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THE RIGHT OF A witness before a Congressional Investigating Committee to refuse to answer questions on the ground of the self-incrimination clause of the Fifth Amendment has in recent years become a matter of great interest and importance because of the activities of Communists in this country and the efforts of Congressional committees to expose them. This has led to considerable confusion as to the powers of Congress and its committees to make investigations and to compel testimony and also as to the meaning and purpose of the self-incrimination clause.

The right of a witness to plead this clause of the Amendment in refusing to answer questions asked by a Congressional committee was never specifically upheld by the Supreme Court until the October term of the Court in 1954.

The power of Congress to make investigations and to compel testimony where self-incrimination was not involved had been rather clearly established by early decisions of the courts. As early as 1821 the Supreme Court upheld the power of the House of Representatives to punish persons outside its membership for contempt as essential to the effective exertion of other powers expressly granted.[1] In 1881[2] it said that neither House of Congress had a "general power of making inquiry into the private affairs of the citizens" but that their power was limited to matters over which, by the constitution, they had "jurisdiction." In this particular case the Court upheld the refusal of a witness to testify because there was no valid legislative purpose to be served. The

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[1] Anderson v. Dunn, 6 Wheaton 204 (1821).

[2] Kilbourn v. Thompson, 103 U.S. 168 (1881); see also, Interstate Commerce v. Brinson, 154 U.S. 407 (1894).

matter being inquired into—a bankruptcy proceeding of Jay Cooke & Company, among whose creditors was the U.S.— had become a judicial question. In the case of *In re Chapman*[3] the Court upheld the authority of the Senate to compel testimony where the matter investigated related to the integrity and fidelity of the Senate in the discharge of its duties. This was within "the range of the constitutional power" of the Senate. Either house could compel testimony in connection with its "legitimate functions." In *McGrain* v. *Daugherty*[4] the Court, after discussing the above cases, stated its conclusion as to the power of Congressional committees as follows: "We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." It then proceeded to consider the power of the Senate Committee to compel the witness, M. S. Daugherty, to testify under a Senate Resolution calling for inquiry into alleged irregularities of the Department of Justice presided over by Harry S. Daugherty, a brother of the witness. The Resolution did not expressly indicate the purpose of the investigation, but the Court "assumed" a legislative purpose. It said, "the only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but . . . was not indispensable."[5] The witness could therefore be made to testify.

These cases clearly establish the principle that the Houses of Congress can through their committees make investigations and compel testimony in aid of their legislative or other constitutional functions. In none of these cases, though, was a refusal to testify based on the clause of the Fifth Amendment against self-incrimination and they therefore throw no light on the availability of this defense for refusal to answer questions. In a number of early cases, however, the Supreme Court has commented on the place of this principle in our constitutional system.

In 1885[6] the Court gave some indication as to the significance of the privilege against self-incrimination when it said that the

[3] 166 U.S. 661 (1897).
[4] 273 U.S. 135 (1927).
[5] *Id.* at 178.
[6] Boyd v. U.S., 116 U.S., 616 (1885).

compulsory production by a Court order under a Congressional statute of a man's private papers to be used against him to forfeit his goods for violating the revenue laws was a violation of the Fourth Amendment and "that part of the Fifth protecting a man from being compelled in any criminal case to be a witness against himself."[7] It is sometimes said today that the Amendment protects the guilty rather than the innocent, and some have gone so far as to advocate the elimination or modification of this clause of the Amendment.[8] An understanding of its history and purpose should help to clarify one's thinking on this matter. The Supreme Court in 1908 described the right of a witness not to be made to testify against himself "as a privilege of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless unfounded or tyrannical prosecutions."[9] And in a recent case it said, "This guarantee against testimonial compulsion . . . 'was added to the original constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that in its attainment, other social objects of a free society should not be sacrificed.' This provision . . . must be accorded a liberal construction in favor of the right it was intended to secure."[10] But the Court has, however, recognized a general obligation of a citizen to give testimony. On this subject it said in another recent case, "persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery." There were exceptions to this obligation, "But every such exemption is grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth."[11]

As to the type of proceedings in which the privilege against self-incrimination may be used, the Court has said; "The object was to insure that a person should not be compelled, when acting as a witness *in any investigation*, to give testimony which might tend to show that he himself had committed a crime."[12] In a later

