentation of facts and that no

43. ting to adjudicative proceed- attempt would be made therein to

ings, there is no specific pro- draw conclusions therefrom." H.R.

vision relating to cross-exam- Doc. No. 340, 76th Cong., 1st

ination. *Id.*, 1.101-1.193. Sess. xviii.

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Federal Trade (1) The Commission is authorized to inves- (1) The Commission may "sub- (1) This is not specified by (1) This is not specified by (1) It is interesting to note that

Commission tigate "the organization, business, con- poena the attendance and tes- statute. The Commission's Rules statute. The Commission's the Commission's Rules of Practice

duct, practices, and management of any testimony of witnesses and the of Practice provide that "[a]ny Rules of Practice provide that draw an express and sharp distinction-

corporation engaged in commerce;" to make an production of all such documents party under investigation concerning a person required to testify in proceedings between investigative and administrative

investigation of the manner in which anti-trust evidence relating to compelled to furnish information or in an investigative proceeding in judicial proceedings, and that

trust decrees are being carried out; to in any matter under investigation documentary evidence shall be "may be accompanied and advised the Commission's Rules relating to

investigate and report the facts relating to investigation." 38 Stat. 722, 15 advised with respect to

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the pursued by counsel, but counsel may notice and cross-examination in

any alleged violations of the antitrust Acts U.S.C. 49. pose and scope of the investigation not, as a matter of right, investigative proceedings are very

by any corporation; and "to investigate (2) The Commission was also investigation." 16 CFR, 1959 Supp., otherwise participate in the similar to those adopted by the

. . . trade conditions in and with foreign given the subpoena power under 1.33.(2) investigation." 16 CFR 1959 Civil Rights Commission.

countries where associations, combinations, under the statute authorizing (2) The Commission's Report on Supp., 1.40. Moreover, (2) It should also be observed

or practices of manufacturers, merchants, or the investigation of the motor vehicle industry the Motor Vehicle Industry did while the Rules of Practice that FTC investigations may be in-

traders, or other conditions, may affect the motor vehicle industry. 52 not indicate what type of notice, make no mention of the right initiated "upon complaint by members

foreign trade of the United States." 38 Stat. 218 if any, was given to those summoned to cross-examine witnesses in of the consuming public, business-

Stat. 721-722, 15 U.S.C. 46. summoned to testify at the investigative proceedings, men, or the concerns aggrieved by

(2) The Commission was also authorized to investigate. H.R. Doc. No. 468, 76th Cong. see *id.*, 1.31-1.42, such a unfair practices," 16 CFR, 1959

conduct a special investigation of the motor vehicle industry, 1st Sess. Presumably, right is specifically given to Supp., 1.11, and that complaints

vehicle industry to determine (a) "the Commission's regular Rules parties in an adjudicative received by the Commission may

tent of concentration of control and of monopoly of Practice obtained. proceeding. *Id.*, 3.16. charge "any violation of law over

opoly in the manufacturing, warehousing, (2) The Commission's Report on which the Commission has jurisdiction-

distribution, and sale of automobiles, accessories, and parts, including methods and not refer to cross-examination. (3) Also relevant to our inquiry

devices used by manufacturers for obtaining and maintaining their control or monopoly. H.R.Doc. No. 468, 76th Cong., is the fact that the Commission

ing and maintaining their control or monopoly. 1st Sess. Presumably, the does not "publish or divulge the

"publish or divulge the

poly . . . and the extent, if any, to which Commission's regular Rules of name of an applicant or complain-

fraudulent, dishonest, unfair, and injur- of Practice obtained. ing party." *Id.*, 1.15.

ious methods . . . [were] employed, includ- (4) Finally, it is important to

ing combinations, monopolies, price fixing, observe that the FTC, unlike the

or unfair trade practices;" and (b) "the Civil Rights Commission, has the

extent to which any of the antitrust laws authority to commence adjudicative

of the United States . . . [were] being proceedings based upon the mater-

violated." 52 Stat. 218 ial obtained by means of investi-

gative proceedings. *Id.*, 1.42.

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National Labor Under the National Labor Relations Act, "For the purpose of all hear-

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This is not specified by stat- This is not specified by stat- It should be noted that the Nation-

Relations Board the Board is given the power to inves- ings and investigations . . . ute. The Board's Statements ute. The Board's Statements al Labor Relations Board may use the

tigate petitions and charges submitted the Board [may] . . . copy any of Procedure and Rules and Reg- of Procedure and Rules and Reg- information collected during

preli-

to it relating to union representation evidence of any person being violations provide for the pre- violations provide for the right minary investigations to initiate

and unfair labor practices. 61 Stat. investigated or proceeded liminary investigation of all to cross-examine witnesses at adjudicative proceedings. 61 Stat.

144, 149, 29 U.S.C. 159(c), 160( / ). against that relates to any petitions and charges received formal, adjudicative hearings, 149, 29 U.S.C. 160( / ). The

matter under investigation, by the Board. Although a copy 29 CFR, 1960 Supp., 101.10, Commission on Civil Rights has no

and it may also issue sub- of the initial charge may be 102.38, 102.66, 102.86, 102.90, such power. Moreover, the Board,

poenas requiring the attend- served upon an alleged viola- but there is no such provision unlike the Civil Rights Commission,

ance and testimony of wit- tor, there is no specific rule with regard to preliminary in- may use the information obtained by

nesses in any proceeding or requiring the Board to give vestigations. *Id.*, 101.4, it through investigations to peti-

investigation. 61 Stat. 150, notice of the preliminary in- 101.18, 101.22, 101.27, 101.32, tion the federal courts for appro-

29 U.S.C. 161. vestigation. See 29 CFR, 102.63, 102.77, 102.85. priate injunctive relief, 61 Stat.

1960 Supp., 101.4, 101.18, 149, 29 U.S.C. 160( / ).

101.22, 101.27, 101.32,

102.63, 102.77, 102.85.

Securities and (1) Under the Securities Act of 1933, as All of the Acts which author- This is not specified by stat- This is not specified by stat- The Securities and Exchange Commis-

Exchange Com- amended, the Commission is authorized to ize the Commission to conduct ute. Nor do the Commission's ute. The Commission's Rules of sion's procedures for investigative

mission conduct "all investigations which . . . investigations also bestow Rules of Practice relating to Practice make no mention of the proceedings are very similar to

are necessary and proper for the enforce- upon it the power to subpoena formal investigations make any right to cross-examine witness- those of the Civil Rights Commis-

ment of" the Act. 48 Stat. 85, 15 U.S.C. witnesses, compel their atten- mention of the type of notice es in investigative proceedings. sion. Investigations may be ini-

77s(b). dance, and require the produc- which must be given in such pro- 17 CFR 202.4. Parties are tiated upon complaints received

(2) The Securities Exchange Act of 1934 tion of any books, correspon- ceedings. 17 CFR 202.4. The given the right to cross-exam- from members of the public, and

authorizes the Commission to "make such dence, memoranda, contracts, Commission's Rules do provide ine witnesses in adjudicative these complaints may contain speci-

investigations as it deems necessary to agreements, and other records for the giving of notice in ad- proceedings, *id.*, 201.5, fic charges of illegal conduct. 17

determine whether any person has violated which are relevant to the in- judicative proceedings, *id.*, but this provision is made spe- CFR 202.4. It should be noted, or is about to violate any provisions of vestigation. Securities Act 1959 Supp., 201.3, but this cifically inapplicable to in- however, that the Securities and . . . [the Act] or any rule or regulation of 1933, 48 Stat. 85, 14 U.S.C. provision is made specifically vestigative proceedings. Exchange Commission, unlike the thereunder." 48 Stat. 899, 15 U.S.C. 77s(b); Securities Exchange inapplicable to investigative *Id.*, 201.20. Civil

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Rights Commission, is an ad-

78u(a). Act of 1934, 48 Stat. 900, 15 proceedings. *Id.*, 201.20. judicatory body, and it may use the

(3) The Public Utility Holding Company U.S.C. 78u(b); Public Util- information gathered through inves-

Act of 1935 empowers the Commission to ity Holding Company Act of tigtive proceedings to initiate

"investigate any facts, conditions, prac- 1935, 49 Stat. 831, 15 U.S.C. "administrative proceedings looking

tices, or matters which it may deem nec- 79r(c); Trust Indenture Act to the imposition of remedial sanc-

essary or appropriate to determine whe- of 1939, 53 Stat. 1174, 15 tions, . . . (or) injunction pro-

ther any person has violated or is about U.S.C. 77uuu(a); Investment ceedings in the courts, and, in the

to violate any provision of . . . [the Company Act of 1940, 54 Stat. case of a willful violation," it

Act] or any rule or regulation there- 842, 15 U.S.C. 80a-41(b); may refer the "matter to the De-

under, or to aid in the enforcement of Investment Advisers Act of partment of Justice for criminal

the provisions of . . . [the Act], in 1940, 54 Stat. 853, 15 U.S.C. prosecution." *Ibid.*  
*See also*

the prescribing of rules and regulations 80b-9(b). Securities Act of 1933, 48 Stat.

thereunder, or in obtaining information 86, 15 U.S.C. 77t(b); Securities

to serve as a basis for recommending fur- Exchange Act of 1934, 48 Stat. 900,

ther legislation concerning the matters 15 U.S.C. 78u(e); Public Utility

to which . . . [the Act] relates." 49 Holding Company Act of 1935, 49

Stat. 831, 15 U.S.C. 79r(a). Stat. 832, 15 U.S.C. 79r(f); In-

(4) The Trust Indenture Act of 1939 au- vestment Company Act of 1940, 54

thorizes the Commission to conduct "any Stat. 843, 15 U.S.C. 80a-41(e);

investigation . . . which . . . is nec- Investment Advisers Act of 1940,

essary and proper for the enforcement 54 Stat. 854, 15 U.S.C. 80b-9(e).

of" the Act. 53 Stat. 1174, 15 U.S.C.

