Hugo Black’s Congressional Investigation of Lobbying and the Public Utility Holding Company Act: A Historical View of the Power Trust, New Deal Politics, and Regulatory Propaganda

William A. Gregory

Georgia State University College of Law, wgregory@gsu.edu

Rennard Strickland

Follow this and additional works at: https://readingroom.law.gsu.edu/faculty_pub

Part of the Law and Politics Commons, Legal History Commons, and the Legislation Commons

Recommended Citation


This Article is brought to you for free and open access by the Faculty Publications at Reading Room. It has been accepted for inclusion in Faculty Publications By Year by an authorized administrator of Reading Room. For more information, please contact mbutler@gsu.edu.
A lobbyist is anyone who opposes legislation I want. A patriot is anyone who supports me.—Senator James A. Reed of Missouri

We are all ready to be savage in some cause. The difference between a good man and a bad man is the choice of the cause.

—William James

Justice Hugo Black believed, and evangelically so, that there are themes or conflicts that recur again and again throughout human history. "He saw," as Professor Meador notes, "common threads in the actions and attitudes of people from the Greeks of Thucydides through Jesus Christ, the Romans of Livy and Tacitus, England of the seventeenth century, the American struggle for independence and union, to the latest hour in the twentieth century." Among the themes of both human history and personal life which haunted Black were the questions of the abuse of economic power, the limits of political influence, and the role of investigation—especially the role, in the contemporary setting, of the Special Legislative Investigation Committee. A passage heavily marked in Black's copy of Joseph Frank's The Levellers reflects both the historical nature and the contemporary character of these concerns.
The Levellers of seventeenth century England faced, and faced up to, many of the social problems which are today plaguing the Western World. Such current issues in the United States as the propriety of loyalty oaths or the need to limit the scope of legislative investigating committees were issues which three hundred years ago helped determine the aims and techniques of the Leveller party. Indeed, the words of the chief Leveller spokesmen are often echoed with startling accuracy on the more progressive editorial pages of the 1950's.\(^6\)

Black's continuing interest is understandable for the Legislative Investigation Committee was intimately connected with the Senate years of Black's life.\(^6\) As John P. Frank notes in his biography, *Mr. Justice Black*, "[I]t was as an investigator that Black performed his greatest service to the New Deal.\(^7\) Unquestionably, among the many factors in Roosevelt's nomination of Black to serve as an Associate Justice of the Supreme Court, was the bulldog tenacity with which the Senator pushed New Deal proposals with his investigative skills and with his special congressional committees.\(^8\)

After Black was on the Court, investigations continued to interest him as shown by the large number of books on the topic which he kept in his home library.\(^9\) And the interest was not purely academic, for he faced the

---


\(^6\) V. Hamilton, *Hugo Black: The Alabama Years* 214-59 (1972) [hereinafter cited as Hamilton].

\(^7\) J. Frank, *Mr. Justice Black: The Man and His Opinions* 63 (1949) [hereinafter cited as Frank].

\(^8\) W. Leuchtenberg, *Klansman Joins the Court: The Appointment of Hugo L. Black*, 41 U. Chi. L. Rev. 1-31 (1973), is the most complete, objective discussion of the Black appointment based upon primary material and oral history sources. Among other political questions which weighed in the nomination was a felt need to nominate a member of the Senate so that confirmation would be an easier task. Roosevelt had just been defeated on his Court reform (or Court packing) plans. Geographic considerations were also important in the case of Black because a southerner would help "balance" the Court. As Mr. Justice Black's biographer and former clerk, John P. Frank, has noted, "Black was appointed first and foremost to be a New Dealer on the Court." Frank, *Justice Black and the New Deal*, 9 Ariz. L. Rev. 26 (1967). However, the story of Black's years on the Court reveals that he was never a total Rooseveltian. A New Dealer, yes. A doctrinaire New Dealer, no!

congressional investigation issue squarely in a number of cases such as *Barenblatt v. United States*¹⁰ in which he dissented from the affirmand a conviction for refusing to answer questions before the House Un-American Activities Committee. As late as 1968 Justice Black returned to the subject of the powers of congressional investigating committees in *A Constitutional Faith*, the James S. Carpentier Lectures at the Columbia University School of Law.¹¹

Because the fascinating legal career of Hugo Black culminated in his many years of service on the Supreme Court and because this tenure was so long and productive, these later Court years tend to obscure an earlier career which, standing alone, would be regarded as a substantial achievement for any man. Both Black's personal life and career have been ably recounted by friends and scholars, although with a greater emphasis on his Supreme Court experience.¹² Recent sources have indicated the long-

---


term nature and breadth of his intellectual interests and of the special southern influence of the so-called "Alabama years."\textsuperscript{13}

The present study deals with the Senate years and Black's investigation of lobbying activities against the Public Utilities Holding Company Act, known as the Wheeler-Rayburn Bill.\textsuperscript{14} The Black investigation is an interesting study in the enactment of legislation and of the New Deal effort to reform rather than replace existing economic policies. The Public Utility Holding Company Bill is an appropriate vehicle for study because after it was ultimately adopted in 1935, the Act proved to be extraordinarily effective in ending the abuses of the holding company, while at the same time preserving the existing benefits of the holding company system.\textsuperscript{15}


\textsuperscript{15} 1 L. Loss, Security Regulation 135 (2d ed. 1961). The corporate simplification man-
Furthermore, the life cycle of the Black Committee serves as a standard to judge the recent past. Economic influence peddling is one of the recurring themes of human history. Black understood that "in the lives of men over a two thousand year spread of time and place" there would be "repeated patterns of behavior—moments of glory and high purpose, acts of skullduggery, displays of the strengths and weaknesses of character, persecutors of the weak by the powerful, triumph and disaster, corruption in public office, and struggles for liberty against arbitrary officialdom." Watergate was not the first example of the bringing to light of massive contributions by interests to influence political decisions. In a very real sense, the Associated Milk Producers, I. T. & T., and selected oil companies are the direct lineal descendants of the Committee of Public Utility Executives, Associated Gas and Electric Company (hereafter A. G. & E.), and the selected power companies investigated by Black. Presidents Eisenhower, Kennedy, Johnson, and Nixon purportedly mirrored Roosevelt's use of federal tax returns in investigating domestic questions and political opponents. And in the midst of power trusts, New Deal politics, and regulatory propaganda, Senator Hugo Black of Alabama conducted what one friendly biographer called "Chairman Black's Three-Ring Circus." Black's committee was authorized by a Senate Resolution of July 2, 1935, and began work immediately in preparation for public hearings. The first were hastily commenced on July 12 and soon became a key instrument of congressional activity in support of the Wheeler-Rayburn Bill. This first phase of the Black investigation ended in late August with the adjournment of Congress and the passage of the Wheeler-Rayburn Bill. Nonetheless, because of the breadth of powers granted to Black's committee, hearings resumed in March of 1936 in the early days of the second session of the 74th Congress. After having exposed the machinations of the power trust, Black turned to a more general investigation of all dated by Section 11 of the Act has now been largely accomplished. By June 30, 1967, the holding companies registered under the Act had been reduced from 216 to 27. 4 L. Loss, at 2276 (1969). A substantial amount of case law has been required to interpret the Act, especially Section 11. These are gathered in 1 L. Loss 135-41 and updated at 4 L. Loss 2276-78. Information on construction of Section 11(b)(1) dealing with limitations on operations of holding company systems may be found at 16 L.Ed.2d 1218 (1967). For a case reflecting the modern restrictions on acquisition of nonutility interests, see Michigan Consolidated Gas Co. v. S.E.C., 444 F.2d 913 (1971).

16 Meadow, supra note 3, at 31.
17 Hamilton, supra note 6, at 234-59.
18 Hugo L. Black, Chairman (Dem., Ala.); Sherman Minton (Dem., Ind.); Lewis B. Schwellenbach (Dem., Wash.); Lynn J. Frazier (Rep., N.D.); Ernest W. Gibson (Rep., Vt.).
19 Hearings before a Special Comm. to Investigate Lobbying Activities, 74th Cong., 1st Sess., at 1 (1935) [hereinafter cited as Hearings, Black Committee].
forms of lobbying, concentrating mainly on the newly formed anti-New Deal groups, such as the Liberty League, Sentinels of the Republic, and the Farmers Independence Council. While this later phase of the investigation bears only a secondary relation to the politics of the Utilities Bill, it is related to the first phase of the investigation in method and purpose. Moreover, it is necessary to explore both phases of Black's investigation in order to appreciate the full opposition, which did not develop until the beginning of the second phase.

When Franklin Roosevelt introduced the Public Utilities Holding Company Bill, he implicitly endorsed a particular brand of political philosophy encompassing an expanded program of federal economic control. That philosophy, stemming from the Wilsonian doctrine of the New Freedom, had its roots in the Progressive era, and now, interpreted by men such as Felix Frankfurter and Louis Brandeis, came to play an increasingly important role in the New Deal. The thrust of this phase is exemplified by Frankfurter's attitude, illustrated in an anecdote of fairly wide circulation in New Deal Washington.

