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PLEADING THE FIFTH AMENDMENT BEFORE
A CONGRESSIONAL COMMITTEE:
A STUDY AND EXPLANATION

I

INTRODUCTION

On June 29, 1955, Winsten Burdett, a commentator for Columbia Broadcasting System appeared voluntarily before a Senate Subcommittee and testified that he had been employed by the Brooklyn Daily Eagle from 1934 to 1940 and during part of this employment, had been a member of the Brooklyn Eagle unit of the Communist Party.¹ He identified thirteen persons he had known as fellow members of this Communist Unit, and five persons he had known as members of the Communist Party who had not been in this unit. All the persons named by Burdett were subpoenaed before the Subcommittee.

One such witness denied that he had ever been a member of the Communist Party and said that Burdett had erred in his testimony.² Two or three witnesses admitted that Burdett had been correct as to them, and gave corroboration to his story.³ The bulk of those subpoenaed however, relied upon the Fifth Amendment's provision against self-incrimination when asked questions relating to present or past membership in the Communist Party. The Subcommittee presented evidence that one such

¹ *Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, Strategy and Tactics of World Communism*, 84th Cong., 1st Sess., pt. 14, at 1324 (1955).

² *Hearings, supra* note 1, at 1130.

³ *Hearings, supra* note 1, pt. 15, at 1402-07, 1502-03.

witness had been expelled publicly from the Communist Party in 1940;⁴ and that another such witness had stated under oath in an application for a passport that he had joined the Communist Party in 1937 and resigned in 1939.⁵

The hearing briefly described above has been repeated time and again since the House Committee on Un-American Activities was established in 1938. A congressional committee receives information that a Communist Party unit existed on a newspaper, at a university, in a factory, and it proceeds to subpoena all the alleged members of the unit. Some few deny membership, some few disclose their own membership but can recall the identity of only two or three others; most of those called plead the Fifth Amendment when asked about their own activities and the identity of others.⁶

Why do these persons rely upon the Fifth Amendment? A present member in the Communist Party might do so, but why does a witness who was expelled publicly from the Communist Party in 1941? Why does a witness who told the State Department under oath that he had left the Communist Party in 1939 rely upon the Fifth Amendment before a congressional committee when asked about present membership in the Communist Party; when asked about the Communist Party membership of someone who has been long dead or someone who has a national reputation for being an anti-communist; when asked about acts of espionage, sabotage, or conspiracy to overthrow the government? The witness knows that his reliance upon the Fifth Amendment will become publicized and that his

⁴ *Hearings, supra* note 1, at 1383.

⁵ *Hearings, supra* note 1, pt. 15, at 1470.

⁶ During the 83rd Congress close to five hundred witnesses relied upon the Fifth Amendment when called before the three congressional committees — respectively headed by Congressman Velde and Senators McCarthy and Jenner — and asked about Communism, alleged fellow Communists, and participation in illegal activities such as espionage, sabotage, and conspiracy to overthrow the government by force and violence.

employer, his union, his friends, may draw an unfavorable inference which may well damage the economic and social status of himself and his family. Why does such a witness subject himself to these possible consequences? Possible answers may be found by discussing one hypothetical case.

Assume that Mr. A goes into a law office with a subpoena from a congressional committee in hand and tells his lawyer that he had been a member of a Communist Party group while a college student in the late 1930's; that he had been drafted into the Army upon graduation and lost interest in Communism; and that he had never again had any contact with the Communist Party. Mr. A also tells his lawyer that there were ten other members of his Communist Party group and that the only other person he personally ever knew to be or to have been a member of the Communist Party was Mr. X, the secretary of the state-wide party organization who recently had been indicated under the Smith Act. Mr. A further tells his attorney that the activity of his group consisted in the main of studying and discussing the classics of Marxism and that his group did nothing illegal. He tells his lawyer that he has lost all contact with six members of the group, but knows as a fact that the other four have lost interest in Communism and are respected citizens in their communities. He further states that five members of his group have already testified, three telling all, and the other two relying on the Fifth Amendment.