77uuu(a).

(5) The Investment Company Act of 1940

gives the Commission the power to "make

such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of . . . [the Act] or of any rule, regulation, or order thereunder, or to determine whether any action in any court or any proceeding before the Commission shall be instituted under . . . [the Act] against a particular person or persons, or with respect to a particular transaction or transactions." 54 Stat. 842, 15 U.S.C. 80a-41(a).

(6) Finally, under the Investment Advisers Act of 1940, the Commission is authorized to determine by investigation

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whether "the provisions of . . . [the Act] or of any rule or regulation prescribed under the authority thereof, have been or are about to be violated by any person."

Office of The Defense Production Act of 1950 author- The Defense Production Act of

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This was not specified by sta- This was not specified by stat- It should be noticed that the Offi-

Price Stabil- ized the President "to issue regulations 1950 conferred upon the Pres- tute or Executive Order. The ute or Executive Order. Nor ce's pre-issuance hearings usually

ization [ [Footnote 2/5](#) ] and orders establishing a ceiling or ceil- ident the power, "by subpoena Office's Rules of Procedure did the Office's Rules of Pro- led to determinations which had

ings on the price, rental, commission, or otherwise, to obtain such provided that a general public cedure make any mention of the severe effects upon certain indivi-

margin, rate, fee, charge, or allowance paid information from, require such notice was to be given in the right to cross-examine witness- duals; yet, there was no provision

or received on the sale or delivery, or the reports and the keeping of Federal Register of all pre- es appearing at pre-issuance for personalized, detailed notice

purchase or receipt, by or to any person, of such records by, make such in- issuance hearings. Price Pro- hearings. The Rules merely or cross-examination.

any material or service, and at the same spections of the books, rec- cedural Regulation 1 -- Gener- said that the hearing was to

time . . . issue regulations and orders sta- ords, and other writings, al Price Procedures, 4, 17 "be conducted in such manner,

bilizing wages, salaries, and other compen- premises, or property of, and Fed.Reg. 3788. consistent with the need for

sation in accordance with provisions of" the take the sworn testimony of, expeditious action, as will

Act. 64 Stat. 803. This authority was del- any person as may be necessary permit the fullest possible

egated to the Economic Stabilization Admin- or appropriate, in his discre- presentation of the evidence

istrator by Exec. Order No. 10161, 15 Fed. tion, to the enforcement or by such persons as are, in the

Reg. 6105. The Administrator, in turn, del- the administration of . . . judgment of the Director, best

egated the duty of issuing price regulations [the] Act and the regulations qualified to provide informa-

to the Office of Price Stabilization. Gen. or orders issued thereunder." tion with respect to matters

Order No. 2 of the Economic Stabilization 64 Stat. 816. This power was considered at the hearing or

Agency, 16 Fed.Reg. 738. Pursuant to this delegated to the Office of most likely to be seriously

authority, the Office of Price Stabiliza- Price Stabilization by Exec. affected by action which may

tion promulgated Rules of Procedure, Sec- Order No. 10161, 15 Fed.Reg. be taken as a result of the

tion 2 of which provided that investiga- 6105; Gen. Order No. 2 of the hearing." Price Procedural

tions would be held before the issuance Economic Stabilization Agency, Regulation 1 -- General Price

of a ceiling price regulation. Price Pro- 16 Fed.Reg. 738. Procedures, 5, 17 Fed.Reg.

cedural Regulation 1, Revision 2 -- Gener- 3788.

al Price Procedures, 2, 17 Fed.Reg. 3788.

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Office of The Administrator was "authorized to make "For the purpose of obtain-

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This was not specified by stat- This was not specified by stat- It should be noted that, even though

Price Stabil- such studies and investigations and to ob- ing any information [in an in- ute. The Administrator's Rules ute. The Administrator's Rules the Administrator's proceedings

ization [ [Footnote 2/6](#) ] tain such information as he . . . [deemed] vestigation] . . . the Admin- of Procedure did not specify the of Procedure made no mention of smacked of an adjudication, there

necessary or proper to assist him in pre- istrator . . . [could] by sub- type of notice, if any, to be the right to cross-examine wit- was no express requirement that

scribing any regulation or order under poena require any . . . per- given during the investigative nesses during either investiga- either detailed notice or the right

. . . [the] Act, or in the administration son to appear and testify or stage of price regulation pro- tion or pre-issuance hearings. to cross-examine witnesses be given

and enforcement of . . . [the] Act and to appear and produce docu- ceedings. 32 CFR, 1944 Supp., 32 CFR, 1944 Supp., 1300.2, to parties affected by the Adminis-

regulations, orders, and price schedules ments, or both, at any desig- 1300.2. After the investiga- 1300.5. The Rules merely pro- trator's actions.

thereunder." 56 Stat. 30. nated place" 56 Stat. 30. tion, the Administrator could vided that hearings were to be

hold a price hearing prior to conducted "in such manner, con-

issuance of the regulation, and sistent with the need for ex-

general notice of the hearing peditious action, as will per-

was to be published in the Fed- mit the fullest possible pres-

eral Register. *Id.*, 1300.4. entation of evidence by such

persons as are, in the judg-

ment of the Administrator, best

qualified to provide informa-

tion with respect to matters

considered at the hearing or

most likely to be seriously

affected by action which may

be taken as a result of the

hearing." *Id.*, 1300.5.

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The Department of Agriculture, (1) Under the Perishable Agricultural Commodities Act of 1930, the Department is authorized to investigate any complaint filed with the Secretary alleging that someone has violated the Act. 46 Stat. 534, 7 U.S.C. 499f(c). witnesses and the production Stockyards Act do not refer to Stockyards Act contain no reference under the Perishable Agricultural

ment of commodities Act of 1930, the Department is authorized to investigate any complaint filed with the Secretary alleging that someone has violated the Act. 46 Stat. 534, 7 U.S.C. 499f(c). witnesses and the production Stockyards Act do not refer to Stockyards Act contain no reference under the Perishable Agricultural

Agriculture Practice adopted pursuant to the Practice adopted pursuant to may use the information obtained

with the Secretary alleging that someone has violated the Act. 46 Stat. 534, 7 U.S.C. 499f(c). witnesses and the production Stockyards Act do not refer to Stockyards Act contain no reference under the Perishable Agricultural

has violated the Act. 46 Stat. 534, 7 U.S.C. 499f(c). witnesses and the production Stockyards Act do not refer to Stockyards Act contain no reference under the Perishable Agricultural

499f(c). witnesses and the production Stockyards Act do not refer to Stockyards Act contain no reference under the Perishable Agricultural

(2) The Department also enforces the Packers and Stockyards Act of 1935, which requires the Secretary to maintain such accounts, records, the type

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of notice, if any, hence to cross-examination during Commodities Act. 7 CFR 47.7.

and Stockyards Act of 1921, which, for the and memoranda as may be made which must be given in investigative proceedings, 7 CFR (2) It is also of interest that

purposes of that Act, gives the Secretary authority for the determination of investigative proceedings, 7 CFR 47.3; 9 CFR 202.3, although investigative proceedings under

the investigative and other enforcement powers of any complaint under" the 47.3; 9 CFR 202.3, although such a right is given in the both the Perishable Agricultural

powers possessed by the Federal Trade Commission. Act. 46 Stat. 536, 7 U.S.C. a specific right to notice is formal, adjudicative stage of Commodities Act and the Packers

Commission, 42 Stat. 168, 7 U.S.C. 222. The Department's 499m(b). given in adjudicative proceedings. 7 CFR and Stockyards Act are commenced

Department's Rules of Practice also provide (2) The Packers and Stockyards Act. 7 CFR 47.6, 47.27; 9 CFR 47.15, 47.32; 9 CFR 202.11, by the filing of complaints from

that investigations shall be conducted when Stockyards Act of 1921 gives to CFR 202.6, 202.23, 202.39. 202.29, 202.48. private individuals. 7 CFR 47.3;

informal complaints charging a violation of the Secretary those powers 9 CFR 202.3.

the Act are received by the Secretary. 9 CFR conferred upon the Federal (3) Finally, it should be noted

CFR 202.23. Trade Commission by "section" that the Department of Agriculture

sections 46 and 48-50 of Title administers the Federal Seed Act,

15." Among those powers is 53 Stat. 1275, 7 U.S.C. 1551-

the authority to subpoena 1610, which makes it unlawful to witnesses. 42 Stat. 168, 7 engage in certain practices relating to the labeling and importation of seeds, and a statute regulating export standards for apples and pears. 48 Stat. 123, 7 U.S.C. 581-589. The Rules of Practice adopted by the Secretary pursuant to statutory authorization provide that proceedings under these statutes shall be initiated by an investigation of the charges contained in any complaint received by the Secretary. These rules make no mention of the type of notice, if any, given to those being investigated;

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nor is there any reference to cross-examination during the inves-

tigative stage of the proceedings.