Thomas Reed Powell, a colleague [of Frankfurter] at the Harvard Law School found himself one evening in the company of eminent legal and financial magnates who dominated the conversation by complaining about Frankfurter's alleged radicalism. Powell listened quietly for a while, but finally his patience gave way. "Felix a radical?" he protested. "Hell! The damn fool is wearing out his heart trying to make capitalism live up to its pretensions."

Many leading scholars of this period have seen the ascendancy of this philosophy as significant enough to mark off the beginning of a new phase of the New Deal, sometimes called the Second New Deal, in which the Roosevelt Administration placed greater emphasis on fundamental reform than immediate recovery from the economic effects of the Great Depression. Today, we know that this phase was the most permanent in reshaping the American nation and in restructuring the American economy.

The Brandeisians diagnosed the ills of the country as the effect of monopolistic concentration of industry. They advocated federal action to break up corporations into sufficiently small units. They believed that the restoration of free competition would effectively cure the country's economic ills which, in their analysis, resulted largely from the corrupt, para-


sitic inefficiency of the corporate structure. Any abuses which free competition could not handle, the Brandeisians would leave to the states, having enabled them to regulate effectively by cutting the corporate monsters down to size. The rationale behind this New Deal approach was a fear of the political and economic effects of concentrated wealth. President Roosevelt expressed this point of view when he stated:

> It is idle to talk of the continuation of holding companies on the assumption that regulation can protect the public against them. Regulation has small chance of ultimate success against the kind of concentrated wealth and economic power which holding companies have shown the ability to acquire in the utility field.\(^2\)

An exhaustive study of the utilities industry undertaken by the Federal Trade Commission established that this was no mere theoretical abstraction.\(^3\) The private utilities industry, once it had acquired economic predominance over municipally or other publicly owned utilities, proceeded to use that economic power to buttress its political position.

The primary weapon of the public utilities was a vast propaganda campaign begun in 1919. The Federal Trade Commission study concluded that “measured by quantity, extent, and cost, this was probably the greatest peace-time propaganda campaign ever conducted by private interests in this country.”\(^4\) Although not limited to influencing the press and the schools, the campaign of the utilities was concentrated in these two areas. The propagandists recognized the importance of these institutions in the formation of public opinion. In the schools the utilities put their message across by employing teachers for the summer, by inviting teachers to help plan courses in utility studies, by making direct money payments to leading universities, and by applying pressure on the textbook publishers.\(^5\) The press easily yielded, especially when induced by large advertising expenditures. The utilities supplemented this indirect influence by purchasing a controlling interest in a number of newspapers.\(^6\)

Considering this history of, depending upon your viewpoint, “public education” or “propaganda,” the magnitude of the public outcry against the Wheeler-Rayburn Bill is no surprise. The storm of protest was as much a result of the carefully prepared long-range propaganda campaign as of an immediate response to the intense lobbying efforts by the opponents of

---

\(^2\) Hawley, supra note 20, at 661.

\(^3\) SUMMARY REPORT OF THE FEDERAL TRADE COMMISSION TO THE SENATE OF THE UNITED STATES ON EFFORTS BY ASSOCIATIONS AND AGENCIES OF ELECTRIC AND GAS UTILITIES TO INFLUENCE PUBLIC OPINION, S. Doc. 92, part 71a (1934).

\(^4\) Id. at 391.

\(^5\) Id.

\(^6\) Id. at 392.
the legislation. Nonetheless, this specific lobbying campaign against the Wheeler-Rayburn Bill is a striking example of the degree of political manipulation available to the holders of concentrated economic power.

The heart of the Wheeler-Rayburn Bill was the so-called "death sentence clause" which provided for the abolition of holding companies unless they could justify their existence to the satisfaction of the Securities and Exchange Commission. Passing the Senate by a margin of only one vote, the death sentence clause then failed to pass the scrutiny of the House. Roosevelt felt the bill was emasculated without this section.

Vice President James N. Garner, in an attempt to strengthen the Administration's position, ignored the traditional seniority procedures and appointed five senators to the conference committee, four of whom had voted for the death sentence clause. The Administration felt that the defeat in the House did not indicate insurmountable opposition because the prodigious lobbying efforts of the utility companies might explain the defeat.

Prominent among the organizations working for the defeat of the bill were the Committee of Utility Company Executives, under the supervision of Philip Gadsden, and the American Federation of Utility Investors, led by Dr. Hugh Magill. These two groups, in conjunction with several others, as well as the more localized efforts of the various operating companies, had mounted an extensive campaign against the Wheeler-Rayburn Bill. The Western Union office at Washington, D.C. later estimated that in the days preceding the vote on the death sentence clause House members received more than 97,000 telegrams.

Letters, telegrams, and personal visits from influential citizens of their home districts assured politically aware congressmen that the Wheeler-Rayburn Bill was unpopular "back home." Ostensibly, an authentic grass-roots movement had developed. New Deal leaders felt the only means to combat the utility lobby was to expose its methods to public view and thereby discredit the claim of popular support. In his column of July 12, Arthur Krock correctly analyzed the Administration strategy.

Only one thing . . . can produce a law with the Senate's narrowly imposed "death sentence", and that is largely in the hands of the investigating committees of the Senate and House. If scandals can be laid to the utility

30 Hawley, supra note 20, at 666; 6 Newsweek, July 20, 1935, at 7-8.
lobbyists the House will stampede for cover, and its conferees will quickly reflect the change.\footnote{31}

Thus Roosevelt’s hopes for the Public Utilities Holding Act rested on Hugo Black of Alabama. Black was an ideal choice to head a committee to expose utility lobbyists. His prior experience in investigation of air mail and shipping subsidies established his reputation as a first-rate, tenacious prober. Black gained his initial exposure to the work of a congressional investigation committee in 1929 when Senator Thaddeus H. Caraway invited him to become “guest assistant” on the Caraway subcommittee established to investigate lobbying.\footnote{32} The Caraway experience was instrumental in forming Black’s views of the duties of a congressional lobbying investigation. The resolution authorizing the Caraway investigation contains these words: “... Whereas the lobbyists seek by all means to capitalize for themselves every interest and every sentiment of the American public which can be made to yield an unclean dollar for their greedy pockets. ...”\footnote{33} Compare this with Black’s statement that follows: “There is no constitutional right to lobby. There is no right on the part of any greedy or predatory interest to use money taken from the pockets of the citizen to mislead him. ...”\footnote{34}

Black’s view of the power lobby, although severe, was essentially accurate. Lobbying by the utility interests differed in both substance and procedure from the citizen’s right to petition his government for redress of grievances. Fraud, deception, and the illicit exertion of monopolistically acquired economic power, Black believed, go far beyond any legitimate right of petition. Not only did Black staunchly oppose the lobby interests, he also refused to permit them to ignore Congress’ investigatory power. For example, in February of 1934 the Senate voted contempt citations against two airline officials who had obstructed Black’s investigation by destroying papers that Black had subpoenaed.\footnote{35} Both men later served ten days in jail in the District of Columbia. The Supreme Court sustained the legality of the Senate’s action in the case of \textit{Jurney v. McCracken},\footnote{36} thereby reinforcing congressional authority to compel testimony from reluctant witnesses.

The Black Committee did not have an exclusive or completely free

\footnote{31} \textit{N.Y. Times}, July 12, 1935, at 18.
\footnote{33} \textit{Senate Hearings Before a Subcomm. of the Comm. on the Judiciary (1929-30)} (Thaddeus H. Caraway, Dem., Ark., chairman).
\footnote{34} \textit{Hearings, Black Committee, supra} note 19.
\footnote{35} \textit{Williams, supra} note 12, at 193.
\footnote{36} \textit{Jurney v. McCracken}, 294 U.S. 125 (1935).
field in which to conduct its investigation. At the same time that the Black Committee was meeting, the House Rules Committee (John J. O'Connor, chairman), was also authorized to investigate attempts to influence voting on the Wheeler-Rayburn Bill. Hearings were held simultaneously. Some House leaders viewed Black's investigation as simply a device to make headlines. Others, such as Representative Rankin of Mississippi, recognized O'Connor's desultory approach to the problem and viewed Black's work as absolutely essential.

Speaker Byrnes wanted either to consolidate the two investigations or to persuade O'Connor to leave the investigation solely to the Senate Committee. However, he did not succeed in this effort to head off conflict.  

Before the twentieth of July, Black's vigorous conduct of the investigation had yielded several startling headlines. This elicited O'Connor's remark that all the Senate Committee had done so far was to "rush in and beat us to it . . . . I don't think they have touched on much yet." O'Connor's dilatory policy became explicable when later testimony before the Black Committee brought out that Basil O'Connor, former law partner of President Roosevelt and a brother of Representative John J. O'Connor, received $25,000 in legal fees from the utilities during the preceding year.  