Mr. A additionally tells his lawyer that he has given great thought to the problem; that he is willing to tell about his own activity; but that he is not willing to disclose the identity of others. This may seem quixotic, he adds, as the committee already has the names of the others; but that is his position.⁷

⁷ This assumed situation is not implausible or even typical. The pages of the congressional hearings are replete with statements that a witness is

If Mr. A tells about his own past communist affiliations, he undoubtedly will be asked to identify his former as-

perfectly willing to tell about himself but is not willing to disclose the identity of others. Consider the following three illustrations.

Miss Lillian Hellman, the noted playwright, was subpoenaed to appear before the House Committee on Un-American Activities and wrote a letter to the committee in which she offered to tell all about her own activities if the committee agreed not to ask about others. She said this:

"I am not willing, now or in the future, to bring bad trouble to people who, in my past association with them, were completely innocent of any talk or any action that was disloyal or subversive To hurt innocent people whom I knew many years ago in order to save myself is, to me, inhuman and indecent and dishonorable. I cannot and will not cut my conscience to fit this year's fashions" *New York Times*, May 22, 1952.

Stuart C. Rand, a noted and respected member of the Boston bar represented three professors from the Massachusetts Institute of Technology who appeared before the House Committee on Un-American Activities in April of 1953. The three professors admitted that they had been members of a Communist group of M.I.T. and Harvard professors that met during the late 1930's and early 1940's, stated that they had left the Communist Party in 1944 or 1945, and disclosed the identity of the other members of their group. At the close of the testimony the committee chairman asked the professors why they had not voluntarily given this information long ago; and, when the professors hesitated in answering, permitted their attorney, Mr. Rand, to answer for them in the following words:

"As you probably realize, it is difficult for a conscientious man to name his friends in this thing. The really courageous fellow is perfectly willing to talk about his own Communist activities. All three of these men, when I started to talk about it, were more than willing to come and tell privately or publicly what their entire connection was with the Communist Party, but they had the same feeling that I certainly have ingrained in myself—that I was brought up not to tell tales, even on my older brother, and none of us like to do it." *Hearings Before the Committee on Un-American Activities, House of Representatives, Communist Methods of Infiltration*, 83rd Cong., 1st Sess., at 1105 (1953).

The third illustration is the testimony of a professor who had been named as, and admitted that he had been, a member of the group described by the three M.I.T. professors, but refused to identify the already identified other members of the group. When directed by the committee chairman to identify the others, he said the following:

"I am prepared to speak fully about myself, as I did yesterday, and tell you everything about myself, waiving my right to my own opinions, past or present, in honesty and sincerity; but I could never, sir, in honor and conscience, trade someone's career for my own, come what may. . . . I feel that I could not possibly work in my laboratory again. It's not that I'm hiding something. It's—it's like the end of a rope, in many ways. It's a basic feeling, sir, and I just cannot. . . ." *Id.* at 1552.

sociates.⁸ If Mr. A refuses on moral grounds alone to identify his former associates, he undoubtedly will be cited for contempt of Congress. The formal documents of the Committee on Un-American Activities state that not all recalcitrant witnesses are cited for contempt,⁹ and some few witnesses have refused to identify others without being punished.¹⁰ But the vast majority of those wit-

⁸ A survey into the public transcripts of three congressional investigating committees discloses only one witness who was not asked to disclose his former associates after admitting past membership in a Communist organization. This single witness "... proved to be an exception to the subcommittee's standard operating procedure." *Report of the Subcommittee to Investigate the Administration of the Internal Security Act to the Senate Committee on the Judiciary*, 83d Cong., 1st Sess., at 18 (Committee Print, July 17, 1953).

⁹ In the pamphlet entitled "*This Is Your House Committee On Un-American Activities*," prepared and released by the Committee on Un-American Activities on September 19, 1954, the following question and answer appear:

"35. Does the committee endeavor to cite all of those witnesses who exhibit contempt for the committee in their appearance before the committee?"

