

A subcommittee's initiation of an investigation of Communist Party activities in labor, without obtaining authorization from a majority of the full committee as required by committee rule, was held in another case to constitute a ground to reverse a contempt conviction for refusal to answer questions.<sup>(16)</sup>

### § 9. Rights of Witnesses Under the Constitution—Fifth Amendment

In addition to meeting the requirements imposed by the contempt statute, discussed in preceding sections, congressional investigators must observe limits imposed by the Bill of Rights, particularly the first,<sup>(17)</sup> fourth,<sup>(18)</sup> and fifth amendments:

Both the *Bryan* and *Emspak* cases predated Rule XI, clause 28(h), which provides that, "Each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall be not less than two." *House Rules and Manual* §735(h) (1973); this clause, numbered 27(h) at the commencement of the 93d Congress 1st Session, was numbered 28(h) at the end of that session. See §13.3, *infra*, for a discussion of adoption of this rule.

16. *Gojack v United States*, 384 U.S. 702 (1966).

17. See § 10, *infra*.

18. See § 11, *infra*.

The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.<sup>(19)</sup>

The most extensive litigation has involved the fifth amendment. Availability of the privilege against self-incrimination in congressional investigations was established in 1879 when the House adopted a Judiciary Committee report stating that the fifth amendment provision, "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." could be invoked by a person in an investigation initiated with a view to impeach him, notwithstanding the fact that a congressional investigation is not a "criminal case."<sup>(20)</sup> Because the government

19. *Watkins v United States*, 354 U.S. 178, 188 (1957). See also Liacos, Rights of Witnesses before Congressional Committees, 33 B.U.L. Rev. 337 (1953).

20. See 3 Hinds' Precedents §§ 1699 and 2514, for discussions of the refusal of George C. Seward, former Counsel General at Shanghai, China, to testify or produce subpoenaed materials. See also, Moreland, Allen B., Congressional Investigations and Private Persons, 40 So. Cal. L. Rev. 189,

could not challenge the availability of the fifth amendment, it generally focused on the character of the answers sought and adequacy of the claim of the privilege.<sup>(1)</sup>

Assertions of the fifth amendment privilege against self-incrimination have been raised in reply to questions relating to a witness' own membership or his knowledge of another person's membership in subversive organizations. Thus, the Supreme Court held that Communist Party activity might tend to incriminate a person for violation of the Smith Act and that it was not necessary to show that the answers sought would support a conviction of crime, but only that they would furnish a link in the chain of evidence needed to prosecute a wit-

ness for violation of conspiracy to violate that act.<sup>(2)</sup> Moreover, because the government could not constitutionally convict persons for refusing to testify about potentially incriminating facts, a district court dismissed contempt charges against 19 witnesses who had asserted the fifth amendment and refused to answer questions relating to Communist Party membership and activities at a Honolulu hearing of the Committee on Un-American Activities.<sup>(3)</sup>

An assertion of the privilege against self-incrimination does not have to take a particular form as long as the committee might reasonably be expected to understand it as an attempt to invoke the privilege.<sup>(4)</sup> Formulations held to be sufficient include: "the First Amendment to the Constitution, supplemented by the Fifth,"<sup>(5)</sup> "the First Amendment of the Con-

253-260 (1967); Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 92-82, 92d Cong. 2d Sess., pp. 91, 92 (1972); and Fisk, J., Compulsory Testimony of the Congressional Witness and the Fifth Amendment, 15 Okla. L. Rev. 157 (1962), for discussions of the privilege against self-incrimination.

1. *Watkins v United States*, 354 U.S. 178, 196 (1957); see also *Quinn v United States*, 349 U.S. 155 (1955), *Emspak v United States*, 349 U.S. 190 (1955), *Bart v United States*, 349 U.S. 219 (1955), which were cited in *Watkins*, at 196.