Chairman O'Connor revealed his hand almost from the beginning. He ignored the lobbying efforts of the utilities and instead focused his attention on the Administration's lobbying activities. The most damaging accusation was Representative Brewster's account of a conversation with Thomas Corcoran, legislative troubleshooter for President Roosevelt. At this point in the testimony Brewster interjected, "You are a liar." Unfortunately for Brewster's reputation, Ernest Gruening, a former Maine newspaper editor, now working for the Department of the Interior, who had been present at the Brewster-Corcoran encounter, substantiated Corcoran's version of the affair. Nonetheless, the publicity O'Connor's investigation gave to the charges of Administration lobbying could only hurt the chances for eventual passage of the Wheeler-Rayburn Bill.

During these preliminary skirmishes with O'Connor, the conference committee’s deliberations had ground to a halt. On August 1 the New York Times, July 13, 1935, at 1; Id., July 14, at 18.


40 U.S. CONGRESS, HOUSE OF REPRESENTATIVES, HOUSE RULES COMMITTEE, INVESTIGATION OF LOBBYING ON UTILITY HOLDING COMPANY BILLS, 74th Cong., 1st Sess., part 1, July 9-17 [no other parts published], at 3 (1935).

41 Id. at 32.

42 Id.

43 Id. at 35.
Times reported that the conferees had not met for the last three weeks. The representatives appointed to the committee had refused to meet if any outsiders were present. They specifically objected to the presence of Dozier Devane, of the Federal Power Commission, and Benjamin Cohen, of the Public Works Administration, both of whom had helped draft large parts of the original bill. The congressmen argued, quite correctly, that this was an executive session, closed to the public and no one but the conferees should be present. If the senators desired to hold a public session with no restrictions on attendance, this was acceptable to the House. Although the senators realized the substantial validity of the representatives’ arguments, they persisted in their demand for the presence of Devane and Cohen, pointing out earlier precedents for the action. In substance this was a ploy to stall deliberations until Black had turned up sufficient fraud, manipulation, and money behind the utilities lobby to destroy the image of grassroots support.

The most damaging testimony Black produced concerned the telegraphic deluge. Black later estimated this phase of the utilities’ campaign accounted for over 250,000 telegrams. These telegrams were written, paid for, and sometimes signed with forged signatures, by utility executives. The testimony of Representative Denis J. Driscoll (Dem., Pa.) gave Black his first clue. The large number of signatures starting with letters in the first part of the alphabet first aroused Driscoll’s suspicions. The B’s alone comprised 14 per cent of the total. On investigating further, Driscoll found that many people denied sending him the telegrams. In other cases the Post Office returned Driscoll’s replies to the telegrams, marked “addressee unknown.” The testimony of Jack A. Fisher, manager of the Western Union office in Warren, Pennsylvania, explained this discrepancy.

During the time the bill was between the House and the Senate, Mr. Herron [an official of Utilities Investing Corporation, which itself was a subsidiary of A. G. & E., a prominent holding company] would come in almost daily for a period of an hour . . . or two . . . and he would dictate these messages to me and the signatures, and his signatures were obtained from a list which he had in his hand, or from the city directory.

On further questioning, Fisher stated that he had no reason to challenge

45 This was noted in a speech on Aug. 8, 1935, delivered over the National Broadcasting Corporation network. Hugo L. Black, Lobby Investigation, I Vital Speeches, Aug. 26, 1935, at 764 [hereinafter cited as Black, Lobby Investigation].
46 Hearings, Black Committee, supra note 19, at 61-62, 76. Telegrams sent to Driscoll: A to M, 596; N to Z, 220: total, 816.
47 Hearings, Black Committee, supra note 19, at 64.
Herron's authorization to sign the telegrams because, as an employee of Western Union, his sole interest was in the revenue to his company. This represented the nadir of the utilities' telegram campaign.

The opponents of the Wheeler-Rayburn Bill also used other means to gather signatures. On July 18 the testimony of Mr. F. R. Veale, general superintendent of the eastern division of Western Union, disclosed that messenger boys, paid three cents for each signature, had collected authorizations for the utility interests. One of the more amusing episodes occurred when Chairman Black questioned Paul Elmer Danielson, one of the messenger boys in Warren, Pennsylvania.

Chairman Black wondered by what means Elmer had won over six citizens: What did you tell them? The boy beamed: Why I explained the Wheeler-Rayburn bill to them! The Senator waited for laughter to subside: And where do you stand on the question today? Elmer's eyes shifted: Well, I guess I'm neutral now.

The well-planned method of operations of the utilities lobby emerged as the testimony of local Western Union officials revealed that the central Western Union office in New York had informed the local offices of the imminence of the telegraphic deluge several weeks in advance so that they would be ready for the increased business. The utilities took care to cover their tracks well. Their agents paid for the telegrams in cash so no written record would remain.

The utility lobby did not rely solely on the city directory or paid solicitors to gather signatures; they also coerced their employees into signing messages. The Metropolitan Edison Company had taken the payroll of the New York Street Railway System and signed the names of every employee and his next of kin, including at least one dead man, to the messages. Of course, the employees, in a time of mass unemployment, remained free to object to their supervisors if they disapproved of this action!

Once the utilities realized that Black was on their trail, they sought to destroy all incriminating evidence. In Warren, Pennsylvania, someone had carefully burned all records of the forged telegrams. Jack A. Fisher, manager of the Warren Western Union office threw some light on this. In

48 Id. at 74.
51 Hearings, Black Committee, supra note 19, at 91.
a conversation with R. P. Herron of A. G. & E., Herron had suggested "[i]t would be a good idea if somebody threw a barrel of kerosene in the cellar." Fisher, at the time, received that as a joke. More ludicrous than sinister, this episode served to further tarnish the reputation of the holding companies. Black persistently drew out all the details. Federal law required copies of all telegrams to be retained for a period of one year. The normal procedure in the Warren office was for one of the messenger boys to burn the appropriate months of the prior year's messages after the required lapse of time. However, Arthur F. Christianson, a clerk at the Warren office, deviated from the normal procedure and himself performed this "janitor work," as Danielson had earlier termed it. The Committee never definitely established who actually burned the messages, although most of the evidence pointed to Christianson. That someone had burned the messages was apparent after Mr. Fisher had testified. He found charred remains of the messages among the ashes in the cellar of the Western Union office. The few legible words and dates connected these remains with the missing messages.

On July 23, the Federal Communications Commission ordered all eight telegraph companies to report on destruction of these records. Such a violation of federal law could bring a fine of $1,000 to $5,000 or one to five years' imprisonment, or both.

Ursal E. Beach, head of the securities department of A. G. & E., supplied the next link in the well-concealed chain of events. He admitted that he had ordered the destruction by A. G. & E. subsidiaries of all written evidence bearing on the propaganda campaign. The testimony of E. W. O'Brien, of Utilities Investing Corporation, an A. G. & E. subsidiary, confirmed this. He stated that on Beach's order he had destroyed his own records.

The utilities did not limit themselves to telegrams and letter writing. Leuchtenberg cites one correspondent's estimate that "there were more utility lobbyists than congressmen" in Washington. Black pictured them as storming the capital. "Hotels buzzed as though another national convention were in town. . . ."

That the utility interests used advertising expenditures to influence newspaper editorial columns was well known. Black furnished the specifics by questioning a utility lobbyist, Philip Gadsden, head of the Committee

54 Hearings, Black Committee, supra note 19, at 68.
55 Id. at 97.
56 Id. at 69.
57 N.Y. Times, July 24, 1935, at 5.
59 LEUCHTENBERG, supra note 20, at 155.
60 Black, Lobby Investigation, supra note 45, at 765.
of Public Utility Executives, on a memorandum found in his office. After speaking of some favorable, from the utilities' standpoint, editorials on the Wheeler-Rayburn Bill, the memorandum concludes with "Your own advertising will further stimulate editorial comment all over the country." Gadsden reacted by denying that this was the actual practice. It was just an idea submitted for consideration but obviously rejected. Questioned further, he modified his stance by conceding that giving advertising to one paper and not another might incur ill will. On July 24 the Committee heard another witness tell how A. G. & E. had dropped the York Dispatch, a local Pennsylvania paper, from its advertising list after a reporter working for the Dispatch had relayed an article on the faking of telegrams to the Philadelphia Record.

In another area Black sought to pinpoint the range of activities of the utility lobbyists in the nation's capital. The utilities made various information services available to interested congressmen, as well as other opponents of the Wheeler-Rayburn Bill. Sometimes the information supplied was conveniently organized into the form of a speech. Black's interrogation of Mr. Burnham Carter, of Ivy Lee and T. J. Ross, public relations counsel, is illustrative.

BLACK: Did you write a speech for her? [a radio commentator, Catherine Curtis]

CARTER: No, Sir.

BLACK: Are you sure you did not?