[7] *Id.* at 633.
[8] See Note, 44 Ky. L.J. 304, 305 (1956).
[9] Twining v. N.J., 211 U.S. 78, 91 (1908).
[10] Hoffman v. U.S., 341 U.S. 479, 486 (1951).
[11] U.S. v. Bryan, 339 U.S. 323, 331 (1950).
[12] Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

case, it said, "The privilege is not ordinarily dependent upon the nature of the proceedings in which the testimony is sought or is used. It applies alike to *civil* and *criminal* proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it."[13] But the privilege is personal and cannot be pleaded on behalf of anyone else;[14] nor is it available to corporations.[15] The privilege is not available either, to a person when he has been granted immunity from prosecution by a congressional statute,[16] and in the absence of such a Federal statute one can plead the defense only to protect oneself from prosecution in Federal, not state, courts.[17] Whether or not an answer would incriminate the witness is a question for the court to decide in view of all the facts; and a witness will not be required to answer a question if the answer would be a link in a chain of incriminating evidence.[18] The privilege can be waived,[19] however, but in *Smith* v. *U.S.*[20] the Court said a waiver of "constitutional rights . . . is not lightly to be inferred." In this case the defendant at the outset of a prosecution for violation of the Second War Powers Act and the Emergency Price Control Act stated, "I want to claim privilege as to anything I say." The Court upheld his claim of privilege even though after the above statement he voluntarily gave incriminating testimony in regard to which, when asked if he claimed privilege, he answered "no." The Court said, "immunity once claimed is not lost in this case by his saying 'no'."[21]

In *Rogers* v. *U.S.*[22] the Court held that the witness had waived the privilege. She was subpoenaed by the grand jury to produce the books and records of the Communist Party in Denver, Colorado. She appeared before the grand jury and admitted having been the treasurer of the Party in Denver but refused to name the person to whom she had turned over the books and records. She justified her refusal on the ground of not wanting to involve

[13] McCarthy v. Arndstein, 266 U.S. 34, 43 (1924).
[14] Hale v. Henkel, 201 U.S. 43 (1906).
[15] Wilson v. U.S., 221 U.S. 361 (1911).
[16] Brown v. Walker, 161 U.S. 591 (1896).
[17] U.S. v. Murdock, 284 U.S. 141 (1931); but compare U.S. v. DiCarlo, 102 F. Supp. 597 (1952).
[18] Roger v. U.S., 340 U.S. 367 (1951); but see U.S. v. DiCarlo, *supra* note 17.
[19] Johnson v. U.S., 318 U.S. 189 (1943).
[20] 337 U.S. 137 (1949).
[21] *Id.* at 150.
[22] 340 U.S. 367 (1951).

the individual to whom she had given the books. At a second appearance before the district judge she claimed the privilege of self-incrimination for the first time. The lower court held that she had waived the privilege by having admitted that she was the treasurer of the Party. The Supreme Court sustained this ruling, saying that her attempt to use the privilege was an afterthought and also that, quoting *U.S.* v. *White*, she had no such privilege as to books and papers " 'kept in a representative rather than in a personal capacity . . . even though production might tend to incriminate [their keeper] personally.' "[23]

The first recent case in which the Court actually upheld a witness in refusing to answer questions on grounds of self-incrimination was *Blau* v. *U.S.*[24] The witness when called before the Grand Jury refused to answer questions about the activities of the Communist Party in Denver and her employment by the Party, and was convicted in the District Court for contempt. On appeal the Supreme Court reversed her conviction. The opinion pointed out that at the time she was called before the jury the Smith Act, making it a crime to advocate the overthrow of the Government by force, or to help organize a society which advocated such doctrine, or to become a member of such a group knowing of its purpose, was already on the statute books. The Court thought the witness "reasonably could fear that charges might be brought against her if she admitted employment by the Communist Party. . . ."[25]

In 1950, the Court had ruled in a contempt case on a technical question of whether a quorum of the House Un-American Activities Committee had to be present when the offense of contempt by a witness was committed. In deciding the case the Court seemed clearly to assume that the privilege against self-incrimination was available before committees of Congress, although it was not necessary so to decide.[26]

During the October 1954 term the Court reversed convictions in three related cases[27] of contempt arising out of the inquiries of

[23] *Id.* at 372; U.S. v. White, 322 U.S. 694 (1944).
[24] 340 U.S. 159 (1950).
[25] *Id.* at 161.
[26] U.S. v. Bryan, 339 U.S. 323 (1950); it was assumed and the witness was upheld in lower Court, see U.S. v. Licavoli, 102 F. Supp. 607 (1952).
[27] Quinn v. U.S., 349 U.S. 155 (1955); Emspak v. U.S., 349 U.S. 190 (1955); Bart v. U.S., 349 U.S. 219 (1955).