"No. The committee feels that it would be an unnecessary burden to the Department of Justice and the courts to pursue action against all such persons. The public record of such action by these individuals is believed sufficient to show the true nature of their contempt, arrogance and perfidy."

In addition, a formal statement of the Internal Security Subcommittee of the Senate Judiciary Committee has recognized the problem of conscience that may arise when a witness is asked to become an informer. The subcommittee has stated that it "... made every effort to induce educators who had left the Communist Party to testify fully at all times. . . . And in almost every case, they were not pressed into *extensive* identifications of former associates when a reluctance to do so became apparent." (Emphasis added.) *Report on Subversive Influence in the Educational Process*, 83d Cong., 1st Sess., at 4.

¹⁰ An extensive survey has discovered thirteen such witnesses who refused, on grounds of conscience alone, to identify others after having testified as to former Communist affiliations. Five of these witnesses appeared before the House Committee on Un-American Activities. *Hearings Before the House Committee on Un-American Activities, Communist Infiltration of Radiation Laboratory and Atomic Bomb Project at the University of California*, 81st Cong., 1st Sess., pt. 1, at 356 (1949); *Id.* at 373; *Id.*, pt. 3, at 3417 (1950); *Id.* at 3453; *Hearings Before the House Committee on Un-American Activities, Investigation of Communist Activities in the Philadelphia Area*, 83d

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nesses who refuse to identify their present or former associates are cited and indicted for contempt of Congress.¹¹ If Mr. A is to escape conviction, he must have legal justification, as moral compunction against playing the role of an informer will avail him naught with the congressional committees.

Cong., 2d Sess., pt. 4, at 4006 (1954). Seven of these witnesses appeared before the Senate Subcommittee on Internal Security. *Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, Subversive Influence in the Educational Process*, 83d Cong., 1st Sess., pt. 6, at 721 (1953); *Id.*, pt. 12, at 1083; *Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, Interlocking Subversion in Government Departments*, 83d Cong., 2d Sess., pt. 20, at 1498 (1954); and four witnesses appeared before an investigation of the Southern Conference Educational Fund, the proceedings of which have not been made public yet. One witness appeared before the Permanent Investigations Subcommittee of the Senate Government Operations Committee. *Hearings Before the Permanent Investigations Subcommittee of the Senate Committee on Government Operations, State Department Information Program and Information Centers*, 83d Cong., 1st Sess., pt. 8, at 486 (1953).

¹¹ Mr. Arthur Miller, the Pulitzer prize-winning playwright, is the latest in a long line of witnesses who refused on grounds of conscience alone to identify others and were subsequently cited for contempt. Mr. Miller was subpoenaed to testify before the Committee on Un-American Activities in connection with an investigation into passports. He appeared in June, 1956, and answered fully all questions relating to his passport application. He was then asked and admitted that in 1947 he had attended several Communist Party meetings, but he refused to identify the others present at those meetings. In response to the question as to who was present at those meetings, Mr. Miller testified, 102 CONG. REC. 13204 (daily ed. July 25, 1956):

"Mr. Chairman, I understand the philosophy behind this question and I want you to understand mine.

"When I say this I want you to understand that I am not protecting the Communists or the Communist Party. I am trying to and I will protect my sense of myself. I could not use the name of another person and bring trouble on him. . . . I ask you not to ask me that question."

After the hearing ended, the committee chairman granted Mr. Miller an additional ten days in which to reconsider and supply the names of those persons who had attended the Communist Party meetings. At the end of this time Mr. Miller wrote a letter stating that his position had not changed. The House Committee on Un-American Activities unanimously recommended that the House of Representatives cite Mr. Miller for contempt of Congress, and the recommendation was followed by the full House after a limited debate.

II

LEGAL DEFENSES OTHER THAN PROTECTION
AGAINST SELF-INCRIMINATION FOR RE-
FUSAL TO ANSWER COMMITTEE QUESTIONS

The Fifth Amendment's provision against self-incrimination is a shield to the witness who cannot in good conscience cooperate fully with a Congressional investigating committee. But Mr. A will be loath to rely upon the Fifth Amendment, and will wish to explore the possibilities of utilizing a legal defense with less social opprobrium. Unfortunately for Mr. A, no other legal justification has to date been recognized by either the congressional committees or the Courts.