CARTER: I supplied material for her.

BLACK: Look at that, Mr. Carter.

CARTER: Yes, sir; this is my document.

BLACK: What is that?

CARTER: Well, I guess it says "draft." I consider it a memorandum.

Black further tried to ferret out the real purposes of the high fees paid to various law firms. The utility lobbyists explained that these payments were for advice as to the legal interpretation of the bill, analyses of its provisions, and preparation of various amendments. The following interchange between Gadsden and Black pointed up the thin line between legal services and outright lobbying.

BLACK: They did not have anything to do, of course, with trying to defeat the bill?

GADSDEN: Oh, no; not a thing. Their job was to advise us.

61 Hearings, Black Committee, supra note 19, at 47.
62 Id. at 49-50.
63 N.Y. Times, July 24, 1935, at 5.
64 Hearings, Black Committee, supra note 19, at 37.
BLACK: They were to advise you how to defeat it.

GADSDEN: That is right... 

In his probe of lobbying activity, Black called Patrick J. Hurley, Secretary of War in the Hoover Cabinet. Hurley was a recalcitrant witness who strongly objected that the Committee had singled out him, a Republican lawyer, for its investigation. He further argued that with a Democratic Congress his influence was not "worth a nickel to anybody." Testimony before the Committee revealed that Hurley had received $85,000 for his services in "advising" the utilities on the Wheeler-Rayburn Bill. A prominent Democratic attorney, Joseph P. Tumulty, also came before the Committee. He had received $33,500, $7,500 of which he paid to other attorneys for their assistance. In reality, the facts indicated, these Washington lawyers might well be considered high-priced influence peddlers, their affluence and political connections bringing them more respectability than they might otherwise have merited.

The only hint of outright bribery arose from the testimony of Eugene B. Sellers. Sellers, working for the N. R. A., and a close associate of Representative Pat Patton of Texas, testified that on the Sunday morning before the vote on the death sentence clause, he had seen Patton return from a meeting with Joseph W. Carpenter, president of the Texas Power and Light Company, carrying a box wrapped in newspaper. Sellers further reported that he had heard Patton’s nephew say, "Hell no, that wasn’t cigars," and "Uncle had bought a bond and it wasn’t pay day." Patton and Carpenter neglected to confer beforehand and Black took full advantage of their inconsistent stories. Carpenter did not recall giving anything to a congressman, except perhaps a box of cigars, whereas Patton remembered that he had taken some Department of Agriculture pamphlets on the diseases of horses and cattle from Carpenter’s room. These pamphlets, an earlier gift to Carpenter’s son, Patton took with him to mail to Carpenter’s home in Texas because his son did not have time to read them in Washington. Patton’s testimony before the Black Committee is a remarkable attempt at evasion and introduction of irrelevancy. Starting out by recalling that he had married "a pretty little girl, a girl from the good old state of Alabama," he continued in the same vein. Black gave him every opportunity to defend himself, allowing extended speeches, although

65 Id. at 46.
71 Hearings, Black Committee, supra note 19, at 530.
still continuing to question him closely on his finances, drawing out that he had purchased $3,000 worth of government bonds on a salary of $3,100 in the four months he had been a congressman. A few days later Patton submitted a revised financial statement which upped his income to $5,100.

Following his appearance before the Black Committee, Patton got a sympathetic hearing from O'Connor's Rules Committee. There Patton, his daughter, and nephew all denied the charges made earlier. The testimony of greatest significance was that of Mr. Shook, Patton's nephew, for he denied Sellers' earlier hearsay account. Thus, O'Connor continued his tactics of obstruction. He devoted his hearings to charges against the Administration and defense of those investigated by Black. In spite of O'Connor's efforts, Patton's activities, if not illegal, seemed suspicious. Although Black failed to accumulate sufficient evidence to take further action against Patton, he brought out into the open the type of clandestine activity the utilities were using to apply pressure.

The costs of the lobbying campaign now fell under the Black Committee's searching eyes. On July 18, Burnham Carter informed the Committee that his firm, Ivy Lee and T. J. Ross, had received fees of $5,000 per month for advising the public utility executives about public relations and preparing and distributing various news releases and statements. Lobbying fees per se, i.e., for such things as printing and binding of statements ($38,148), advertising ($27,720), and public relations counsel ($22,750) amounted to $151,865, according to a statement which the Committee of Public Utility Executives presented to Black. Added to legal fees of $150,000 paid to the law firms of Sullivan and Cromwell, and Simpson, Thacher and Bartlett, this one group spent over $300,000 to fight the Wheeler-Rayburn Bill. This was only a fraction of the total expended. To get the full amount one must sum the expenditures of the other lobbying committees, the holding companies, and their subsidiaries. For example, Joseph W. Carpenter, president of Texas Public Power and Light Company, admitted spending $33,777 for lobbying expenses. Incidentally, he charged this to the company's operating expenses, thus bearing out Black's contention that the consumer was ultimately to pay the bill. The New York Times summarized the outlays the Black Committee had thus far brought to light.
One million dollars was no doubt a minimum; Black later estimated the total cost to be at least five times that.\textsuperscript{80}

These revelations led naturally to another question. What sort of corporate financial structure permitted the expenditure of such astronomical sums? A. G. & E. had no money to pay dividends in recent years, as U. E. Beach testified, yet was "able to pay out $700,000 to defeat this legislation."\textsuperscript{81} This strange contradiction seemed to confirm the Brandeisian thesis of corporate mismanagement of "other people's money."

Certainly the utility executives could not attribute the default in dividends to inability to pay for the top quality management. Philip Gadsden was paid $31,000 by the United Gas Improvement Company, while John E. Zimmerman, its president, received approximately $90,000, according to Gadsden's testimony.\textsuperscript{82} But these men, while arguably overpaid, did not cold-bloodedly drain off their company's assets as did Howard C. Hopson of A. G. & E. Stewart P. Ross, assistant counsel for the New York State Joint Legislative Committee to Investigate Public Utilities, disclosed these facts about Hopson's income. Although A. G. & E. had suspended cash dividends in 1931 and stock dividends in 1932, Hopson's income or the income of corporations controlled solely by Hopson or his family averaged well above $500,000 for the period 1929-1933.\textsuperscript{83}

At this point in the investigation, President Roosevelt officially came to the aid of the Black Committee by opening all federal tax returns to its inspection. Significantly, the Executive Order did not mention the House Rules Committee investigating the same matter.\textsuperscript{84} The same week the President's name was again connected with the Black Committee's investigation as E. P. Cramer, an advertising agency employee, testified that he had initiated the idea of a "whispering campaign" designed to create popular suspicion that the "new dealers and especially the 'New Dealer-in-

\textsuperscript{80} H. Black, \textit{Inside a Senate Investigation}, HARPER'S MAGAZINE, Feb., 1936, at 275-86.
\textsuperscript{81} N.Y. Times, July 20, 1935, at 2.
\textsuperscript{82} \textit{Hearings, Black Committee}, supra note 19, at 25-26.
\textsuperscript{83} N.Y. Times, July 30, 1935, at 14. Profits of Hopson's companies: 1929, $575,000; 1930, $852,000; 1931, $393,000; 1932, $533,000; 1933, $449,000; total, $2,805,000.
\textsuperscript{84} \textit{Id.}, Aug. 1, 1935, at 1.
chief" are either incompetent or insane. . . ." Black saved this bombshell for the day of the House roll call vote on the Wheeler-Rayburn Bill, thus underscoring the political implications of his investigation. Cramer's suggestion, made to C. E. Groesbeck, chairman of the board of directors of Electric Bond and Share, a utilities holding company, never, according to Groesbeck, received serious consideration. After all, a man "cannot be responsible for suggestions and statements in a letter written to [him]." Roosevelt gave his view of the matter at his press conference of August 2, the following day.

Q—you probably saw the paper. Is there anything you can tell us further about this so-called "whispering campaign?"

The President: Except probably the least surprised by most of that testimony was perhaps myself.

A few days later Cramer's employer discharged him, stating that although no evidence existed that he actually participated in such a campaign, "his advocacy of so reprehensible a plan is sufficient to warrant his release from this company." Cramer's discharge is exceptional, apparently the only instance of retaliation directed at a witness for his testimony. Only bitter partisans could accuse Black of a witch hunt. In the sole example of retribution the initiative came from private industry and not from the Black Committee.