2. *Blau v United States*, 340 U.S. 159 (1950).
3. Applicability of the privilege against self-incrimination to congressional hearings was recognized in *United States v Yukio Abe*, 95 F Supp 991 (D.C.Hawaii 1950) in an opinion entered one month prior to *Blau v United States*. The decision to dismiss the indictments was not reported.
4. *Quinn v United States*, 349 U.S. 155 (1955).
5. *Id.* at p. 164.

stitution supplemented by the Fifth Amendment,"<sup>(6)</sup> primarily the First Amendment, supplemented by the Fifth."<sup>(7)</sup>

Courts "indulge every reasonable presumption against waiver of fundamental constitutional rights" and refuse to interpret ambiguous statements as waivers of the privilege against self-incrimination.<sup>(8)</sup> A witness may waive the privilege by failing to assert it,<sup>(9)</sup> expressly disclaiming it,<sup>(10)</sup> or testifying on the same matters concerning which he later claims the privilege.<sup>(11)</sup> However, because the

privilege attaches to a witness in each particular case in which he is called to testify, without reference to his declarations at some other time or place or in some other proceeding, it was held not to be waived when a witness verified allegations in prior litigation<sup>(12)</sup> or answered the same questions several years prior to committee interrogation when interviewed by an agent of the Federal Bureau of Investigation.<sup>(13)</sup>

Furthermore, a witness does not waive the privilege by giving answers which do not constitute an admission or proof of any crime.<sup>(14)</sup>

An insight into availability of the privilege may be gained by reviewing its purpose and permissible uses:

Privilege . . . may not be used as a subterfuge.

The privilege may only be asserted when there is reasonable apprehension on the part of the witness that his answers would furnish some evidence upon which he could be convicted of a criminal offense against the United States or which would lead to a prosecution of him for such offense, or

6. *United States v Fitzpatrick*, 96 F Supp 491, 493 (D.D.C. 1951).
7. *Emspak v United States*, 349 U.S. 190, 193, 197 (1955); this statement was held to be sufficient notwithstanding the fact that the witness, in response to the question, "Is it your feeling that to reveal your knowledge of them [certain individuals about whose communist activities the witness had been questioned] would subject you to criminal prosecution?" replied, "No, I don't think this Committee has a right to pry into my associations. That is my own position." *Emspak*, at 195, 196.
8. *Emspak v United States*, 349 U.S. 190 (1953).
9. *Id.*
10. *Hutcheson v United States*, 369 U.S. 599, 609 (1962).
11. *Rogers v United States*, 340 U.S. 367 (1951); *Presser v United States*, 238 F2d 233 (1960); cert. denied, 365 U.S. 316 (1960); rein. denied, 365 U.S. 858 (1960).

12. *Poretto v United States*, 196 F2d 392 (5th Cir. 1952).
13. *Marcello v United States*, 196 F2d 437 (5th Cir. 1952).
14. *United States v Costello*, 198 F2d 200, 202 (2d Cir. 1952).

which would reveal sources from which evidence could be obtained that would lead to such conviction or to prosecution therefor.

A witness is not bound to explain why answers to apparently innocent questions might tend to incriminate him when circumstances render such reasonable apprehension evident. Once it has become apparent that the answers to a question would expose a witness to the danger of conviction or prosecution, wider latitude is permitted the witness in refusing to answer other questions upon the ground that such answers would tend to incriminate him.<sup>(15)</sup>

Consequently, availability of the privilege is affected more by the context in which the question is asked and the underlying circumstances than by the nature of the question. In the application of this principle, a witness was not permitted to assert the privilege in response to questions relating to his place of residence and other preliminary data in the absence of a showing that elements of incrimination might attach to that information;<sup>(16)</sup> in another case, however, the privilege was held to

be properly asserted in response to a question as to whether the witness knew any individuals who had been listed in an investigating committee's interim report which referred to such individuals as possibly involved in organized crime.<sup>(17)</sup>

Similarly, a witness was permitted to refuse to answer a question as to his employment record because the question was asked "in a setting of possible incrimination."<sup>(18)</sup> And a witness with a criminal record was said to have properly invoked the fifth amendment in response to all questions except his name and address before a Senate committee investigating crime.<sup>(19)</sup>

After testifying to an incriminating fact, a witness may not refuse to answer more questions on the same subject on the ground that such answers would further incriminate. Thus, after a witness testified that she had been treasurer of the Communist Party in Denver, she could not invoke the privilege against self-incrimination when asked the name of the person to whom she had given or

15. *United States v Jaffee*, 98 F Supp 191 (D.D.C. 1951). See also, Moreland, Allen B., *Congressional Investigations and Private Person*, 40 So. Cal. L. Rev. 189, 258, 259 (1967) for a discussion of the scope of coverage of the privilege.

16. *Simpson v United States*, 241 F2d 222 (9th Cir. 1957).

17. *Aiuppa v United States*, 201 F2d 287 (6th Cir. 1952).

18. *Jakins v United States*, 231 F2d 405 (9th Cir. 1956).