I. THE FIRST AMENDMENT

The First Amendment is applicable generally to congressional investigations. It is recognized that "the realistic effect of public embarrassment is a powerful interference with the free expression of views."¹² The First Amendment, read literally, prohibits Congress from making any law abridging the freedom of speech or the right of the people peaceably to assemble. The Supreme Court, however, has construed the First Amendment as prohibiting all Congressional invasions of free speech and assembly, whether Congress acts by statutory enactments or otherwise. "Indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A

¹² *Rumely v. United States*, 197 F.2d 166, 174 (D. C. Cir.), *aff'd on other grounds*, 345 U. S. 41 (1952).

requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature."¹³ Also obviously of this nature is the requirement that witnesses before Congressional Committees disclose to the television camera their past political affiliation and associations.

No court has yet, however, held that the First Amendment protects witnesses before congressional committees when asked about Communism. To the contrary, all the courts which have passed upon the problem have held that the congressional committee invasion of First Amendment rights was justified by the congressional need for information on the subject.

In 1946 and 1947 the House Committee on Un-American Activities subpoenaed a number of persons, ostensibly to inquire about the extent, character, and objects of un-American propaganda. These persons included Messrs. Dennis and Eisler, leaders of the Communist Party; Messrs. Barsky, Morford, and Marshall, leaders of propaganda organizations subsequently listed by the Attorney General as subversive; and Messrs. Lawson, Trumbo, and Bessie, prominent script writers in the motion picture industry. Some of these persons failed to appear; others appeared and refused to testify; and still others appeared, testified, but refused to tell the Committee whether or not they were members of the Communist Party as of that moment. They were all cited for contempt by Congress; indicted by a grand jury; convicted by the district court;¹⁴ and appealed to the circuit court where they argued that the First Amendment prevented the congressional committee from requiring them to answer the question. In a series of decisions issued in 1948 and 1949, the court of appeals affirmed the convictions, and the Supreme Court refused

¹³ *American Communications Ass'n v. Douds*, 339 U. S. 382, 402 (1950).

¹⁴ *United States v. Bryan*, 72 F. Supp. 58 (D. D. C. 1947).

to hear argument on this point.¹⁵

The initial case concerned one Barsky, who was subpoenaed by the House Committee on Un-American Activities to appear and bring with him the ledgers of the Joint Anti-Fascist Refugee Committee, an organization of which he was chairman. Barsky appeared, but without the ledgers. He was cited for contempt; indicted; and convicted. On appeal, he argued that the First Amendment justified his refusal to cooperate with the Committee. The court of appeals, in an opinion by Judge Prettyman, held that the forced testimony, such as was there involved, did in fact abridge the freedom of speech and assembly. However, the Court also held, over the strenuous dissent of Judge Edgerton, that this abridgment of First Amendment rights was justified at the beginning of the cold war, as Congress, at that time, had a right and a duty to inform itself of the then current activities of the Communist Party, Communist Party members, and so-called "front" organizations.¹⁶

Mr. A's lawyer might advise him that the rationale of the Barsky and other similar cases no longer controls, that a great deal has happened since Barsky and the others relied upon the First Amendment before congressional com-

¹⁵ Barsky v. United States, 167 F.2d 241 (D. C. Cir.), *cert. denied*, 334 U. S. 843 (1948); Eisler v. United States, 170 F.2d 273 (D. C. Cir. 1948), *cert. dismissed*, 338 U. S. 883 (1949); Dennis v. United States, 171 F.2d 986 (D. C. Cir. 1948), *aff'd on other grounds*, 339 U.S. 162 (1950); Lawson v. United States, 176 F.2d 49 (D. C. Cir. 1949), *cert. denied*, 339 U. S. 934 (1950); Morford v. United States, 176 F.2d 54 (D. C. Cir. 1949), *rev'd on other grounds*, 339 U. S. 258 (1950).