7 CFR 291.151, 33.17.

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Commodity Ex- The Commodity Exchange Act empowers the Sec- The Secretary of Agriculture This is not specified by stat- This is not specified by stat- It is of interest to note that in-

change Commis- retary of Agriculture (acting through the (acting through the Commis- ute. The Commission has no spe- ute. The Commission has no spe- vestigations may be initiated by

sion (Depart- Commission) to "make such investigations as sion) is given the same sub- cial rules for investigations; cial rules for investigations; complaints from private parties,

ment of Agri- he may deem necessary to ascertain the facts poena powers as are vested in however, its Rules of Practice however, its Rules of Practice and that the information obtained

culture) regarding the operations of boards of trade, the Interstate Commerce Com- provide that a private party may provide that a private party during investigations may be used

whether prior or subsequent to the enactment mission by the Interstate initiate a disciplinary proceed- may initiate a disciplinary pro- in a subsequent adjudicative pro-

of" the Act. The Secretary is also empower- Commerce Act, 24 Stat. 383, ing by filing a complaint, and ceeding by filing a complaint, ceeding. 17 CFR 0.53.

ed to "investigate marketing conditions of 27 Stat. 443, 32 Stat. 904, that an investigation of the com- and that an investigation of the

commodity and commodity products and bypro- 34 stat. 798, 49 U.S.C. plaintiff will be made. No mention complaint will be made. No men-

ducts, including supply and demand for these 23, 46-48. 42 Stat. 1002, as is made of the type of notice, if tion is made of the right to

commodities, cost to the consumer, and hand- amended, 49 Stat. 1499, 69 any, which must be given in in- cross-examine witnesses during

ling and transportation charges." 42 Stat. Stat. 160, 7 U.S.C. 15. vestigative proceedings. 17 CFR investigative proceedings. 17

1003, as amended, 49 Stat. 1491, 7 U.S.C. 0.53. CFR 0.53.

12.

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Food and Drug The Regulations adopted pursuant to the Fed- The Act makes no provision for This is not specified by stat- This is not specified by stat- It should be noted that the Admin-

Administration eral Caustic Poison Act, 44 Stat. 1406, 15 compelling testimony. ute. The Administration's Reg- ute. The Administration's reg- istration investigates specific in-

(Department of U.S.C. 401-411, authorize the Administra- ulations make no reference to ulations make no mention of the stances of possible unlawful activ-

Health, Educa- tion to conduct investigations, 21 CFR notice of investigative proceed- right to cross-examine witness- ity, and that, unlike the Civil

tion and 285.15, and to hold preliminary hearings ings, but they do require that es appearing at investigative Rights Commission, the Secretary

Welfare "whenever it appears . . . that the provis- general notice be given to those proceedings or preliminary (acting through the Administrator)

ions of section 3 or 6 of the Caustic Poi- against whom prosecution is con- hearings. 21 CFR 285.17. is required to refer possible vio-

son Act . . . have been violated and crim- templated. 21 CFR 285.17. lations to the proper United States

inal proceedings are contemplated. *Id.*, Attorney. 44 Stat. 1409, 15 U.S.C.

285.17. 409(b).

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*Presidential* (1) The Commission is authorized "to inves- The Commission may, "for the

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Many of the statutory provisions This is not specified by stat- (1) Since the Commission's investi-

*Commissions* tigate the administration and fiscal and in- purposes of carrying out its authorizing the Commission to ute. The Commission's Rules per- gative powers are generally exer-

United dustrial effects of the customs laws of this functions and duties in con- hold hearings pursuant to its mit a party who has entered an cised to aid the President in the

States country now in force or which may be hereaf- nection with any investiga- investigatory power require that appearance to question a witness execution of his duties under the

Tariff Act enacted, the relations between the rates authorized by law, . . . reasonable notice of prospective "for the purpose of assisting Tariff Act, it is readily apparent

Commission of duty on raw materials and finished products (1) . . . have access to and hearings be given. 46 Stat. 701, the Commission in obtaining the that the Commission's investiga-

ducts, the effects of ad valorem and specific duties the right to copy any documents 19 U.S.C. 1336(a); 65 Stat. 72, material facts with respect to investigations may have far-reaching ef-

fective duties and of compound specific and ad valorem duties, paper, or record, per- 19 U.S.C. 1360(b)(1); 65 Stat. the subject matter of the investigation affects upon those persons affected

ad valorem duties, all questions relative to the subject matter 74, 19 U.S.C. 1364(a); 49 Stat. investigation." 19 CFR 201.14, by specific tariff regulations.

the arrangement of schedules and classification under investigation, in the 774, 7. U.S.C. 624(a). The However, all questioning is done (2) It should also be noted that

classification of articles in the several schedules possession of any person, Commission's Rules of Practice under the direction of and submission of business data given to the Commission-

of the customs law, and, in general, . . . firm, copartnership, corporation- also provide that public notice subject to the limitations imposed investigation may be classified as confi-

the operation of customs laws, including investigation, or association engaged of any pending investigation by the Commission, and a person confidential, 19 CFR 201.6, and that

their relation to the Federal revenues, in the production, importation- shall be given. 19 CFR, 1960 who has not entered a formal application- confidential material contained in

[and] their effect upon the industries and production, or distribution of any commodity, the appearance of which may not, as a matter of applications for investigation and

labor of the country." 46 Stat. 698, 19 article under investigation, right, question witnesses. complaints will not be made avail-

U.S.C. 1332(a). (2) . . . summon witnesses, *Ibid.* See also *Norwegian Ni-* able for public inspection. *Id.*,

(2) The Commission is also authorized "to take testimony, and adminis- *trogen Products Co. v. United* 201.8.

investigate the tariff relations between territories, (3) . . . require *States*, [288 U. S. 294](#) .

the United States and foreign countries, any firm, person, corpora-

commercial treaties, preferential provis- tion, or association to pro-

visions, economic alliances, the effect of ex- duce books or papers relating

port bounties and preferential transporta- to any matter pertaining to

tion rates, the volume of importations such investigation, and (4)

compared with domestic production and con- require any person, firm,

sumption, and conditions, causes, and ef- copartnership, corporation,

facts relating to competition of foreign or association to furnish, in

industries with those of the United States, including dumping and cost of pro-

duction." 46 Stat. 698, 19 U.S.C. 1332(b). sion may prescribe, informa-

(3) The Commission may investigate "the Paris tion in their possession per-

Economy Pact and similar organizations and training to such investigation arrangements in Europe." 46 Stat. 698, 19 U.S.C. 1332(c). amended, 72 Stat. 679, 19

(4) The Commission is empowered to "investigate the differences in the costs of production U.S.C. 1333(a).

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of any domestic article and of any like or similar foreign article." 46 Stat. 701, 19 U.S.C. 1336(a).

(5) The Commission is authorized to investigate any complaint alleging that a person has engaged in unfair methods of competition or unfair acts in the importation of articles into the United States. 46 Stat. 703, 19 U.S.C. 1337(a), (b).

(6) Before the President enters into negotiations concerning any proposed foreign trade agreement, the Commission is required to conduct an investigation and make a re-

port to the President, indicating the type of agreement which will best carry out the purpose of the Tariff Act. 65 Stat. 72, 19 U.S.C. 1360(a).

(7) The Commission is authorized to "make an investigation and make a report thereon . . . to determine whether any product which a concession has been granted under a trade agreement is, as a result, in whole or in part, of the duty or other customs treatment reflecting such concession, being imported into the United States in such increased quantities, either actual or relative, as to cause or threaten serious injury to the domestic industry producing like or directly competitive products." 65 Stat. 74, 19 U.S.C. 1304(a).

(8) The Commission is authorized to investigate the effects of dumping, and to determine whether, because of such dumping, "an industry in the United States is being or is likely to

be injured, or is prevented from being established." 42 Stat. 11, 19 U.S.C. 160(a).

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(9) Finally, the Commission is authorized to conduct investigations for the purpose of determining whether "any article or articles are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, any program or operation undertaken under" the Agricultural Adjustment Act or the Soil Conservation and Domestic Allotment Act. 49 Stat. 773, as amended, 62 Stat. 1248, 7 U.S.C. 624(a).

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Commission To The Commission was authorized to investigate The Commission was authorized

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Neither the Executive Order cre- Neither the Executive Order cre- It is of special interest that the

Investigate the attack upon Pearl Harbor in order to pro- "to issue subpoenas requiring ating the Commission, Exec. Order ating the Commission, Exec. Or- Commission was charged with the re-

The Japanese vide bases for sound decisions whether any the attendance and testimony No. 8983, 6 Fed.Reg. 6569, nor der No. 8983, 6 Fed.Reg. 6569, sponsibility of determining whether

Attack on derelictions of duty or errors of judgment on of witnesses and the produc- the joint resolution conferring nor the joint resolution confer- the successful attack upon Pearl

Hawaii the part of the United States Army or Navy tion of any evidence that re- the subpoena power upon the Com- ring the subpoena power upon the Harbor resulted from any individual

personnel contributed to such successes as lates to any matter under in- mission, 55 Stat. 853, required Commission, 55 Stat. 853, made derelictions of duty. Yet, even

were achieved by the enemy on the occasion vestigation by the Commis- the Commission to inform pros- any mention of the right to though the Commission's investiga-

mentioned, and if so, what these derelictions sion." 55 Stat. 854. spective witnesses of complaints cross-examine witnesses. An ex- tion had all the earmarks of an ad-

or errors were, and who were responsible lodged against them. amination of the Commission's judication, none of the procedural

therefor." Exec. Order No. 8983, 6 Fed.Reg. proceedings does not disclose safeguards demanded by the respond-

6569. instances wherein any witness or ents in these cases were provided.

party to the investigation was

given the right to cross-examine

other witnesses. In fact, such

interested parties as Admiral

Kimmel and General Short, the

Navy and Army commanders at

Pearl Harbor, were not even pre-

sent at the hearings when other

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witnesses were testifying.