the House Committee on Un-American Activities in which the privilege against self incrimination was the issue. In each case the witness was prosecuted for contempt of Congress under Sec. 192 of U.S. Code.[28] In the first of these cases, *Quinn* v. *U.S.*, three members of a labor union refused to answer questions concerning their alleged membership in the Communist Party, basing their refusal on "the First and Fifth Amendments" and "the First Amendment to the Constitution, supplemented by the Fifth." This defense was used by the first witness, Fitzpatrick, and was adopted by Quinn as justification for his own refusal to answer. Whether this was a sufficient pleading of the self-incrimination clause of the Fifth Amendment was really the question before the Court. Chief Justice Warren who wrote the opinion began by reviewing the earlier cases discussed above involving Congress' power to investigate. He acknowledged the power of Congress to investigate and to compel testimony to be "co-extensive with its power to legislate." He pointed out, however, that the power to investigate was limited. Congress could not pry into "private affairs unrelated to a valid legislative purpose;" nor did its power "extend to an area in which Congress is forbidden to legislate;" the power was "not to be confused with any of the powers of law enforcement" which were "assigned under our Constitution to the Executive and Judiciary;" and it was limited by the Bill of Rights.[29] He then cited cases in which the Court had said that the self-incrimination clause "must be accorded liberal construction in favor of the right it was intended to secure." "Such liberal construction," he said, "is particularly warranted in a prosecution of a witness for a refusal to answer, since the respect normally accorded the privilege is then buttressed by the presumption of innocence accorded a defendant in a criminal trial."[30] Taking up the real question as to whether the witness had sufficiently pleaded the self-incrimination clause, he said that claiming "the privilege does not require any special combination of words." He continued, "If an objection was made in any language that a committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected, both by the commit-

[28] 2 U.S. C Sec. 192.
[29] Quinn v. U.S., *supra* note 27 at 160.
[30] *Id.* at 162.

tee and by a Court."[31] This, the Chief Justice thought, the witness had done. He rejected the Government's argument that the witness had destroyed his defense by pleading both the First and Fifth Amendments. On this point he said, "if a witness has two Constitutional objections to a committee's line of questioning he is not bound at his peril to choose between them." He continued, "The fact that a witness expresses his intention in vague terms is immaterial so long as the claim is sufficiently definite to apprise the Committee of his intention." Quinn's references to the Fifth Amendment were sufficient to put the Committee on notice of an apparent claim of the privilege. "It then became incumbent on the Committee either to accept the claim or to ask petitioner whether he was in fact invoking the privilege,"[32] he concluded. There was a second ground on which the decision was based. For conviction of the witness under section 192 of the U.S. Code for contempt of Congress, a criminal intent had to be proved beyond a reasonable doubt, the Chief Justice said. He then pointed out that "at no time did the committee specifically overrule his objection based on the Fifth Amendment," nor specifically direct the witness to answer the questions. The witness was never therefore "confronted with a clear-cut choice between compliance and non-compliance, between answering the question and risking prosecution for contempt."[33]

In the second of the cases, *Emspak* v. *U.S.*, the basis for the witness' refusal to answer questions was "primarily the first Amendment, supplemented by the fifth." This was sufficiently definite, the Court held, pointing out that a Committee does not have to accept an ambiguous constitutional claim but can if necessary inquire into the nature of the claim. The Government in this case had argued that the witness had waived his privilege as to some particular questions concerning some of his associations. He was asked, "Is it your feeling that to reveal your knowledge of them would subject you to criminal prosecution?" His answer was, "No, I don't think this committee has a right to pry into my associations. That is my own position." As to whether this constituted a waiver the Chief Justice cited the *Smith* case to the effect that a waiver of a Constitutional right was not to be lightly

[31] *Ibid.* [32] *Id.* at 164. [33] *Id.* at 166.

inferred, and said, "we do not think that petitioner's 'no' answer can be treated as a waiver of his previous express claim under the Fifth Amendment . . . At most it is equivocal," and went on to say, "that the courts must indulge every reasonable presumption against waiver of fundamental Constitutional rights."[34] In this case also there was no clear-cut over-ruling of the witness' claim of privilege and no demand that he answer, he concluded.