¹⁶ In a subsequent case concerning a "right-wing" organization, Judge Prettyman said that "there can be no doubt . . . that the realistic effect of public embarrassment is a powerful interference with the free expression of views," and reversed and remanded, on grounds including the First Amendment, the conviction of one who had refused to give a congressional committee the list of subscribers to publications issued by the Committee for Constitutional Government. The theory of the court was that the congressional need for such information lacked justification by any public danger "clear or otherwise, present or otherwise." Rumely v. United States, 197 F.2d 166 (D. C. Cir.), *aff'd on other grounds*, 345 U. S. 41 (1952).

mittees in 1946 and 1947. The need for information concerning the Communist Party, which was held to justify the abridgment of Barsky's First Amendment rights in 1946, might no longer exist. Since that time Congress has informed itself thoroughly on the subject of Communism.¹⁷ A great deal of legislation¹⁸ and many executive orders have been issued on the basis of this information.¹⁹

Mr. A's lawyer might also point out the differences (1) between a leader such as Dennis or Eisler and one of the rank and file; (2) between present membership and membership which ceased in the long past; and (3) between membership of the witness himself and the membership of third persons. But Mr. A's lawyer would undoubtedly tell him that these and other distinctions have been urged upon the courts in recent months, and as yet to no avail.²⁰

¹⁷ Senator McCarran, speaking in favor of the senate resolution establishing the committee to investigate the laws relating to internal security, said the following:

"Over the course of many years there have been accumulated by various committees of the Congress substantial quantities of information respecting the scope and nature of the Communist fifth column in the United States. . . . The purpose of the Senate Resolution is not to again marshal the factual material which has already been assembled and which demonstrates conclusively the deadly menace of the Communist fifth column. . . ." 96 CONG. REC. 15966 (1950).

¹⁸ Typical are the "non-communist" affidavit requirements of the Labor-Management Relations Act, 61 STAT. 141 (1947), 29 U. S. C. § 159 (h) (1952); the Internal Security Act of 1950, 64 STAT. 987, 50 U. S. C. § 781 (1952); the Communist Control Act of 1954, 68 STAT. 746, 18 U. S. C. § 841 (Supp. III, 1956); the Bail Jumping Act, 68 STAT. 749 (1954), 18 U. S. C. § 3146 (Supp. III, 1956); the Harboring of Criminals Act, 68 STAT. 747 (1954), 18 U. S. C. § 1071 (Supp. III, 1956).

¹⁹ Exec. Order No. 10450, 3 C.F.R. 72 (Supp. 1953), establishing the so-called Federal Employees Security Program.

²⁰ Some of the recent cases decided on this point are: *Watkins v. United States*, 233 F.2d 681 (D.C. Cir. 1956), *cert. granted*, 25 U.S.L. WEEK 3093 (U. S. October 9, 1956) (No. 261); *United States v. Sacher*, 139 F. Supp. 855 (D.D.C. 1956); *United States v. Singer*, 139 F. Supp. 847 (D.D.C. 1956), *appeal docketed*, No. 13299, D.C. Cir., April, 1956; *United States v. Kamin*, 135 F. Supp. 382 (D.C. Mass. 1955); *United States v. Lamont*, 18 F.R.D. 27 (S.D.N.Y. 1955); and *United States v. O'Connor*, 135 F. Supp. 590 (D.D.C. 1955), *appeal docketed*, No. 13049, D.C. Cir. Nov., 1955.

II. SEPARATION OF POWERS DOCTRINE

The "power to investigate, broad as it may be, is subject to recognized limitations."²¹ One basic limitation is provided by the doctrine of separation of powers. Legislative Committees may investigate for legislative purposes, but they may not try a man for past deeds. That function is reserved to the courts. When the sole or primary purpose of a congressional committee is the exposure of individuals to public scorn and retribution, the committee is engaging in a legislative trial in violation of the doctrine of separation of powers. Although a congressional committee may compel testimony which involves the exposure of individuals when such exposure is ancillary and incidental to an investigation in aid of legislation, it has no separate and distinct power of exposure unrelated to a legislative purpose.