Hearings of the Joint Congres-

sional Committee on the Inves-

tigation of the Pearl Harbor

attack.

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Temporary The Committee was authorized to investigate The Committee was given the This was not specified by stat- This was not specified by stat-

National "monopoly and the concentration of economic same subpoena powers as were ute. The Rules of Procedure ute. The Rules of Procedure

Economic power in and financial control over produc- conferred upon the Securities adopted by the Committee for the adopted by the Committee for the

Committee tion and distribution of goods and services and Exchange Commission by the conduct of its hearings made no conduct of its hearings did not

. . . with a view to determining . . . (1) Public Utility Holding Company mention of the type of notice, if refer to cross-examination.

the causes of such concentration and control Act, 49 Stat. 831, 15 U.S.C. any, which was to be given to There was merely a general

and their effect upon competition; (2) the 79r(c). 52 Stat. 706. prospective witnesses. Hearings statement that, "[i]n all exami-

effect of the existing price system and the of the Temporary National Econo- nation of witnesses, the rules

price policies of industry upon the general mic Committee, pt. 1.193. of evidence shall be observed,

level of trade, upon employment, upon long- but liberally construed." Hear-

term profits, and upon consumption, and (3) ings of the Temporary National

the effect of existing tax, patent, and Economic Committee, pt. 1, 193.

other government policies upon competition,

price levels, unemployment, profits, and

consumption." 52 Stat. 705.

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*Congressional* The Committee was authorized to conduct an The Committee was authorized This was not specified by the This was not specified by the It should be noted that this Com-

*Investigating* investigation into charges that William "to send for persons, papers, authorizing resolution. Howev- authorizing resolution. The Se- mittee was investigating the alleg-

*Committees* [ [Footnote 2/7](#) ] Duane, a newspaper editor, had published and records, and compel the er, a subsequent resolution pro- nate later rejected a motion to edly unlawful conduct of a speci-

Senate articles defaming the Senate. 10 Annals of attendance of witnesses which vided that Duane was to be in- permit Duane "to have assist- fic individual; yet, it does not

Committee Cong. 117 (1800). may become requisite for the formed of the charges against ance of counsel for his de- appear that he was given the right

of Privi- execution of their commis- him when he presented himself at fense," but allowed him to be to cross-examine adverse witnesses.

leges (1800) sion." 10 Annals of Cong. the bar of the Senate. 10 Annals heard through counsel "in de-

121 (1800). of Cong. 117 (1800). ial of any facts charged against

[him] or in excuse and extenua-

tion of his offense." 10 Annals

of Cong. 118, 119 (1800).

Committee of Senator Smith had been accused of conspiring The authorizing resolution did

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This was not specified by the au- This was not specified by the Here again, it should be observed

the Senate to with Aaron Burr to commit treason, and the not indicate whether the Com- thorizing resolution. The Com- authorizing resolution. Before that the Committee was investiga-

Investigate Committee was established to investigate the mittee had the subpoena power. mittee furnished Senator Smith the Committee, Senator Smith ting the conduct of a particular

Whether Se- charge and to inquire whether Senator Smith 17 Annals of Cong. 40 (1807). with a description of the charges "claimed, as a right, to be individual, and that the Commit-

nator John "should be permitted any longer to have a and evidence against him. Report heard in his defense by counsel, tee's findings could have had se-

Smith of Ohio seat" in the Senate. 17 Annals of Cong. 40 of the Committee, 17 Annals of to have compulsory process for vere consequences on that indivi-

Should Re- (1807). Cong. 56 (1807). witnesses, and to be confronted dual.

tain His Seat with his accusers, as if the

in the Senate Committee had been a circuit

(1807). court of the United States."

Report of the Committee, 17 An-

nals of Cong. 56 (1807). How-

ever, the Committee rejected these claims on the ground that it was not a court, but rather a body whose function it was to investigate and report the facts relating to Senator Smith's conduct. *Ibid.*

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Joint Com- (1) The Committee was established "to inquire The Committee had "the power This was not specified by the au- This was not specified by the It should be noted that the Commit-

mittee on the into the conduct of the present [Civil] to send for persons and pa-  
thorizing resolution. Many of authorizing resolution. Many of tee's investigation frequently cen-

Conduct of war." Cong.Globe, 37th Cong., 2d Sess. 32, pers." Cong.Globe, 37th  
the generals whose conduct was the generals whose conduct was tered on the  
allegedly derelict

the Civil War 40 (1861). Cong., 2d Sess. 32, 40 (1861). being investigated were  
given no being investigated were not gi- conduct of specific individuals.

(1861). (2) The Committee was also authorized "to in- notice of the charges that  
had ven the right to be assisted by Botterud, The Joint Committee on

quire into the truth of the rumored slaughter been leveled against them. Bot-  
counsel or to cross-examine oth- the Conduct of the Civil War (M.A.

of the Union troops, after their surrender, erud, The Joint Committee on the er witnesses. Botterud, The Thesis, Georgetown University,

at the recent attack of the rebel forces Conduct of the Civil War (M.A. Joint Committee on the Conduct 1949) 42.

upon Fort Pillow, Tennessee,; as, [sic] also, Thesis, Georgetown University, of the Civil War (M.A. Thesis,

whether Fort Pillow could have been suffic- 1949), 42. Georgetown University, 1949) 42.

iently reenforced or evacuated, and, if so,

why it was not done." 13 Stat. 405.

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House Commit- The Committee was established to investi- The Committee had authority

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This was not specified by the au- The questioning of all witness- It is of interest that the Commit-

tee to Inves- gate charges that the Electric Boat Company "to send for persons and pa- thorizing resolution. However, es was conducted by the Commit- tee was investigating specific

tigate the Elec- of New Jersey had "been engaged in efforts to pers." H.R.Res. 288, 60th most of the charges which led to tee, although the parties being charges of corruption leveled

tric Boat Com- exert corrupting influence on certain Members Cong., 1st Sess, 42 Cong.Rec. the investigation were made in investigated were permitted to against named individuals.

pany of New of Congress in their legislative capacities, 2972. public hearings before the Rules submit written interrogatories

Jersey (1908). and . . . [had], in fact, exerted such cor- Committee of the House. H.R.Rep. for the Committee to propound to

rupting influence." H.R.Res. 288, 60th No. 1168, 60th Cong., 1st Sess. certain witnesses. H.R.Rep. No.

Cong., 1st Sess., 42 Cong.Rec. 2972. 1727, 60th Cong., 1st Sess. 11.

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House Commit- (1) The Committee was authorized to conduct The Committee was authorized This was not specified by the au- This was not specified by the Once again, it should be noted

tee to Inves- an investigation "for the purpose of ascer- "to compel the attendance of thorizing statute. Nor was this authorizing statute. The Com- that the Committee was established

tigate Viola- taining whether or not there have been viola- witnesses [and] to send for specified by the Committee's mittee's Rules of Procedure pro- to investigate, among other

tions of the tions of the antitrust act of July 2, 1890, persons and papers." H.R.Res. Rules of Procedure. vided that "counsel may attend things, possible violations of the

Antitrust Laws and the various acts supplementary thereto, 157, 62d Cong., 1st Sess, 47 witnesses before this committee, law.

by the Ameri- by the American Sugar Refining Co.," and fur- Cong.Rec. 1143. but  
may not participate in the

can Sugar Re- ther, to "investigate the organization and proceedings, either by  
way of

fining Co. operation of said American Sugar Refining Co., examination or  
argument, except

(1911). and its relations with other persons or cor- upon permission given by the  
porations engaged in the business of manufac- committee, from time to time, as

turing or refining sugar, and all other per- the occasion arises." Hearings

sons or corporations engaged in manufactur- before the Special Committee on

ing or refining sugar and their relations with the Investigation of the Ameri-

each other." H.R.Res. 157, 62d Cong., 1st can Sugar Refining Co., 62d

Sess., 47 Cong.Rec. 1143. Cong., 1st Sess., Vol. 1, 3.

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Senate Commit- The Committee was authorized "to make a full The Committee  
was authorized This was not specified by the au- This was not specified by the

tee to Inves- and complete investigation of all lobbying "to require by subpoena or  
thorizing resolution. authorizing resolution. The

tigate Lobbying activities and all efforts to influence, en- or otherwise the  
attendance of Committee adopted a rule that

(1935-1936). courage, promote, or retard legislation, di- such witnesses and the  
produc- witnesses and their attorneys

rectly or indirectly, in connection with the tion of such correspondence, could not examine other witness-

so-called "holding company bill,"

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or any oth- books, papers, and documents ses; however, they could submit

er matter or proposal affecting legislation." . . . as it . . . [deemed] ad- written questions, which the

S.Res. 165, 74th Cong., 1st Sess., 79 Cong. visible." S.Res. 165, 74th Committee would consider pro-

Rec. 11003. Cong., 1st Sess., 79 Cong.Rec. pounding to other witnesses.

