by the committee, that the objection must be made by the witness or the respondent himself, rather than by the counsel of the witness?

THE SPEAKER: It is incumbent upon the witness to protect himself, after consulting counsel, if he desires to consult counsel. But it is the duty of the witness to do so.

§ 14. —Right to Counsel

A witness' right to counsel[11] at an investigative hearing[12] is circumscribed by rules of the House,[13] rules of committees, precedents,[14] and court decisions. Rules of the House establish a minimum level of participation by counsel; committees either in their rules or in response to requests made at a hearing, may permit a counsel to do more than advise the witness about constitutional rights.

The Supreme Court implicitly approved a rule of the Committee on Un-American Activities which permitted counsel to accompany a witness for the purpose of advising him of his constitutional rights when it observed, "[Counsel for the witness] would not have been justified in continuing [seeking to read certain telegrams into the record], since Committee rules permit counsel only to advise a witness, not to engage in oral argument with the committee. Rule VII (b)."[15]

In General

§ 14.1 The House amended its rules to provide that, "Witnesses at investigative hearings may be accompanied by their own counsel for the purpose of advising them of their constitutional rights."

On Mar. 23, 1955,[16] the House by voice vote approved House Res-

11. See, for example, 3 Hinds' Precedents §§ 1696, 1741, 1771, 1788, 1837, 1846; 6 Cannon's Precedents § 400. 6 Cannon's Precedents § 336, for earlier precedents. For collateral sources, see Rauh, Joseph L., Jr., Representation before Congressional Committee Hearings, 50 J. of Crim. Law, Criminology, and Police Science 219 (1959), and Rauh and Pollitt, Right to and Nature of Representation before Congressional Committees, 45 Minn. L. Rev. 853 (1961).

12. This section deals only with investigative hearings on designated subject matters; it does not include investigations relating to impeachment (see Ch. 14, supra), election contests (see Ch. 9, supra), or conduct of Members (see Ch. 12, supra).

13. See §§ 14.1 and 14.2, infra.

14. See §§ 14.3 to 14.5, infra.

15. *Yellin* v *United States*, 374 U.S. 109, 112, 113 (1963).

16. 101 CONG REC. 3569, 3585, 84th Cong. 1st Sess.

olution 151, known as the Code of Fair Procedures, a provision of which permits witnesses at hearings to be accompanied by counsel.[17]

During the debate, questions were raised as to the effect of this provision:[18]

> MR. [GEORGE] MEADER [of Michigan]: May I draw the gentleman's attention to the provisions of paragraph (k) on that same page, lines 7, 8, and 9, relating to the right of witnesses to have counsel present at hearings. My question is, Would the absence of counsel where a witness demands the right to have counsel present vitiate the legal status of the inquiry?
>
> MR. [HOWARD W.] SMITH of Virginia: By no means. This is merely a privilege given to him. If he does not choose to exercise that privilege of having counsel, that is his fault.
>
> MR. MEADER: If he should demand that he be permitted to have counsel but there was no counsel present, would the committee be unable to proceed until counsel was present?
>
> MR. SMITH of Virginia: If he does not have his counsel, of course he cannot obstruct justice by using that sort of subterfuge. I have no doubt that any committee would be reasonable with him by reason of the sickness of his counsel.
>
> MR. MEADER: But the committee has not lost control over the proceeding because of this provision?
>
> MR. SMITH of Virginia: Not by any means.
>
> MR. MEADER: I think the gentleman may remember that Henry Grunewald and his counsel, William Power Maloney, delayed the King Subcommittee of the Ways and Means Committee for 6 hours with obstructionist tactics. Grunewald refused to testify because the committee finally ejected Maloney and he did not have any counsel there.
>
> MR. SMITH of Virginia: That could not occur under this rule. . . .
>
> MR. [CLARENCE J.] BROWN [of Ohio]: . . . The next provision provides for witnesses at investigative hearings—that does not mean ordinary legislative hearings where they are discussing a bill, such as a public-works project or an authorization bill, but where a committee is holding investigative hearings—that witnesses have the right to be accompanied by their own counsel, and that counsel shall have the privilege of advising them concerning their constitutional rights.
>
> That does not mean that the lawyer may sit there and answer every question of fact for the witness. But he may advise him as to his constitutional rights, whether he may plead the fifth amendment or refuse to answer on some other ground if he thinks his constitutional rights are being violated.
>
> MR. [KENNETH B.] KEATING [of New York]: . . . At lines 7 through 9 on page 2, I am troubled with the language chosen by the draftsmen, and wonder if it is exactly what was intended. Does this wording include an absolute right to be present in the event that a witness is heard in an executive session? Does it mean merely

17. See *House Rules and Manual* § 735(k) (1973).

18. 101 CONG REC. 3569, 3572, 3582, 3583, 84th Cong. 1st Sess.

to be present in the room or to accompany the witness when he takes the stand, and if the latter, does it create a right to consult and confer without limitation during the course of the examination? Does the limitation, "concerning their constitutional rights" mean that counsel would be limited, in conferring with his client, to a discussion of the first or fifth amendments, which are the only constitutional provisions likely to be involved at any time, under normal circumstances?

May counsel not perform the usual and proper services of explanation and advice with respect to all the rights and duties pertaining to the status of the witness before the committee? . . .

Mr. Keating's inquiries were not directly addressed. He had, in earlier remarks, given his views on the background of the right to counsel:[19]

[W]e have long conceded that outsiders, appearing as witnesses before our committees, should be accorded certain rights. There is no specific basis for the right of a witness to be accompanied and advised by his counsel, nor for recognition of the traditional privileges of lawyer and client, doctor and patient, priest and penitent, and the like. But they are so universally accorded, and so deeply woven into our traditions of fairness and due process that they perhaps should be specified for the advice and comfort of all those who are called to testify. It is, as I said, only a matter of drawing the lines clearly and precisely where we wish them to lie.