19. *Marcello v United States*, 196 F2d 437 (5th Cir. 1952).

ganizational records. The majority of the Supreme Court reasoned that upholding a claim of privilege in such a case would invite distortion of facts by permitting the witness to select any stopping place in testimony.<sup>(20)</sup>

A witness who responded that he had complied to the best of his ability with a subpoena and had made available all records he possessed at the time of service was held to have waived the privilege against self-incrimination; this waiver applied to a question relating to whether he had destroyed any of the subpoenaed records since the time of service.<sup>(1)</sup>

A witness who admitted attending a meeting of the Communist Party but denied that he was a member was not permitted to invoke the privilege against self-incrimination in response to questions asking him to identify other persons present at that meeting.<sup>(2)</sup>

Under Part V of the Organized Crime Control Act of 1970,<sup>(3)</sup> any

witness who refuses on the basis of his privilege against self-incrimination to testify or provide information may be granted immunity by court order based upon the affirmative vote either of a majority present before either House of Congress or two-thirds of the members of a full committee for a proceeding before a committee, subcommittee, or joint committee. Furthermore, the Attorney General must be served with notice of the intention to request the order 10 or more days prior to making it. When these conditions are met and a duly appointed member of the House or committee concerned makes the request, a U.S. district court shall issue the order requiring the witness to testify or provide the information. Issuance of the order may be deferred not longer than 20 days from the date of the request upon application of the Attorney General. The effect of such an order is to compel the witness to testify or provide the information by immunizing him from use in a criminal trial not only of tes-

20. See *Rogers v United States*, 340 U.S. 367 (1951) which involved questioning before a grand jury.

1. *Presser v United States*, 384 F2d 233 (D.C. Cir. 1960), cert. denied, 365 U.S. 816 (1960); rein. denied, 365 U.S. 855 (1960).

2. *United States v Singer*, 139 F Supp 847 (D.D.C. 1956); aff'd. *Singer v United States*, 244 F2d 349 (D.C. Cir. 1957); rev'd. on other grounds on reh., 247 F2d 535 (1957).

3. 84 Stat. 926; 18 USC §§6002, 6005. The previous immunity statute, the

Compulsory Testimony Act of 1954, codified at 18 USC §3486 (1964), as amended, 18 USC §3486 (1965), which applied to any investigation relating to national security or defense, was repealed. See also 6 Cannon's Precedents §354, for a discussion of earlier cases on immunity.

timony or other information compelled under the order, but also any information directly or indirectly derived from such testimony or information.

A witness may intervene in a proceeding to grant immunity to contest the issuance of the order on the ground that the procedure prescribed by the statute has not been followed. Nonetheless, a witness may not challenge the committee's scope of inquiry, pertinence of questions propounded, or constitutionality of the statute, because the discretion of the district court in an immunity hearing does not encompass these issues.<sup>(4)</sup>

The present immunity statute<sup>(5)</sup> has been interpreted to require the court to make sure of compliance with established procedures, but does not authorize discretion to determine the advisability of granting immunity or impose conditions on such a grant.<sup>(6)</sup>

## § 10. —First Amendment

Claims involving freedom of association, belief, expression, and

4. *In re McElrath*, 248 F2d 612 (D.C. Cir. 1957); this case arose under 18 USC § 3486, which has been repealed.

5. 18 USC § 6005.

6. Application of U.S. Senate Select Committee on Presidential Campaign Activities, 361 F Supp 1270 (D.C. 1973).

petition under the first amendment have sometimes been asserted in cases arising out of congressional investigations, though such claims are less frequent than those involving the privilege against self-incrimination.<sup>(7)</sup> The Supreme Court has recognized the applicability of the first amendment to investigations:

Clearly an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by rule-making.<sup>(8)</sup>

7. See, for example, Moreland, Allen B., *Congressional Investigations and Private Persons*, 40 So. Cal. L. Rev. 189, 260–265 (1967), and Bendich, A. M., *First Amendment Standards for Congressional Investigations*, 51 Calif. L. Rev. 267 (1963), for discussion of the First Amendment.

8. *Watkins v United States*, 354 U.S. 178, 197 (1957); see note 31, inserted at this point in the *Watkins* opinion, which listed other cases supporting this principle, including *United States v Rumely*, 345 U.S. 41, 43 (1953); *Lawson v United States* 176 F2d 49, 51, 52 (D.C. Cir. 1949); *Barsky v United States*, 167 F2d 241, 244–250 (D.C. Cir. 1948), cert. denied 334 U.S. 843 (1948); and *United*