11003 Hearings before Special Senate

Committee to Investigate Lobby-

ing Activities, 74th Cong., 2d

Sess. 1469.

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ewm:

[ [Footnote 2/1](#) ]

This Appendix describes the Rules of Procedure governing the authorized investigative proceedings of a representative group of administrative agencies, executive departments, presidential commissions, and congressional committees. The Appendix does not purport to be a complete enumeration of the hundreds of agencies which have conducted investigations during the course of this country's history. Rather, it is designed to demonstrate that the procedures adopted by the Civil Rights Commission are similar to those which have traditionally been used by

investigating agencies in both the executive and legislative branches of our Government.

[ [Footnote 2/2](#) ]

We have found many other administrative agencies and presidential commissions empowered to conduct investigations and to subpoena witnesses. Those agencies are not listed in the body of this Appendix because we were unable to find an adequate description of the rules of procedure governing their investigative proceedings. However, it is significant that the statutes creating these agencies made no reference to appraisal or cross-examination in investigative proceedings. Among the agencies in this category are: (1) Bureau of Corporations in the Department of Commerce and Labor, 32 Stat. 827; (2) Commission on Industrial Relations, 37 Stat. 415; (3) the Railroad Labor Board, 41 Stat. 469; (4) the United States Coal Commission, 42 Stat. 1023; (5) the Investigation Commission established by the Railroad Retirement Act of 1935, 49 Stat. 972; (6) National Bituminous Coal Commission, 49 Stat. 992; (7) Wage and Hour Division of the Department of Labor, 52 Stat. 1061; (8) Board of Investigation to Investigate Various Modes of Transportation, 54 Stat. 952; (9) Commission on Organization of the Executive Branch of the Government, 67 Stat. 143; (10) Commission on Intergovernmental Relations, 67 Stat. 145.

[ [Footnote 2/3](#) ]

If the relevant statute makes no reference to notice, this fact will be mentioned. The negative inference which may be drawn from the absence of any statutory requirement that notice be given is supported by the fact that, in a few instances, Congress has made specific provision for the giving of notice in investigative proceedings. See, e.g., the statutes cited on p. [363 U. S. 473](#) , *supra*, requiring the United States Tariff Commission to give reasonable notice of any investigative hearing.

[ [Footnote 2/4](#) ]

If the relevant statute makes no reference to cross-examination, that fact will be mentioned because of the inference which may be drawn therefrom that Congress did not intend persons appearing at investigative hearings to cross-examine other witnesses. This inference is strengthened by the fact that, in a relatively few instances, Congress has, for one reason or another, required that persons being investigated by a commission or agency be given the right to cross-examine other witnesses. See, e.g., 49 Stat. 1381, which authorized the Secretary of Commerce to appoint special boards to investigate the causes of marine casualties.

[ [Footnote 2/5](#) ]

The Office of Price Stabilization is now defunct, having been terminated by Exec.Order No. 10434, 18 Fed.Reg. 809.

[ [Footnote 2/6](#) ]

The Office of Price Administration is now defunct, its functions having been transferred to the Office of Temporary Controls by Exec.Order No. 9809, 11 Fed.Reg. 14281, which in turn was terminated by Exec.Order No. 9841, 12 Fed.Reg. 2645.

[ [Footnote 2/7](#) ]

In addition to the investigating committees listed in the body of the Appendix, we think mention should also be made of the contemporary standing committees of Congress. Most of these committees have rules very similar to those adopted by the Civil Rights Commission. The Rules of Procedure of the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration are typical. Rule 17 of the Rules reads as follows:

"There shall be no direct or cross-examination by counsel appearing for a witness. However, the counsel may submit in writing any question or questions he wishes propounded to his client or to any other witness. With the consent of the majority of the Members of the Subcommittee present and voting, such question or questions shall be put to the witness by the Chairman by a Member of the

Subcommittee or by the Counsel of the Subcommittee either in the original form or in modified language. The decision of the Subcommittee as to the admissibility of questions submitted by counsel for a witness, as well as to their form, shall be final."

See *also* S.Rep. No. 2, 84th Cong., 1st Sess. 20; Hearings before the Subcommittee on Rules of the Senate Committee on Rules and Administration, on S.Res. 65, 146, 223, 249, 253, 256, S.Con.Res. 11 and 86, 83d Cong., 2d Sess., Part 3, 141-142, 344, 345, 374; Rules of Procedure of the Select Committee on Improper Activities in the Labor or Management Field, Rules 10 and 11. Reference has been made in the text, *supra*, p. [363 U. S. 436](#) -439, to the House "fair play" rules, which govern the hearings of most House Committees and which make no provision for cross-examination.

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MR. JUSTICE FRANKFURTER, concurring in the result.

The United States Commission on Civil Rights, in exercising powers granted to it by the Civil Rights Act of 1957 (71 Stat. 635, 42 U.S.C. 1975c), scheduled a hearing to be held by it in Shreveport, Louisiana, on July 13, 1959. By these two actions, judgments were sought to declare the proposed hearing illegal and to restrain the members of the Commission from holding it.

The rules of procedure formulated by the Commission amply rest on leave of Congress. I need add nothing on this phase of the case to the Court's opinion. While it is a most salutary doctrine of constitutional adjudication to give a statute even a strained construction to avoid facing a serious doubt of constitutionality,

"avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here, the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered."

*Moore Ice Cream Co. v. Rose*, [289 U. S. 373](#) , [289 U. S. 379](#) . I have no such misgivings in the situation before us. I also agree with the Court's conclusion in rejecting the constitutional claims of the clients. In view, however, of divergences between the Court's analysis and mine of the specific issues before us, including the authoritative relevance of *In re Groban*, [352 U. S. 330](#) , and *Anonymous Nos. 6 and 7 v. Baker*, [360 U. S. 287](#) , I state my reasons for agreement.

To conduct the Shreveport hearing on the basis of sworn allegations of wrongdoing by the plaintiffs, without submitting to them these allegations and disclosing the identities of the affiants, would, it is claimed, violate the Constitution. The issue thus raised turns exclusively on the application of the Due Process Clause of the Fifth Amendment. The Commission's hearing are not proceedings requiring a person to answer for an "infamous crime," which must be based on an indictment of a grand

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jury (Amendment V), nor are they "criminal prosecutions" giving an accused the rights defined by Amendment VI. Since due process is the constitutional axis on which decision must turn, our concern is not with absolutes, either of governmental power or of safeguards protecting individuals. Inquiry must be directed to the validity of the adjustment between these clashing interests -- that of Government and of the individual, respectively -- in the procedural scheme devised by the Congress and the Commission. Whether the scheme satisfies those strivings for justice which due process guarantees, must be judged in the light of reason drawn from the considerations of fairness that reflect our traditions of legal and political thought, duly related to the public interest Congress sought to meet by this legislation as against the hazards or hardship to the individual that the Commission procedure would entail.

Barring rare lapses, this Court has not unduly confined those who have the responsibility of governing within a doctrinaire conception of "due process." The Court has been mindful of the manifold variety and perplexity of the tasks which the Constitution has vested in the legislative and executive branches of the

Government by recognizing that what is unfair in one situation may be fair in another. Compare, for instance, [59 U. S. Hoboken Land & Improvement Co.](#), 18 How. 272, with *Ng Fung Ho v. White*, [259 U. S. 276](#) , and see *Federal Communications Comm'n v. WJR*, [337 U. S. 265](#) , [337 U. S. 275](#) . Whether the procedure now questioned offends "the rudiments of fair play," *Chicago, M. & St. P. R. Co. v. Polt*, [232 U. S. 165](#) , [232 U. S. 168](#) , is not to be tested by loose generalities or sentiments abstractly appealing. The precise nature of the interest alleged to be adversely affected or of the freedom of action claimed to be curtailed, the manner in which this is to be done and the reasons for doing it, the balance of individual hurt and the justifying public good -- these and such like are the

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considerations, avowed or implicit, that determine the judicial judgment when appeal is made to "due process."

The proposed Shreveport hearing creates risks of harm to the plaintiffs. It is likewise true that, were the plaintiffs afforded the procedural rights they seek, they would have a greater opportunity to reduce these risks than will be theirs under the questioned rules of the Commission. Some charges touching the plaintiffs might be withdrawn or modified, if those making them knew that their identities and the content of their charges were to be revealed. By the safeguards they seek, the plaintiffs might use the hearing as a forum for subjecting the charges against them to a scrutiny that might disprove them, or at least establish that they are not incompatible with innocent conduct.

Were the Commission exercising an accusatory function, were its duty to find that named individuals were responsible for wrongful deprivation of voting rights and to advertise such finding or to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecutions might well be the controlling starting point for assessing the protection which the Commission's procedure provides. The objectives of the Commission on Civil Rights, the purpose of its creation, and its true functioning are quite otherwise. It is not

charged with official judgment on individuals, nor are its inquiries so directed. The purpose of its investigations is to develop facts upon which legislation may be based. As such, its investigations are directed to those concerns that are the normal impulse to legislation and the basis for it. To impose upon the Commission's investigations the safeguards appropriate to inquiries into individual blameworthiness would be to divert and frustrate its purpose. Its investigation would be turned into a forum for the litigation of individual culpability -- matters which are not within the keeping

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of the Commission, with which it is not effectively equipped to deal and which would deflect it from the purpose for which it was within its limited life established.