19. 101 CONG. REC. 3582, 84th Cong. 1st Sess.

§ 14.2 The House amended its rules to provide that, "The chairman may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from the hearings; and the committee may cite the offender to the House for contempt."

On Mar. 23, 1955,[20] the House by voice vote approved House Resolution 151, known as the Code of Fair Procedures, one provision of which dealt with the powers of the chairman in maintaining order.[1] During the debate on the resolution, the effect of this provision was discussed:[2]

MR. [CLARENCE J.] BROWN of Ohio: . . . Then it spells out into law again what I believe the chairman of the committee already has, the power to punish breaches of order and decorum and of professional ethics on the part of counsel, by censure and exclusion from the hearings.

That legalizes, and it does away with any doubt as to the right of a chairman, in a case like that of Henry Grunewald, which was mentioned a moment ago, to say, "You are violating the rules of this committee, you are out." And he will tell the witness to get

20. 101 CONG. REC. 3569, 3585, 84th Cong. 1st Sess.

1. See *House Rules and Manual* § 735(1) (1973).

2. 101 CONG. REC. 3572, 84th Cong. 1st Sess.

another lawyer. And the committee may cite such an offender to the House for contempt. If a lawyer simply does not obey the orders of the chairman, if he creates a disturbance, if he refuses to leave, and the situation becomes serious such that the committee wants to recommend that he be cited by the House for contempt, then that may be done and it is up to the House to take action as it sees fit.

Counsel's Participation

§ 14.3 The privilege granted by the rule, permitting a witness at an investigative hearing to be accompanied by counsel to advise him of his constitutional rights, does not, as a matter of right, entitle the counsel to present argument, make motions, or make demands on the committee.

On Oct. 18, 1966,[3] Speaker John W. McCormack, of Massachusetts, during the ruling on a point of order raised against House Report 2305, relating to the refusal of Yolanda Hall to testify before the Committee on Un-American Activities,[4] indicated the scope of authority of counsel in advising a witness during an investigative hearing.[5]

THE SPEAKER: The Chair is prepared to rule.

The gentleman from Illinois [Mr. Yates] has raised a point of order against the privileged report filed by the gentleman from Louisiana, citing a witness before a subcommittee of the Committee on Un-American Activities for contempt. The point of order is based on the ground that the subcommittee, while holding hearings in Chicago, failed or refused to follow the rules of the House—specifically, rule XI, clause 26(m)—and, at the demand of the witnesses' attorney, take the testimony in executive session rather than in an open hearing. . .

The Chair will also point out parenthetically, that subsection (k) of rule XI, provides:

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

This privilege, unlike advocacy in a court, does not as a matter of right entitle the attorney to present argument, make motions, or make demands on the committee.

§ 14.4 Although a witness at an investigative hearing, under

3. 112 CONG. REC. 27494, 27495, 89th Cong. 2d Sess. See also *House Rules and Manual* § 735(k) (1973).
4. See § 15.6, infra, for the point of order and debate on this report.
5. The Speaker expressed the same view of the authority of counsel in responses to points of order raised against two House reports relating to refusals to testify before the Committee on Un-American Activities. See 112 CONG. REC. 27448, 89th Cong. 2d Sess., Oct. 18, 1966, and 112 CONG. REC. 27505, 89th Cong. 2d Sess., Oct. 18, 1966, for the rulings on points of order against H. REPT. No. 2302, the refusal of Milton Mitchell Cohen, and H. REPT. No. 2306, the refusal of Dr. Jeremiah Stamler.

the House rules, may be accompanied by counsel to advise him of his constitutional rights, the witness and not counsel is primarily responsible for protecting his rights and invoking procedural safeguards guaranteed under the rules of the House.

On Oct. 18, 1966,[6] during consideration of a privileged report, House Report No. 2305, relating to the refusal of Yolanda Hall, to testify before the House Committee on Un-American Activities,[7] Speaker John W. McCormack, of Massachusetts, responded to a parliamentary inquiry regarding the responsibility of a witness to protect his rights.

MR. [SIDNEY R.] YATES [of Illinois]: Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state his parliamentary inquiry.

MR. YATES: Mr. Speaker, is it in order for me to request the Chair for an explanation of a part of the Chair's ruling; namely, that part which is directed to the representation before a committee of a witness by a lawyer?

In his ruling the Chair has indicated that counsel does not, as a matter of right, have the right to present argument, make motions, or make demands on the committee.

Does this mean, Mr. Speaker, that if an objection is to be voiced to an action by the committee, that the objection must be made by the witness or the respondent himself, rather than by the counsel of the witness?

THE SPEAKER: It is incumbent upon the witness to protect himself, after consulting counsel, if he desires to consult counsel. But it is the duty of the witness to do so.

§ 14.5 A House committee has discretion to refuse to allow demands of counsel at an investigative hearing and it may reject an attorney's demand that certain evidence be taken in executive session or require the witness personally to raise the issue.

On Oct. 18, 1966,[8] during consideration of a privileged report, House Report No. 2305, relating to the refusal of Yolanda Hall to testify before the House Committee on Un-American Activities,[9] the Speaker indicated that a demand that testimony be taken in executive session could be rejected at the discretion of the committee.[10]

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6. 112 CONG. REC. 27495, 89th Cong. 2d Sess. See *House Rules and Manual* § 735(k) (1973) .

7. See § 15.6, infra, for this report.

8. 112 CONG. REC. 27495, 89th Cong. 2d Sess.

9. See § 15.6, infra, for this report.

10. See the ruling of Speaker John W. McCormack (Mass.), discussed in § 14.3, supra.