The more responsible utility interests were at first somewhat willing to cooperate, but they soon changed their tactics to adamant opposition to the Black Committee. A. G. & E., Hopson's firm, and many others, were recalcitrant from the first. Resorting to exaggeration and distortion of facts, the utility lobbyists criticized the procedure of the Black Committee. Philip H. Gadsden complained that Black's agents surprised him at his office whereupon they rushed him off to testify, without time for the slightest preparation. Furthermore, while he was testifying before the Committee, Gadsden charged that the Committee's investigators, without any search warrant, had ransacked his papers, reading them all, both personal and business, and removing those items of interest to them. The New York Times' account contradicted this, stating that the investigators bore subpoenas. Williams uncritically follows Gadsden's account of the incident. Black's investigator, H. A. Blomquist, replied to the charges the

85 Hearings, Black Committee, supra note 19, at 817.
89 Hearings, Black Committee, supra note 19, at 52.
91 Williams, supra note 12, at 59.
next day. He stated that he had only sequestered the correspondence and files found in Gadsden's office at the Mayflower Hotel, not his apartment located elsewhere. While this was going on, Gadsden’s secretary and others were present and were permitted to examine everything taken from the records.\(^\text{92}\) Black was clearly in the right in this dispute, refusing to be taken in by the claim that business papers were personal. Gadsden's outcry, based on emotion, tried to arouse doubts as to Black's adherence to constitutional limits.\(^\text{93}\) This foreshadowed Hearst’s attack, although on a smaller scale. The *New York Times* reported that Black questioned Gadsden “in such rapid fire fashion that new questions were being asked . . . before answers could be obtained to the preceding one.”\(^\text{94}\) If this was a grievance, no one else, including Gadsden, complained of it.

Another procedural dispute involved Black’s refusal to allow F. S. Burroughs, vice president of A. G. & E., or Carl Estes, editor-publisher from Longview, Texas, to make statements or have them published in the record.\(^\text{95}\) Black’s philosophy of congressional investigation emphasized fact-finding. The Committee would gather information by asking specific questions, while demanding and receiving short and to the point answers. The investigation was not a trial and the same procedures did not apply as would have been used in a court of law.\(^\text{96}\) Burroughs even demanded the witness fee of $3 per day and expenses. Black pointed out that Burroughs made $60,000 a year and clinched his argument by quoting Burroughs’ earlier statement demanding to come before the Committee, “I want everybody to know I came here of my own volition and I’ve been trying to come before this committee for a week.”\(^\text{97}\)

The editorial reactions to the revelations of the Black Committee were diverse. The *New York Times* argued that the utility lobby was a defensive measure against Administration lobbying and the public ownership crowd and as such was merely an extension of the ancient right of petition. Furthermore, legitimate holding company executives showed considerable anxiety lest some extremist “make a fool of himself.”\(^\text{98}\) This point of view minimized the results of Black’s investigation. The *Chicago Daily News* (independent) ignored Black’s committee and instead urged O’Connor to “Rip off the lid”\(^\text{99}\) from Administration lobbying. The *Commercial and
Financial Chronicle did an about-face when on July 13 it editorialized that "no concrete evidence of anything of the nature of lobbying had been shown, merely ordinary efforts to bring a point of view to the attention of the public." The following week the telegram scandals in Warren and Meadville had their effect. Terming such acts indefensible, this prominent business journal expressed the hope that the whole utilities industry would not be made to suffer because of the actions of the irresponsible few.  

Representing another point of view, the Christian Century denounced the utility industry's tactics as "more than criminal." The Portland Oregon Journal (independent-Republican) asserted that the investigation was necessary to protect self-government from the power of the utility lobby and urged an "all-exhaustive probe." The Charleston (W. Va.) Gazette (independent-Democrat) saw the utility lobby as "fairly and squarely caught with the goods."

* * *

Inseparable from the political scene, the effectiveness of the Black Committee was now to be judged on the floor of the House. On August 1, Representative Huddleston successfully put to a vote his motion to exclude Cohen and Devane from the deliberations of the conference committee. His success in this foreshadowed the House defeat of the death sentence clause, this time on a roll call vote, 210-155, with practically all Republicans voting against the bill and the Democrats almost equally divided. The debate on the floor of the House illustrates the intimate political connection of the Black investigation to the death sentence clause vote. Sam Rayburn (Dem., Tex.) asked the clerk to read a news service account of the whispering campaign testimony of E. P. Cramer. Representative Cooper of Ohio charged that the Senate investigation was being "held as a club over the members of Congress." Cooper's analysis, although rhetorically extreme, was politically accurate. Most political observers of the day supported this view.

Thus, the first phase of the Black investigation was drawing to a close. The effort had to be regarded as a political failure. Black had only one more chance to effect his purpose: He had to find the elusive Howard

---

100 COMMERCIAL AND FINANCIAL CHRONICLE, July 13 and 20, 1935, at 152 and 318.
102 120 LITERARY DIGEST, July 20, 1935, at 5.
103 Lobbying by Wire, 120 LITERARY DIGEST, Aug. 3, 1935, at 37.
C. Hopson. The "Hopson Hunt" provided most of the political fireworks during the 1935 phase of the Black investigation. It was this episode which was largely responsible for final passage of the Wheeler-Rayburn Bill.

"Eliza crossing the ice, hotly pursued by bloodhounds, had nothing on Howard O. Hopson," wrote Robert S. Allen, Washington correspondent of the Philadelphia Record (Ind.). "Through the corridors of leading Washington hotels, over the rolling meadows of near-by Virginia, through the highways and byways of adjacent Maryland, troops of Congressional agents, G men, police, and assorted sleuths sniffed excitedly on the trail of the elusive utility baron."107

Hopson had a long established record of avoiding appearances before Senate committees. The Senate Banking Committee (Ferdinand Pecora, chairman) did not succeed in apprehending Hopson until a United States marshal served a subpoena on him in Chicago.108 Black threatened a similar nationwide search on July 31.108 Nothing turned up until on August 12 agents of the House Rules Committee announced that they had found Hopson and that he would be a witness before the Committee the following morning.110 O'Connor's questioning during the Rules Committee sessions was so amicable that it drew widespread comment. Later testimony made it clear that Hopson or his attorney had arranged in advance to surrender to O'Connor's committee.111

Black tried to get Hopson before his own committee during those times when he was not testifying before the House. Senate Report 1272 recounts Black's efforts in this regard.112 An agent of Black's committee finally succeeded in serving a subpoena on Hopson. Hopson's attorney, W. A. Hill, aided by O'Connor and the District of Columbia police, had blocked the first attempt. Black's committee called the policemen involved and listened to their version of the facts before taking further action. The evidence indicated a well thought-out plan to prevent Hopson's appearance before the Black Committee. Black, having called his committee to order to await Hopson's attorney, tried to contact him, then went directly to the floor of the Senate and obtained, by unanimous vote, a contempt citation.113 Senator Robinson, the majority leader, suggested postponement until the following day, but Black prevailed. Further action proved unnecessary as

113 Id. at 13077.
Hopson voluntarily appeared the following day, not, however, without another attempt at escape.

O’Connor, by now quite obviously Hopson’s ally, offered a resolution to the House which would have directed the House’s sergeant-at-arms to arrest Hopson and keep him in custody until O’Connor finished questioning him. Such an action would have effectively precluded Black from ever interrogating Hopson because it would have nullified the legal effect of Black’s subpoena. O’Connor’s action failed, largely because the members of his own committee refused to support him. Recognizing the inevitable, O’Connor agreed to a compromise whereby the two committees, “Solomon like” divided Hopson in two. The compromise provided that “the House would question him each morning, the Senate each afternoon.” O’Connor’s record in this affair is consistent with his general policy of obstruction of the Roosevelt Administration, although he did not break openly with the President until 1938.

In the search for Hopson, a revealing episode occurred. The Senate Sergeant-at-Arms Chesley Jurney, while looking for Hopson, called on an A. G. & E. lobbyist, B. B. Robinson, and to his chagrin he found not Hopson but a group including Marvin McIntyre, the President’s secretary, L. W. Robert, Jr., of the Treasury Department, Amon Carter, a Texas newspaper publisher, and Senator Tydings of Maryland. Senator Gibson (Rep., Vt.), took this opportunity to denounce the Washington social lobby. Although nothing more came of this incident, it is instructive for two reasons. First, it indicates the subtle personal relationships which lobbyists can use to attain their ends. Second, publisher Carter attempted to suppress the story by threatening the reporters present with loss of their jobs. Carter’s paper was a customer of all three press services. He failed only because a Hearst reporter did not succumb to his intimidation.