We would be shutting our eyes to actualities to be unmindful of the fact that it would dissuade sources of vitally relevant information from making that information known to the Commission if the Commission were required to reveal its sources and subject them to cross-examination. This would not be a valid consideration for secrecy were the Commission charged with passing official incriminatory, or even defamatory judgment on individuals. Since the Commission is merely an investigatorial arm of Congress, the narrow risk of unintended harm to the individual is outweighed by the legislative justification for permitting the Commission to be the critic and protector of the information given it. It would be wrong not to assume that the Commission will responsibly scrutinize the reliability of sworn allegations that are to serve as the basis for further investigation and that it will be rigorously vigilant to protect the fair name of those brought into question.

In appraising the constitutionally permissive investigative procedure claimed to subject individuals to incrimination or defamation without adequate opportunity for defense, a relevant distinction is between those proceedings which are preliminaries to official judgments on individuals and those, like the investigation of this Commission, charged with responsibility to gather information as a solid foundation for legislative action. Judgments by the Commission condemning or stigmatizing individuals are not called for. When official pronouncements on

individuals purport to rest on evidence and investigation, it is right to demand that those so accused be given a full opportunity for their defense in such investigation, excepting, of course, grand jury investigations. The functions of that institution and its constitutional prerogatives

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are rooted in long centuries of Anglo-American history. On the other hand, to require the introduction of adversary contests relevant to determination of individual guilt into what is in effect a legislative investigation is bound to thwart it by turning it into a serious digression from its purpose.

The cases in which this Court has recently considered claims to procedural rights in investigative inquiries alleged to deal unfairly with the reputation of individuals or to incriminate them have made clear that the fairness of their procedures is to be judged in light of the purpose of the inquiry, and, more particularly, whether its essential objective is official judgment on individuals under scrutiny. Such a case was *Greene v. McElroy*, [360 U. S. 474](#) . There, the inquiry was for the purpose of determining whether the security clearance of a particular person was to be revoked. A denial of clearance would shut him off from the opportunity of access to a wide field of employment. The Court concluded that serious constitutional questions were raised by denial of the rights to confront accusatory witnesses and to have access to unfavorable reports on the basis of which the very livelihood of an individual would be gravely jeopardized. Again, *Joint Anti-Fascist Refugee Committee v. McGrath*, [341 U. S. 123](#) , presented a contrasting situation to the one before us. The Government there sought, through the Attorney General, to designate organizations as "Communist," thus furnishing grounds on which to discharge their members from government employment. No notice was given of the charges against the organizations, nor were they given an opportunity to establish the innocence of their aims and acts. It was well within the realities to say of what was under scrutiny in *Joint Anti-Fascist Refugee Committee v. McGrath* that

"It would be blindness . . . not be recognize that in the conditions of our time such designation drastically restricts

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the organizations, if it does not proscribe them."

341 U.S. at [341 U. S. 161](#) (concurring opinion). And the procedure which was found constitutionally wanting in that case could be fairly characterized as action "to maim or decapitate, on the mere say-so of the Attorney General, an organization to all outward seeming engaged in lawful objectives. . . ." *Ibid.* Nothing like such characterization can remotely be made regarding the procedure for the proposed inquiry of the Commission on Civil Rights.

Contrariwise, decisions arising under the Due Process Clause of the Fourteenth Amendment strongly support the constitutionality of what is here challenged, where the purposes were as here truly investigatorial. Thus, *In re Groban*, [352 U. S. 330](#) , sustained inquiry by the Ohio State Fire Marshal into the causes of a fire while excluding counsel of subpoenaed witnesses on whose premises the fire occurred. The Court so held even though the Fire Marshal had authority, after questioning a witness, to arrest him if he believed there was sufficient evidence to charge him with arson. The guiding consideration was that, although suspects might be discovered, the essential purpose of the Fire Marshal's inquiry was not to adjudicate individual responsibility for the fire, but to pursue a legislative policy of fire prevention through the discovery of the origins of fires. This decision was applied in *Anonymous Nos. 6 and 7 v. Baker*, [360 U. S. 287](#) , at [360 U. S. 288](#) , which concerned "a state judicial Inquiry into alleged improper practices at the local bar." Rejecting the claim based on the consideration that the inquiry might serve as a groundwork for the prosecution of witnesses called before it, the Court applied *Groban* because the inquiry was a general one and appellants were before it not as potential accused, but "solely as witnesses." The proposed investigation of the Commission on Civil Rights is much less likely to result in prosecution of witnesses before it than were the investigations in *Groban* and

*Baker*. Just as surely, there is not present in the cases now before us a drastic official judgment, as in *Greene* and *Joint Anti-Fascist Refugee Committee*, where the Court deemed it necessary to insure that full opportunity for defense be accorded to individuals who were the specific adverse targets of the secret process.

Moreover, the limited, investigatorial scope of the challenged hearing is carefully hedged in with protections for the plaintiffs. They will have the right to be accompanied by counsel. The rules insure that they will be made aware of the subject of the hearings. They will have the right to appeal to the Commission's power to subpoena additional witnesses. The rules significantly direct the Commission to abstain from public exposure by taking in executive session any evidence or testimony tending "to defame, degrade, or incriminate any person." A person so affected is given the right to read such evidence and to reply to it. These detailed provisions are obviously designed as safeguards against injury to persons who appear in public hearings before the Commission. The provision for screening defamatory and incriminatory testimony in order to keep it from the public may well be contrasted with the procedure in the *Joint Anti-Fascist* case, where the very purpose of the inquiry was to make an official judgment that certain organizations were "Communist." Such condemnation of an organization would, of course, taint its members. The rules of the Commission manifest a sense of its responsibility in carrying out the limited investigatorial task confided to it. It is not a constitutional requirement that the Commission be argumentatively turned into a forum for trial of the truth of particular allegations of denial of voting rights in order thereby to invalidate its functioning. Such an inadmissible transformation of the Commission's function is in essence what is involved in the claims of the plaintiffs. Congress has entrusted the Commission with a very different

role -- that of investigating and appraising general conditions and reporting them to Congress so as to inform the legislative judgment. Resort to a legislative

commission as a vehicle for proposing well founded legislation and recommending its passage to Congress has ample precedent.

Finally, it should be noted that arguments directed either at the assumed novelty of employing the Commission in the area of legislative interest which led Congress to its establishment or at the fact that the source of the Commission's procedures were those long used by Committees of Congress are not particularly relevant. History may satisfy constitutionality, but constitutionality need not produce the title deeds of history. Mere age may establish due process, but due process does not preclude new ends of government, or new means for achieving them. Since the Commission has, within its legislative framework, provided procedural safeguards appropriate to its proper function, claims of unfairness offending due process fall. The proposed Shreveport hearing fully comports with the Constitution and the law. Accordingly I join the judgment of the Court in reversing the District Court.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, concurring.

In joining the Court's opinion, as I do, I desire to add that, in my view, the principles established by *In re Groban*, [352 U. S. 330](#) , and *Anonymous Nos. 6 and 7 v. Baker*, [360 U. S. 287](#) , are dispositive of the issues herein in the Commission's favor.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

With great deference to my Brethren, I dissent from a reversal of these judgments.

The cause which the majority opinion serves is, on the surface, one which a person dedicated to constitutional

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principles could not question. At the bottom of this controversy is the right to vote, protected by the Fifteenth Amendment. That Amendment withholds power from either the States or the United States to deny or abridge the right to vote "on account of race, color, or previous condition of servitude." This right stands beyond the reach of government. Only voting qualifications that conform to the standards

proscribed by the Fifteenth Amendment may be proscribed. See *Lassiter v. Northampton County Board of Elections*, [360 U. S. 45](#) . As stated in *Terry v. Adams*, [345 U. S. 461](#) , [345 U. S. 468](#) ,

"The Amendment, the congressional enactment, and the cases make explicit the rule against racial discrimination in the conduct of elections."

By democratic values, this right is fundamental, for the very existence of government dedicated to the concept "of the people, by the people, for the people," to use Lincoln's words, depends on the franchise.

Yet, important as these civil rights are, it will not do to sacrifice other civil rights in order to protect them. We live and work under a Constitution. The temptation of many men of goodwill is to cut corners, take short-cuts, and reach the desired end regardless of the means. Worthy as I think the ends are which the Civil Rights Commission advances in these cases, I think the particular means used are unconstitutional.

The Commission, created by Congress, is a part of "the executive branch" of the Government, 71 Stat. 634, 42 U.S.C. 1975(a), whose members are appointed by the President and confirmed by the Senate. 1975(a). It is given broad powers of investigation with the view of making a report with "findings and recommendations" to the Congress. 1975c. It is empowered, among other things, to

"investigate allegations in writing under oath or affirmation that certain citizens of the United States

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are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based."

1975c(a)(1).

Complaints have been filed with the Commission charging respondents, who are registrars of voters in Louisiana, with depriving persons of their voting rights by reason of their color. If these charges are true, and if the registrars acted willfully ( see *Screws v. United States*, [325 U. S. 91](#) ), the registrars are criminally responsible under a federal statute which subjects to fine and imprisonment [ [Footnote 3/1](#) ] anyone who willfully deprives a citizen of any right under the Constitution "by reason of his color, or race." [ [Footnote 3/2](#) ] 18 U.S.C. 242.