In the third of these related cases, *Bart* v. *U.S.*, the Court reversed the conviction of petitioner for refusing to answer the Committee's questions because the necessary criminal intent had not been shown. The record showed that when the witness refused to answer questions a member of the Committee suggested to the Chairman that the witness "be advised of the possibilities of contempt" for refusal to answer. But the Chairman replied, "No, he has counsel. Counsel knows that is the law." Other discussion in the Committee revealed that the Chairman advised counsel for the witness to instruct the witness and not to argue with the Committee "because we do not rule on objections." The Court ruled that the "witness was entitled to a clear-cut ruling" at the time the refusal to answer was made. "Because of the consistent failure to advise the witness of the committee's position as to his objections, petitioner was left to speculate about the risk of possible prosecution for contempt; he was not given a clear choice between standing on his objections and compliance with a committee ruling,"[35] the Court concluded. The effect of these three decisions would seem to be that a Congressional Committee must make it unequivocally clear to a witness that his refusal to answer questions will be considered contempt and that he will risk prosecution.

This review of the court decisions regarding the use of the plea of self-incrimination in refusing to answer questions before Congressional committees would seem to justify the following conclusions. Committees of each House of Congress may be authorized to investigate any matter over which the House has express or implied power under the language of the constitution and such committees can compel witnesses to testify when self-incrimination is not involved. The power of Congress is limited

[34] Emspak v. U.S., *supra* note 27 at 196.
[35] Bart v. U.S., *supra* note 27 at 223.

by the absence of any general power to pry into private affairs of citizens, and presumably by the separation of powers which was the basic principle in *Kilbourn* v. *Thompson* discussed above. One might suppose that Chief Justice Warren's language that "the power to investigate must not be confused with any of the powers of law enforcement," which "are assigned under our constitution to the Executive and the Judiciary"[36] was in the nature of a warning to Congress for the future. Moreover, to plead the privilege of self-incrimination no particular language is necessary. Any language that makes reasonably clear what the intention of a witness is will suffice. If the Committee is in doubt as to the witwitness' intentions it can clarify the matter of doubt. It is also incumbent on the committee to make clear to the witness that it rejects his claims of privilege and to present him with a clear-cut choice between answering or refusing to answer and risking prosecution for contempt. The Courts will interpret the clause liberally to protect the privilege.

The court decisions to date throw no light on the legality of investigations by Committees of Congress for the purpose of "exposing" certain individuals in a private capacity or in public office or of investigations for the purpose of influencing public opinion by informing the people of the existence of undesirable conditions. This fact would seem to indicate the desirability of a clear statement by Congress in the resolutions creating investigating committees of the constitutional purpose for which the inquiry is to be conducted. Presumably the Supreme Court will, as it did in *McGrain* v. *Daugherty*, assume a legislative purpose where one is not clearly expressed when the subject matter is such as to make such assumption reasonable. But this decision on that point was a departure from the position the Court took in the earlier case of *Kilbourn* v. *Thompson* where it said, after reviewing English precedents as to powers of legislatures to investigate, that the precedents give little aid to "the doctrine, that this power exists as one necessary to enable either House of Congress to exercise successfully their function of legislation."[37] For further clarification of this important field of constitutional law we must await developments. It may be argued that when Congress is

[36] Quinn v. U.S., *supra* note 27 at 160.
[37] Kilbourn v. Thompson, 103 U.S. 168, 189 (1881).

seeking information for the purpose of legislating for the country as a whole, one called as a witness has greater legal obligation to testify than if he were testifying as a witness in a criminal case or before a grand jury. But the issue is the same. It involves reconciling the interests of society with that of the individual citizen and in this matter as in matters involving other provisions of the Bill of Rights it may be that the Supreme Court should, under its power of judicial review, as it does in connection with Congressional statutes, continue to draw the line between public and private rights in committee inquiries. In drawing the line the Court will no doubt carefully weigh the relative advantages of upholding Congressional power and defending basic human rights. It is frequently argued that Congress needs a free use of the investigating power in order to get the facts necessary to legislate wisely. But it is doubtful if the shortage of facts available to Congress is so great as to make it necessary or wise to deprive the citizen of the fundamental privilege of immunity from helping the state to convict himself. Congress has other means of acquiring information. A fundamental principle in Anglo-American jurisprudence is that the State has the burden of proof without any help from the accused when a citizen is being prosecuted.

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