Hopson proved to be worthy of the pursuit. Once Black had Hopson before the Committee, the full story of the utility lobby emerged. Black elicited more information from Hopson in two hours than O’Connor had in two full days of hearings. Black’s first line of questioning concerned Hopson’s attempt, as president of A. G. & E., to influence editorial policy by advertising. He quoted from a telegram signed by Hopson, “Am inclined to think we ought to withhold patronage of this paper in line with our

118 Id. at 67; N.Y. Times, Aug. 23, 1935, at 1; Ward, Shenanigans of the Power Lobby, 141 Nation, Aug. 28, 1935, at 235.
119 Ward, supra note 114, at 235.
former practice. . . " and then asked for an explanation of its meaning. Hopson explained that he thought it unwise for A. G. & E. to advertise in papers which ignored the worthwhile contributions of the utilities and instead published only anti-utility propaganda. The New York Times, Hopson indicated, was dominated by other financial interests. That was an additional reason for A. G. & E.'s withdrawal of advertising.\textsuperscript{121}

Hopson's influence on the newspapers was not solely negative. A positive side consisted in suggesting topics for editorials. Black's presentation of a Hearst editorial and a Hopson telegram of the preceding day, suggesting a similar editorial, established a causal relationship which is hard to ignore.\textsuperscript{122} Hopson himself admitted, "Yes. I looked up all of the newspapers I could find, and magazines that had holding companies and tried my best to bring to their attention that the heat would soon be turned on them if they let us go over the deep end."\textsuperscript{123}

Black also zeroed in on the letter writing campaign. He found in Hopson's correspondence, as early as February 21, 1935, a suggestion of the plan. Hopson's letter suggested that it would be best to write letters requiring replies because "that makes it necessary to do a little work to answer them, and they will appreciate more fully the volume of the opposition."\textsuperscript{124} When questioned as to the destruction of records, Hopson explained this as standard procedure for interoffice memoranda, that A. G. & E. never retained such records. Black then inquired why Hopson requested carbon copies from his correspondents.\textsuperscript{125}

Black was accumulating a vast volume of evidence clearly exposing the practices of the utility lobby. On August 15 Black read a report into the record showing expenditures of $875,000 by A. G. & E. alone in the utility lobbying campaign.\textsuperscript{126} Black did not miss another chance to publicize Hopson's business ethics. On August 16 he questioned Hopson on his attempt to avoid appearing in a lawsuit in New York state. Hopson accomplished this by obtaining an affidavit from his physician certifying that he was too ill to testify.\textsuperscript{127}

Black responded to the criticisms of the Committee for investigating only the most disreputable holding companies, such as A. G. & E., by reading a telegram which referred to a request by Wendell Wilkie, presi-
dent of Commonwealth and Southern Corporation, for a memorandum from A. G. & E. on how he should testify on the Wheeler-Rayburn Bill. Wilkie, in his public speeches, had always refused to associate with Hopson's organizations.\(^{128}\)

On the procedural side, Black had several advantages. Black had subpoenaed from the various telegraph companies all of Hopson's correspondence. He used it to the fullest extent. Several times Hopson complained that Black would not permit him to examine these telegrams. Black ignored this request, obliquely referring to Hopson's prior destruction of his own records.\(^{129}\) Another tactic of Black's was his insistence on short, direct answers. He refused to allow evasion. He expressed his point of view as follows: "Yes; I want the truth, but I do not care to have any discussions or arguments or philosophies. We are asking for facts. If we want philosophies, we will ask for them."\(^{130}\)

On August 21 Black read a statement by the Committee threatening to charge Hopson with contempt if he persisted in evading questions, making speeches, criticizing the Committee, rambling beyond the scope of the question, or continuing to talk after being called to order.\(^{131}\) This had great effect on Hopson, as the New York Times reported. Formerly reluctant to answer questions bearing on profits to himself or his family, he began to talk freely.\(^{132}\)

By August 21, the Hopson testimony had the desired results. A proposed compromise on the death sentence clause was now in sight. The original Senate bill would have dissolved all but first degree holding companies by 1940 and the others by 1942 unless the Securities and Exchange Commission considered them in the public interest. The House bill, in contrast, would have dissolved all holding companies by 1940, although the Securities and Exchange Commission would have power to permit indefinite continuance.\(^{133}\) Actually quite close together, a compromise was not hard to work out once the political obstacles had been overcome. The compromise, which eventually became law, dissolved all holding companies above the second degree and gave the Securities and Exchange Commission power to dissolve holding companies of the second degree unless they met specific criteria limiting them to a single integrated system.\(^{134}\)

On August 24 the Senate and House adopted the Conference Report,

\(^{128}\) Id. at 1041.
\(^{129}\) Id. at 1036.
\(^{130}\) Id. at 990.
\(^{131}\) Id. at 1096-97.
\(^{132}\) N.Y. Times, Aug. 21, 1935, at 35.
\(^{133}\) Id., Aug. 23, 1935, at 8.
the Senate without a roll call, the House by a vote of 222-112.\textsuperscript{135} The general opinion credits Black's investigation, especially his questioning of Hopson, with this result.\textsuperscript{136} To the extent that Hopson's testimony spotlighted the abuses of the holding company system, which it amply did, this is correct. Black originally undertook the investigation with this purpose in mind. All the evidence indicates that he adhered to it throughout the course of the investigation.

On August 23, the first phase of Black's investigation had come to an end. The last day of hearings departed from the usual topic and took up the issue of the shipping lobby. Black heard testimony that a plan was in motion to defeat Roosevelt's direct subsidy plan and continue the existing system of subsidy by mail contracts. The events of the day bore this out. Black abruptly recessed his committee and hurried to the floor of the Senate to battle against this surprise move by the shipping interests. He failed in this attempt.\textsuperscript{137} At this point there was still uncertainty as to whether Black would continue his investigation, although it was reported to be likely.\textsuperscript{138}

With the meeting of the new session of Congress in March, the Black Committee resumed its work. Operating under broad powers to investigate all types of lobbying, the Committee did not end its work with the passage of the Wheeler-Rayburn Bill. However, in its topics of investigation, the Committee hearings took on a changed tone. This second phase of the investigation had a modified aim. Having discovered the effectiveness of the congressional probe, Black intended to fully politicize his success and to use this weapon to aid in the 1936 campaign. His political strategy was to demonstrate that much of the opposition to the New Deal was a dangerous artificial creation of big business. But here Black ran into trouble. Relying on his power of subpoena, Black had sought to gather evidence by examining the telegrams sent or received by various individuals. Although Black at no time technically exceeded constitutional limitations on such power, not even approaching the widespread use of the subpoena power during the uncovering of the Teapot Dome scandals, his political opponents seized on this as a convenient point of attack.

Before starting the new phase of the investigation, a few items remained from the previous year. The testimony of Henry L. Doherty, principal controlling figure in the Cities Service system, brought out that he had

\textsuperscript{135} Id., Aug. 25, 1935, at 1.
\textsuperscript{136} FRANK, supra note 7 at 80-81; Lane, Some Lessons from Past Congressional Investigations of Lobbying, 14 Pub. Opinion Q., at 32, as reprinted in the 96 CONG. REC. A1203 at A1205 (1950) [hereinafter cited as Lane]; N.Y. Times, July 24, 1935, at 3.
\textsuperscript{137} N.Y. Times, Aug. 24, 1935, at 3.
\textsuperscript{138} Id., Aug. 18, 1935, at 1.
disposed of 200,000 shares of Cities Service stock shortly before the market crash of 1929, realizing a profit of $17,800,000. Ending the preoccupation with the utilities was the testimony of Victor A. Dorsey of Chicago, an expert appraiser of utility properties. He indicated that most utility stocks were worthless because the total value of public utility property would just equal the liability for outstanding bonds.

Probing further into the lobbying activity, Black heard Robert E. Smith, a lobbyist representing the National Conference of Investors, tell an interesting story of how he and six members of Congress had shared a suburban house in Washington the last summer. Interestingly enough, Representative Samuel B. Pettengill of Indiana, bitter foe of the Wheeler-Rayburn Bill, was one of the six.

The chief aspect of the renewed investigation centered on the activities of such anti-New Deal groups as the Liberty League, Farmers Independence Council of America, Southern Committee to Defend the Constitution, and the Sentinels of the Republic. The New York Times considered this work valuable in exposing the gullibility of ordinarily hard-headed businessmen who, faced with a sharp political promoter, reacted with simple-minded naivete. Black proved the interconnections of these groups. Most derived financial support from the same group of wealthy businessmen. Typical of their interrelations was the disclosure by Black that one organizer of the Farmer's Council was being paid by the Liberty League during the Council's initial organizational period.