The investigation and hearing by the Commission are therefore necessarily aimed at determining if this criminal law has been violated. The serious and incriminating nature of the charge and the disclosure of facts concerning it are recognized by the Congress, for the Act requires certain protective procedures to be adopted where defamatory, degrading, or incriminating evidence may be adduced.

"If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford

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such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpoena additional witnesses."

42 U.S.C. 1975a(e).

Yet these safeguards, given as a matter of grace, do not in my judgment dispose of the constitutional difficulty. First, it is the Commission's judgment, not the suspect's, that determines whether the hearing shall be secret or public. Thus, this procedure has one of the evils protested against in *In re Groban*, [352 U. S. 330](#) , [352 U. S. 337](#) , [352 U. S. 348](#) -353 (dissenting opinion). The secrecy of the inquisition only underlines its inherent vices:

"Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power. They are often the beginning of tyranny as well as indispensable instruments for its survival.

Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation or worse until the groundwork has been securely laid for their inevitable conviction."

*Id.* , at [352 U. S. 352](#) -353. As said in dissent in *Anonymous Nos. 6 and 7 v. Baker*, [360 U. S. 287](#) , [360 U. S. 299](#) , "secretly compelled testimony does not lose its highly dangerous potentialities merely because" it is taken in preliminary proceedings. Second, the procedure seems to me patently unconstitutional whether the hearing is public or secret. Under the Commission's rules, the accused is deprived of the right to notice of the charges against him and the opportunity of cross-examination. This statutory provision, fashioned to protect witnesses, as such, rather than a prospective defendant, permits the Commission to exclude the accused entirely from the hearing and deny him the opportunity even to observe the testimony of his accusers. And even if the Commission were inclined in a particular case to protect the accused from the opprobrium likely to flow from the testimony of

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individual witnesses against him by holding secret sessions, this would be little comfort after the Commission's findings, based on such untested evidence, were publicized across the Nation.

I assume that no court would be justified in enjoining a Congressional Committee composed of Senators or Congressmen that engaged in this kind of conduct. This is not that kind of a committee. Moreover, even if it were, and if private rights were infringed by reason of the Committee's violations of the Constitution, there are circumstances when redress can be had in the courts. *Kilbourn v. Thompson*, [103 U. S. 168](#) . Cf. *Greenfield v. Russel*, 292 Ill. 392, 127 N.E. 103; *Opinion of the Justices*, 96 N.H. 530, 73 A.2d 433. The judiciary also becomes implicated when the Congress asks the courts to back up what its Committees have done; or when a victim of an investigation asks relief from punishment imposed on him. Then, the procedural safeguards of the Bill of Rights come into full play. See ~ *Watkins v. United States*, [354 U. S. 178](#) .

The Civil Rights Commission, however, is not a Congressional Committee of Senators or Congressmen; nor is it an arm of Congress. It is an arm of the Executive. There is, in my view, only one way the Chief Executive may move against a person accused of a crime and deny him the right of confrontation and cross-examination, and that is by the grand jury.

The grand jury is the accusatory body in federal law as provided by the Fifth Amendment. The essence of the institution of the grand jury was stated by 1 Stephen, *History of Criminal Law of England*, 252: "The body of the country are the accusers." Thomas Erskine stated the matter accurately and eloquently in *Jones v. Shipley*, 21 How.St.Tr. 847, 977:

"[I]t is unnecessary to remind your lordships that, in a civil case, the party who conceives himself

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aggrieved states his complaint to the court -- avails himself at his own pleasure of its process -- compels an answer from the defendant by its authority -- or, taking the charge *pro confesso* against him on his default, is entitled to final judgment and execution for his debt, without any interposition of a jury. But, in criminal cases, it is otherwise; the court has no cognizance of them without leave from the people forming a grand inquest. If a man were to commit a capital offense in the face of all the judges of England, their united authority could not put him upon his trial -- they could file no complaint against him, even upon the records of the supreme criminal court, but could only commit him for safe custody, which is equally competent to every common justice of the peace -- the grand jury alone could arraign him, and, in their discretion, might likewise finally discharge him by throwing out the bill with the names of all your lordships as witnesses on the back of it. If it shall be said that this exclusive power of the grand jury does not extend to lesser misdemeanors, which may be prosecuted by information, I answer that, for that very reason, it becomes doubly necessary to preserve the power of the other jury which is left."

This idea, though uttered in 1783, is modern and relevant here. The grand jury brings suspects before neighbors, not strangers. Just recently, in *Stirone v. United States*, [361 U. S. 212](#) , [361 U. S. 218](#) , we said,

"The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."

This Commission has no such guarantee of fairness. Its members are not drawn from the neighborhood. The

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members cannot be as independent as grand juries because they meet not for one occasion only; they do a continuing job for the executive and, if history is a guide, tend to acquire a vested interest in that role.

The grand jury, adopted as a safeguard against "hasty, malicious, and oppressive" action by the Federal Government, *Ex parte Bain*, [121 U. S. 1](#) , [121 U. S. 12](#) , stands as an important safeguard to the citizen against open and public accusations of crime. Today, the grand jury may act on its own volition, though originally specific charges by private prosecutors were the basis of its action. *Hale v. Henkel*, [201 U. S. 43](#) , [201 U. S. 59](#) -60. It has broad investigational powers to look into what may be offensive against federal criminal law. *United States v. Johnson*, [319 U. S. 503](#) , [319 U. S. 510](#) . An indictment returned by a grand jury may not be challenged because it rests wholly on hearsay. *Costello v. United States*, [350 U. S. 359](#) , [350 U. S. 361](#) -362. An accused is not entitled to a hearing before a grand jury, nor to present evidence, nor to be represented by counsel; and a grand jury may act secretly -- a procedure normally abhorrent to due process. In this country, as in England of old, the grand jury is convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor. *Costello v. United States, supra*, at [350 U. S. 362](#) .

Grand juries have their defects. They do not always return a true bill, for while the prejudices of the community may radiate through them, they also have the saving quality of being familiar with the people involved. They are the only accusatory body in the Federal Government that is recognized by the Constitution. I would allow no other engine of government, either executive or legislative, to take their place -- at least when the right of confrontation and cross-examination are denied the accused as is done in these cases.

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The might and power of the Federal Government have no equal. When its guns are leveled at a citizen on charges that he committed a federal crime, it is for me no answer to say that the only purpose is to report his activities to the President and Congress, not to turn him over to the District Attorney for prosecution. Our Constitution was drawn on the theory that there are certain things government may not do to the citizen, and that there are other things that may be done only in a specific manner. The relationship of the Federal Government to a man charged with crime is carefully defined. Its power may be marshalled against him, but only in a defined way. When we allow this substitute method, we make an innovation that does not comport with that due process which the Fifth Amendment requires of the Federal Government. When the Federal Government prepares to inquire into charges that a person has violated federal law, the Fifth Amendment tells us how it can proceed.

The Civil Rights Commission, it is true, returns no indictment. Yet, in a real sense, the hearings on charges that a registrar has committed a federal offense are a trial. Moreover, these hearings before the Commission may be televised or broadcast on the radio. [ [Footnote 3/3](#) ] In our day, we have seen Congressional Committees probing into alleged criminal conduct of witnesses appearing on the television screen. This is in reality a trial in which the

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whole Nation sits as a jury. Their verdict does not send men to prison. But it often condemns men or produces evidence to convict, and even saturates the Nation with prejudice against an accused so that a fair trial may be impossible. As stated in 37 A.B.A.J. 392 (1951),

"If several million television viewers see and hear a politician, a businessman or a movie actor subjected to searching interrogation, without ever having an opportunity to cross-examine his accusers or offer evidence in his own support, that man will stand convicted, or at least seriously compromised, in the public mind, whatever the later formal findings may be."

The use of this procedure puts in jeopardy our traditional concept of the way men should be tried and replaces it with "a new concept of guilt based on inquisitorial devices." Note, 26 Temp.L.Q. 70, 73.

Yet, whether the hearing is televised or not, it will have all the evils of a legislative trial. "The legislative trial," wrote Alan Barth in *Government by Investigation* (1955) p. 81, "is a device for condemning men without the formalities of due process." And he went on to say:

"The legislative trial serves three distinct though related purposes: (1) it can be used to punish conduct which is not criminal; (2) it can be used to punish supposedly criminal conduct in the absence of evidence requisite to conviction in a court of law; and (3) it can be used to drive or trap persons suspected of 'disloyalty' into committing some collateral crime such as perjury or contempt of Congress, which can then be subjected to punishment through a judicial proceeding. 'It is hard to get them for their criminal activities in connection with espionage, but a way has been found,' Senator McCarthy once remarked."

"We are getting them for perjury and putting some of the worst of them away. For that

reason, I hope every witness who comes here is put under oath and his testimony is gone over with a fine-tooth comb, and if we cannot convict some of them for their disloyal activities, perhaps we can convict some of them for perjury."

"That they may have been guilty of no violation of law in the first place seems of no concern to the Senator."

*Id.* at 83. *And see* Telford Taylor, *Grand Inquest* (1955).

Barth wrote of hearings in the so-called loyalty cases. But the reasons apply to any hearing where a person's job or liberty or reputation is at stake. Barth wrote of hearings held by Congressional Committees. Yet the evil is compounded where the "legislative trial" has become a "Commission trial." And while I assume that a court would not enjoin the typical Congressional Committee, it is duty bound to keep commissions within limits when its jurisdiction is properly invoked.