The anti-New Deal convention held at Macon, Georgia, in late January of 1936, which endorsed Governor Talmadge as an anti-Roosevelt candidate, was a target of the politicized Black investigation. The Senate Committee scored a triumph when they revealed that John J. Raskob and Pierre S. du Pont were the principal financial backers of the movement. At this convention various racist literature was distributed. Neither Raskob nor du Pont made any attempt to interfere with this approach. Another group, the American Taxpayer's League also made the headlines. J. A. Arnold, the manager of the Taxpayers' League, became very angry when the Senate Committee questioned him. The Committee had reminded Arnold that a former investigation by the Caraway Committee had focused attention on his unusual financial practices. Arnold destroyed all financial

140 Id., Mar. 4, 1936, at 7.
141 Id., Mar. 17, 1936, at 3.
142 Id., Apr. 17, 1936, at 20.
143 Id., Apr. 16, 1936, at 2.
records annually, preserving only his auditor's report. His auditor was subsequently convicted and sentenced for fraud.\textsuperscript{144}

Fred G. Clark, national commander of the Crusaders, defended his group by saying, "We did not receive a dollar in contributions from any public utility company."\textsuperscript{145} The Senate Committee's records proved the contrary. Cities Service, Commonwealth Edison, as well as other large companies had made substantial contributions to the Crusaders. Such brazen deception of the public, Black felt, deserved exposure. Only Congress had sufficient authority to deal with such misrepresentation. Black himself proposed legislation which would give the public information on the activities and financial backing of such groups. The \textit{St. Louis Post-Dispatch} considered such legislation beneficial in that it would end many of the abuses of lobbying by forcing them out into public view. The \textit{New York Times} considered the bill partisan, drastic, and too restrictive. Although neither Black's bill nor a similar one in the House became law, similar proposals were enacted by a later Congress.\textsuperscript{146}

Silas Strawn, a Chicago attorney whose correspondence was subpoenaed by Black, decided to challenge him by taking legal action to enjoin Western Union from handing over copies of his telegrams to Black. His main argument, later accepted by the court, was that Black was conducting "a general inquisitorial investigation and fishing expedition..."\textsuperscript{147} As a practical matter the case was of little import, for Black had already received most of the telegrams that he had subpoenaed. However, one can well understand the potential this action had to cripple future investigations by noting that over 50 per cent of Black's documentary data came from this now illegal source.\textsuperscript{148} Black vigorously opposed the court action and threatened to retaliate with the passage of legislation to restrict the jurisdiction of the courts should an injunction be granted.\textsuperscript{149}

The Federal Communications Commission encountered equally severe criticisms of illegal invasion of personal rights by giving Black copies of all telegrams he requested under the general supervisory powers to inspect all telegraph company records. The Democratic Senate ordered an investigation and found the charge to be untrue.\textsuperscript{150} On March 12,
1936, Justice Alfred A. Wheat of the District of Columbia Supreme Court issued a temporary injunction, later made permanent, in which he substantially agreed with Strawn's views. The injunction barred the Western Union from turning Strawn's telegrams over to Black. 151

The Black Committee was once again the target of vast public criticism. Senator Steiwer of Oregon denounced Black's so-called totalitarian use of the powers of the state, comparing it to the methods of the OGPU, the terrorist secret police. 152 "Invasion of private rights," "Nazi methods," and "boiling oil and melted lead" were typical of the rhetoric used to castigate Black. 153 Black vigorously defended his controversial activities in a Senate speech. He quoted a remark by Senator Reed, who, although a critic now, had once had a fair different view when he himself was an investigator. "It is utterly useless to hide behind the old dodge that every lawyer has worked, saying, 'Put your finger on the paper you want, and we will perhaps produce that paper.' " 154 Black reminded his colleagues that Senator Wheeler of Montana and Senator Walsch, also of Montana, incurred the same sort of criticism during the investigation of Mr. Fall and Attorney General Daugherty in the Teapot Dome scandals. Here Black quoted from a New York Herald-Tribune editorial describing that investigation as "good clowning." 155 That committee had used the subpoena power even more extensively, yet the Supreme Court had sustained such use. 156

Several legal authorities considered that Black's investigation of lobbying was "unquestionably within the powers of the Senate." 157 The assumption that the fourth amendment imposed the same limitations on Congress as it does on law enforcement agencies, the editors of the Columbia Law Review termed "unwarranted." 158 Furthermore, the only existing legal restriction, that of valid legislative purpose, does not apply, because Black himself, by introducing a bill to regulate lobbying, met this possible objection. And yet, because of the political atmosphere of an election year, the second phase could not shake this partisan stigma.

The only other dispute over Black's use of the subpoena power that ever reached the courts involved William Randolph Hearst, "the sage of

151 Id., Mar. 12, 1936, at 1.
152 Id., Mar. 10, 1936, at 1.
154 80 Cong. Rec. 4100 (1936).
155 Id. at 4101.
158 36 COLUM. L. REV. 841, 842 (1936).
San Simeon," as Senator Minto referred to him. Hearst, not one to neglect a chance for publicity, seized the opportunity when he heard of the Strawn case. Hearst's case was somewhat different. The fishing expedition epithet was irrelevant here. Hearst sought to enjoin Western Union from delivering one specific telegram to Black. He later amended his petition to ask return of all other telegrams already in Black's possession. Hearst's attorney, Elisha Hanson, based his case in part on first amendment grounds, arguing that Black had interfered with freedom of the press.\footnote{159 N.Y. Times, Mar. 13, 1936, at 6; \textit{Id.}, Mar. 14, 1936, at 5; \textit{Id.}, Mar. 15, 1936, at 20.}

Crampton Harris, Black's former law partner, defended the Committee in this case as in the other one. The essence of his defense was that the courts had no power to enjoin a coordinate branch of the government from performing its duties as it saw fit. Hearst lost his case, Justice Wheat ruling that freedom of the press meant the right to criticize the government. First, no such question arose in this case. Second, the subpoena was sufficiently specific, unlike the Strawn case. Third, the courts had no authority to enjoin a Senate committee.\footnote{160 \textit{Id.}, Mar. 27, 1936, at 6; \textit{Id.}, Apr. 9, 1936, at 18.} In a later appeal, it was held that Hearst might have been able to obtain relief if he had filed earlier. The courts' jurisdiction did not reach into the Senate.

Neither Hearst nor Black limited their battle to the courts. Roosevelt responded to Hearst's continual attacks at a press conference, where in response to an inquiry about censorship in his Administration, Roosevelt replied, "Preposterous! The correspondent must have read that in a Hearst paper."\footnote{161 \textit{Lobbies: Battle of the Subpoenas Lands a Bomb in Publisher's Lap, 7 NEWSWEEK, Mar. 28, 1936, at 11.}} Black further retaliated by releasing to Representative John McSwain of South Carolina, chairman of the House Committee on Military Affairs, a Hearst telegram instructing his editorial writer to publish an editorial urging the impeachment of McSwain, describing him as a Communist in spirit and a traitor in effect. McSwain then denounced Hearst in a speech before the House. The House reacted to Hearst's silly accusation of McSwain by roaring with laughter.\footnote{162 N.Y. Times, Mar. 19, 1936, at 1, col. 2.} Hearst also got his share of abuse in the Senate. Senator Schwellenbach reviewed Hearst's record of securing newsworthy documents by theft, of his bribing a telegraph operator to steal news releases. The wire service sued Hearst and won. In the economic realm, Hearst's three 10 per cent reductions in his employees' wages were criticized by Black's close friend from Indiana. Hearst, it was noted, failed to cut his own $500,000 salary.\footnote{163 \textit{Id.}, Apr. 2, 1936, at 13, col. 1; \textit{Id.}, Apr. 1, 1936, at 11, col. 1.}
and certainly the equivalent of what Hearst’s papers were saying every day about Black and his committee. One is hard-pressed to call this an abuse of the privilege of congressional immunity. Black’s friends argued that Hearst, protected by his wealth and newspaper ownership, was no innocent victim of headline-conscious senators. Frankly, it would be difficult to imagine that Hearst was being seriously hurt by the bad publicity.

Whether justified or not, Black’s investigation, in part because of its effectiveness, made powerful enemies. The House rejection of a special appropriations resolution Black sponsored bears this out. The defeat of this resolution, by a vote of 153-137, came after argument formally based almost entirely on the point that Congress should not make an exception to a general law for the needs of one committee. In reality, the opposition arose because of Black’s prior conflicts with individual congressmen. Sparring over the custody of Hopson, the suspicion of bribery thrown on Representative Patton, and the uncovering of the close relationship of several congressmen to the utility lobbyists coalesced the various opponents of Black. Although the investigation continued into 1938 under the chairmanship of Senator Minton (Black was appointed to the Supreme Court in August, 1937), few hearings were held after April, 1936. Therefore, this point is appropriate to end the discussion of the Black investigation and evaluate its results.

* * *

Without question, Black’s investigation was, as has been argued, a “model of thorough and courageous application” and “unearthed a rich store of carefully concealed fact and circumstance.” Several factors accounted for the success of Black as an investigator. First, he diligently prepared in advance. By questioning on the basis of prior knowledge, obtained by thorough reading of letters, memoranda, and other documents, Black was able to get to the central issue immediately. Second, Black’s firmness in compelling hostile witnesses to testify, by forbidding evasion, introduction of irrelevant items, or speech-making, pointed the investigation toward the gathering of facts rather than a forum for pro and con debate. At the same time, these procedures resulted in an unfavorable

164 7 NEWSWEEK, Apr. 25, 1936, at 13.
165 N.Y. Times, Apr. 10, 1936, at 9, col. 1.
167 WILLIAMS, supra note 12, at 60.
168 Lobby—Inquiry Recoil Disconcerts Administration, 120 LITERARY DIGEST, Aug. 10, 1935, at 4; Lane, supra note 136, at A1207.
169 FRANK, supra note 7, at 86-87.
public reaction which lessened the effectiveness of the investigation in forming public opinion.\textsuperscript{170}

The major contribution of the Black Committee was made in the first phase when the relationship between the legislative objective of the Public Utilities Holding Company Act and Black's intensive probing was clear. However, the second phase is more difficult to defend on grounds of legislative rather than political purpose, especially in an election year when only anti-New Deal forces were really investigated.

Two prominent philosophical attitudes toward congressional inquiries exist. One emphasizes protection of individual rights, the other the protection of Congress' power to investigate. Neither attitude is inherently liberal or conservative nor partisantly Democratic or Republican. Indeed, the position taken has often depended on the particular circumstances. In 1935 the \textit{Wall Street Journal} argued that "... people just can't persuade themselves that they can get along without law or that a Senate committee is a substitute for the courts."\textsuperscript{171} In 1947 the \textit{Journal} stated, "... to say that the public has no ... right to inquire ... to learn the facts is to say something quite foolish."\textsuperscript{172} The liberal journals in 1935 took a different stand from today's. \textit{The Nation} remarked that "as usual in business appeals to the Bill of Rights, liberty is being invoked in order to protect entrenched privilege."\textsuperscript{173} The American Civil Liberties Union alone can claim consistency, arguing in 1936, as today, that their duty is to defend civil rights, not to "... examine the philosophies of those whose rights are violated."\textsuperscript{174} The crux of the matter lies in Alfred Junz' statement, "... the real limits of the powers of the members of the Congress lie in the positive political morality of the nation."\textsuperscript{175} It has proven hopeless, a futile task, to seek to restrict Congress by an infinity of specific regulations. The basic constitutional safeguards provide a framework, but history has demonstrated that the nation can best insure fair play of the committee hearings by electing fair and honest men of reasoned judgment to Congress—men of the caliber of Hugo Black.

Upon occasion, especially in the use of tax returns and telegrams, Senator Black's conduct is troublesome and difficult to reconcile with the ideals of Justice Black. However, we must resist the temptation to write our story backwards, to apply the standards that Black ultimately helped

\textsuperscript{170} Lane, \textit{supra} note 136, at A1207.
\textsuperscript{172} Id. at 475.
\textsuperscript{173} Id. at 470.
\textsuperscript{174} Id. at 470.
\textsuperscript{175} Id. at 475.
to create to the circumstances which, no doubt, influenced their creation. One of the commonplaces in any study of Black is the recognition that by modern senatorial confirmation standards, a former Klansman would be unlikely to reach the High Court. Furthermore, the theme of Platonic cure of soul dominates the debate on at least one important aspect of Black’s philosophy. Until quite recently we have not demanded of potential justices a long-established Arthurian purity. And, quite frankly, such is not likely to be the pedigree of a red-clay Alabama politician with a reputation for battling the establishment.176

Perhaps it is too easy to rationalize that Black’s ideas and ideals emerged only after his elevation to the Court. It is no doubt true that his philosophy developed more fully during his many years on the bench. However, one can understand Black’s personal concepts and practices of senatorial investigation by concentrating on his fairness in substance and by further remembering that Black, the New Dealer, was attacking the powers of corporate trusts rather than investigating individual citizens. When one sees, as Black no doubt did, real dangers in concentration of immense wealth, and the corresponding accumulation of political power which is drawn like a magnet to it, then Black’s investigation may be seen as necessary self-defense on the part of the Senate, fighting to escape the tentacles of a dishonest, openly corrupt power trust.

New Dealers continue to regard Black’s investigation as absolutely essential and extremely fair. In recalling the battle for the Public Utility Holding Company Act, William O. Douglas concluded, “I often thought that the real driving force behind this legislation was Hugo Black who . . . used the Congressional hearing as it had never been used before, making it an instrument to achieve reform.” Douglas defends Black’s role as follows:

He pursued financial chicanery, helped to quicken the conscience of America and to mold public opinion to the need for reforms. He expended an intensity of effort seldom seen.

Black dug deep for facts and was as relentless as a terrier pursuing a

176 Meador, Mr. Justice Black: A Tribute, 57 Va. L. Rev. 1109, 1111 (1971). Professor Meador’s discussion of the roots of Black’s ideas seems especially appropriate. “Hugo Black’s attitudes were significantly shaped in the tag end of the nineteenth century and the early years of the twentieth when he was growing to maturity in the Alabama outback and beginning the practice of law amidst the raw and still new industrialism of Birmingham. His roots lay in the ‘other South’ of that period, the South of the hill country, the South of industrial labor; he did not come out of the ‘old South’ or the cotton South. In background, in his time and region, he was outside the establishment, to use a currently overworked word. He remained to an extent spiritually outside of the national establishment all his life, though formally a part of it as a Supreme Court Justice. Today those who think there is something new about challenging that establishment could learn much from the career of Hugo Black, who as politician, legislator, and finally judge was at the business in the days of the grandfathers of many now living.”
rat. He was charged with being unfair, but he never trafficked in innuendos and slurs, as did some Senate and House investigators who followed him. His standards were high, as they always had been. . . . Hugo Black never tried to destroy a man or woman, only ideas. And through his investigative committees he exposed ideas that he thought were hostile to democratic principles. It was largely Black who made possible FDR's reforms in the financial world.\textsuperscript{177}

But one still wishes and wonders and tries, at least in the mind's eye, to make Senator Black into Justice Black. Perhaps our great heroes of the law do cast shadows backward, as well as forward, especially when we know the story's ending. And yet, the ending is but a reflection and development of the beginning. Without question, Black knew the power of which he spoke, and knew from the most real and personal experience the feelings of the zealous congressional advocate, of the man on the attack who has smelled blood and is tempted by the "rightness of his cause" to go in for the kill. Perhaps his own testing by temptation made Black, the judicial guardian, more aware of the weakness of the flesh and the need for a strength and a resolve in the protection of the individual against even the purest of knights in service of the most righteous of causes.

Although Black was the first and, in some respects, the most loyal of the so-called "New Deal Justices," one must remember, as Douglas notes, that Black's basic commitments were to ideals—ideals which the New Deal personified but, nonetheless, ideals which he had held long before there was anything known as a New Deal and which he would continue to hold long, long after the Rooseveltian revolution had become history. The strength, the tenacity, the dedication to purpose which he exemplified in the days of the senatorial investigations served Black and his ideals well during his thirty-four years on the bench. "His alive and forceful personality," as Professor Meador reminded us, "made it difficult to keep in mind that he had been appointed to the Court in that now remote administration of President Franklin D. Roosevelt, himself dead before most of today's law students were born."\textsuperscript{178}

In the early days of the New Deal, the public utilities holding companies represented to Black a challenge—a challenge which can be understood most clearly in the light of history and of Black's own understanding of history. Just as Black believed there are recurring themes in the lives of nations, indeed, in the epochs of civilization, so also are there themes in the lives of men. And in the life of Hugo Black, one of those themes was surely the fear of corruption by power, whether that power be the power

\textsuperscript{177} W. Douglas, Go East Young Man: The Early Years 365-66 (1974).

\textsuperscript{178} Meador, Mr. Justice Black: A Tribute, 57 Va. L. Rev. 1109 (1971).
of the dollars of the public utility holding company or the power of the subpoenas of a congressional investigating committee which Black ultimately came to believe might destroy freedom of speech and association in a quest to destroy communism.

Black understood, perhaps too well, Lord Acton’s oft-quoted dictum on power and corruption. He had read, and read deeply, in the likes of Plutarch and Livy. To Black, both the Republican and Democratic party roles in the corruption of Watergate would have been nothing new—tragic, but not new.

To know these dangers and to understand the need to continue to struggle against them is one of the hardest lessons of history. To be able to do so is the real tribute, the ultimate measure of a man and of his own role in history. It is reassuring to remember that we may also learn from the past that just as surely as there are recurring problems, often there are recurring solutions; there are heroes to match villains, and always, faced against the usurpers of liberty are the solitary guardians of freedom.

In a very real and meaningful sense, Black’s congressional investigations are a part, to borrow Holmes’s phrase, of the seamless web of Black’s life at the law—a life of achievement in which the Supreme Court years are no doubt important but not exclusive. The sum, in his case, is made all the greater by the total of its parts. And, thus, Black’s entire career can be favorably measured against the ideal life that Choate described for the man of law.

To be a priest, and possibly a high priest in the Temple of Justice; to serve at her altar and aid in her administration; to maintain and defend the inalienable rights of life, liberty and property upon which the safety of society depends; to succor the oppressed and defend the innocent; to maintain constitutional rights against all violations, whether executive, by the legislature, by the restless power of the press, or most of all by the ruthless rapacity of an unbridled majority; to rescue the scapegoat and restore him to his proper place in the world—all this seems to me to furnish a field worthy of any man’s ambitions.179

179 J. Choate, Address Delivered to the Bench and Bar of England at Lincoln’s Inn on April 14, 1905 in S. Theron, Joseph H. Choate 130 (1917).