The right to know the claims asserted against one and to contest them -- to be heard -- to conduct a cross-examination -- these are all implicit in our concept of "a full and fair hearing" before any administrative agency, as the Court in *Morgan v. United States*, [304 U. S. 1](#) , [304 U. S. 18](#) , emphasized. We spoke there in the context of civil litigation where property was at stake. Here, the need for all the protective devices of a fair hearing is greater. For one's job and perhaps his liberty are hinged on these hearings.

We spoke in the tradition of the *Morgan* case only recently in *Greene v. McElroy*, [360 U. S. 474](#) , [360 U. S. 496](#) -497.

"Certain principles have remained relatively immutable in our jurisprudence. *One of these is that, where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so*

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*that he has an opportunity to show that it is untrue.* While this is important in the case of documentary evidence, it is even more important where the evidence

consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment, which provides that, in all criminal cases, the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative and regulatory actions were under scrutiny."

(Italics added.)

We spoke there in a context where men were being deprived of their jobs as a result of investigations into their loyalty. Certainly no less is required if hearings are to be held on charges that a person has violated a federal law.

Respondents ask no more than the right to know the charges, to be confronted with the accuser, and to cross-examine him. Absent these rights, they ask for an injunction. In the *Greene* case, we said these rights were available "where governmental action seriously injures an individual." 360 U.S. at [360 U. S. 496](#) . Injury is plain and obvious here -- injury of a nature far more serious than merely losing one's job, as was the situation in the *Greene* case. If the hearings are to be without the safeguards which due process requires of all trials -- civil and criminal -- there is only one way I know by which the Federal Government may proceed, and that is by grand jury. If these trials before the Commission are to be held on

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charges that these respondents are criminals, the least we can do is to allow them to know what they are being tried for, and to confront their accusers and to cross-examine them. [ [Footnote 3/4](#) ] This protection would be extended to them in any preliminary hearing, even in one before a United States Commissioner. [ [Footnote 3/5](#) ] Confrontation and cross-examination are so basic to our concept of due process ( *Peters v. Hobby*, [349 U. S. 331](#) , [349 U. S. 351](#) -352 (concurring

opinion)) that no proceeding by an administrative agency is a fair one that denies these rights.

References are made to federal statutes governing numerous administrative agencies such as the Federal Trade Commission and the Securities and Exchange Commission; and the inference is that what is done in this case can be done there. This comes as a surprise to one who for some years was engaged in those administrative investigations. No effort was ever made, so far as I am aware, to compel a person charged with violating a federal law to run the gantlet of a hearing over his objection.

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No objection based either on the ground now advanced nor on the Fifth Amendment was, so far as I know, ever overruled. Investigations were made; and they were searching. Such evidence of law violations as was obtained was turned over to the Department of Justice. But never before, I believe, has a federal executive agency attempted, over the objections of an accused, to force him through a hearing to determine whether he has violated a federal law. If it did, the action was lawless, and courts should have granted relief.

What we do today is to allow under the head of due process a fragmentation of proceedings against accused people that seems to me to be foreign to our system. No indictment is returned, no commitment to jail is made, no formal criminal charges are made. Hence, the procedure is condoned as violating no constitutional guarantee. Yet what is done is another short-cut used more and more these days to "try" men in ways not envisaged by the Constitution. The result is as damaging as summoning before committees men who it is known will invoke the Fifth Amendment, and pillorying them for asserting their constitutional rights. This case -- like the others -- is a device to expose people as suspects or criminals. The concept of due process which permits the invention and use of prosecutorial devices not included in the Constitution makes due process reflect the subjective or even whimsical notions of a majority of this Court as from time to time constituted. Due process under the prevailing doctrine is what the judges say

it is, and it differs from judge to judge, from court to court. This notion of due process makes it a tool of the activists who respond to their own visceral reactions in deciding what is fair, decent, or reasonable. This elastic concept of due process is described in the concurring opinion as follows:

"Whether the scheme satisfies those strivings for justice which due process guarantees must be judged in

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the light of reason drawn from the considerations of fairness that reflect our traditions of legal and political thought, duly related to the public interest Congress sought to meet by this legislation, as against the hazards or hardship to the individual that the Commission procedure would entail."

When we turn to the cases, personal preference, not reason, seems, however, to be controlling.

Illustrative are the First Amendment protection given to the activities of a classroom teacher by the Due Process Clause of the Fourteenth Amendment in *Sweezy v. New Hampshire*, [354 U. S. 234](#) , [354 U. S. 255](#) , 261-263 (concurring opinion), but denied to the leader of an organization holding discussion groups at a summer camp in *Uphaus v. Wyman*, [360 U. S. 72](#) ; the decisions that due process was violated by the use of evidence obtained by the forceful use of a stomach pump in *Rochin v. California*, [342 U. S. 165](#) , but not when evidence was used which was obtained by taking the blood of an unconscious prisoner. *Breithaupt v. Abram*, [352 U. S. 432](#) .

It is said in defense of this chameleon-like due process that it is not "an exercise of whim or will," that it is

"founded on something much deeper and more justifiable than personal preference. As far as it lies within human limitations, it must be an impersonal judgment. It must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed."

*Sweezy v. New Hampshire, supra*, at [354 U. S. 267](#) (concurring opinion). Yet one who tries to rationalize the cases on cold logic or reason fails. The answer turns on the personal predilections of the judge, and the louder the denial, the more evident it is that emotion, rather than reason, dictates the answer. This is a serious price to pay for adopting a freewheeling concept of due process, rather than confining it to the procedures and devices enumerated

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in the Constitution itself. As said in *Adamson v. California*, [332 U. S. 46](#) , [332 U. S. 68](#) , [332 U. S. 89](#) (dissenting opinion):

"In my judgment, the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced, and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights."

That was written concerning the meaning of the Due Process Clause of the Fourteenth Amendment. But it has equal vitality when applied to the Due Process Clause of the Fifth Amendment, with which we are now concerned.

I think due process is described in the Constitution, and limited and circumscribed by it. The Constitution is explicit as respects permissible accusatory process that the Executive can employ against the citizen. Men of goodwill, not evil ones only, invent, under feelings of urgency, new and different procedures that have an awful effect on the citizen. The new accusatory procedure survives if a transient majority of the Court are persuaded that the device is fair or decent. My view of the Constitution confines judges -- as well as the lawmakers and the Executive -- to the procedures expressed in the Constitution. We look to the Constitution -- not to the personal predilections of the judges -- to see what is permissible. Since summoning an accused by the Government to explain or justify his conduct, that is

charged as a crime, may be done only in one way, I would require a constitutional amendment before it can be done in a different way.

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The alternate path which we take today leads to trial of separate essential parts of criminal prosecutions by commissions, by executive agencies, by legislative committees. Farming out pieces of trials to investigative agencies is fragmentizing the kind of trial the Constitution authorizes. It prejudices the ultimate trial itself, and it puts in the hands of officials the awesome power which the Framers entrusted only to judges, grand jurors and petit jurors drawn from the community where the accused lives. It leads to government by inquisition.

The Civil Rights Commission can hold all the hearings it desires; it can adduce testimony from as many people as it likes; it can search the records and archives for such information it needs to make an informed report to Congress. *See United States v. Morton Salt Co.*, [338 U. S. 632](#) ; *Oklahoma Press Pub. Co. v. Walling*, [327 U. S. 186](#) . But when it summons a person, accused under affidavit of having violated the federal election law, to see if the charge is true, it acts in lieu either of a grand jury or of a committing magistrate. The sifting of criminal charges against people is for the grand jury or for judges or magistrates, and for them alone, under our Constitution. In my view, no other accusatory body can be used that withholds the rights of confrontation and cross-examination from those accused of federal crimes.

I would affirm these judgments.

[ [Footnote 3/1](#) ]

Civil suits for damages are also authorized. *See* 42 U.S.C. 1983; *Lane v. Wilson*, [307 U. S. 268](#) .

[ [Footnote 3/2](#) ]

The section reads in relevant part as follows:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . by reason of his color, or race . . . shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

[ [Footnote 3/3](#) ]

The Rules of the Commission by Subdivision (k) provide:

"Subject to the physical limitations of the hearing room and consideration of the physical comfort of Commission members, staff, and witnesses, equal and reasonable access for coverage of the hearings shall be provided to the various means of communications, including newspapers, magazines, radio, news reels, and television. However, no witness shall be televised, filmed, or photographed during the hearings if he objects on the ground of distraction, harassment, or physical handicap."

[ [Footnote 3/4](#) ]

*Cf.* Frankfurter, Hands Off the Investigations, New Republic, May 21, 1924, p. 329 at 331:

"It must be remembered that our rules of evidence are but tools for ascertaining the truth, and that these tools vary with the nature of the issues and the nature of the tribunal seeking facts. Specifically, the system of rules of evidence used in trials before juries 'are mainly aimed at guarding the jury from the overweening effect of certain kinds of evidence.' That system, as pointed out by Wigmore, 'is not applicable by historical precedent, or by sound practical policy' to 'inquiries of fact determinable by administrative tribunals.' Still less is it applicable to inquiries by congressional committees. Of course, the essential decencies must be observed, namely, opportunity for cross-examination must be afforded to those who are investigated or to those representing issues under investigation."

[ [Footnote 3/5](#) ]

Rule 5(b), Rules of Criminal Procedure, provides that the defendant shall be informed of the complaint against him and of his right to retain counsel. Rule 5(c) expressly states, "The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf."

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