Mr. A might ask his lawyer why the separation of powers doctrine is not a valid legal defense. He might say that three previous witnesses have testified fully about his old Communist Party group, that the congressional committee already has more than adequate information for any legislative purpose, and that therefore the committee must be contemplating the illegal exercise of a power denied it by the Constitution.

Mr. A's lawyer would reply that a presumption of regularity attends any congressional action, and that to date, no court has permitted a defendant to introduce evidence designed to rebut this presumption. The two most recent cases are *United States v. Singer*,²² and *Watkins v. United States*.²³ Watkins appeared in response to a subpoena and testified before the Committee on Un-American Activities that he had been closely associated

²¹ *Quinn v. United States*, 349 U. S. 155, 161 (1955).

²² 139 F. Supp. 847 (D. D. C. 1956).

²³ 233 F.2d 681 (D. C. Cir. 1956).

with, but not a member of the Communist Party during the early 1940's. He refused to say whether he had known some thirty persons as members of the Communist Party during this period, and was subsequently cited and indicted for contempt of Congress. Watkins sought to prove in the trial court that the Committee actually had in its files all the information about himself and the thirty individuals which it attempted to obtain from him and that, therefore, the Committee's only purpose in forcing him to testify was to publicly expose him and these thirty individuals to public scorn and retribution. The district court held that such evidence was irrelevant, and found him guilty.

On appeal, the case was first heard by a panel of three judges who reversed the conviction on the ground that the committee was only authorized to investigate "propaganda"; that the questions Watkins refused to answer did not relate to "propaganda"; and that therefore the committee was not acting within its authority when it asked the questions in issue.²⁴ The court decided as it did and gave the house resolution establishing the committee a limited construction so as to avoid the necessity of ruling on the important constitutional issue of whether a congressional committee has the independent right to "expose," and in this connection said the following: "If we were obligated to decide what the Committee's purpose was in asking the questions Watkins would not answer, we might be forced to conclude that the Committee asked them for the sole purpose of exposure."²⁵ The full court

²⁴ 24 U. S. L. WEEK 2329 (D. C. Cir. Jan. 26, 1956).

²⁵ The court relied upon the following quotations to support its holding: (1) "Exposure in a systematic way began with the formation of the House Committee on Un-American Activities, May 26, 1938."

"The House Committee on Un-American Activities was started on its way May 20, 1938, with instructions . . . to expose people and organizations attempting to destroy this country. That is still its job, and to that job it sticks."

of appeals then agreed to rehear the case, and, reversing the decision of the panel which previously had ruled for Watkins, sustained the district court conviction.²⁶ The court of appeals, over the strenuous dissent of Chief Judge Edgerton who wrote the original decision, held that the questions asked could have related to a proper legislative purpose, and that statements and speeches of individual members of the committee to the contrary cannot be introduced in evidence to rebut the presumption of regularity.

The Supreme Court to date has refused to hear any case involving the separation of powers doctrine as applied to the field of congressional investigation. However, in connection with the presumption of pertinency which accompanies congressional inquiry, the Supreme Court has held that "the stronger presumption of innocence attended the accused at the trial."²⁷ It would seem that a defendant in a contempt of congress trial should be able to prove an unlawful purpose by introducing evidence similar to that rejected in the Watkins case; that is, that the committee chairman announced an intention to hold hearings for the purpose of exposing "known or sus-

100 Things You Should Know About Communism, H. R. Doc. No. 136, 82nd Cong., 1st Sess., 19, 67 (1952).

(2) "... [W]e feel that we have a duty and that duty has been imposed upon us by Congress not only to report to Congress for the purpose of remedial legislation but to inform the people who elected us about subversive activities." Statement of Chairman Velde, *Hearings Before the Committee on Un-American Activities*, House of Representatives, 83rd Cong., 1st Sess., at 1106 (1953).

(3) "Unlike most congressional committees, in addition to the legislative function we are required to make the American people aware if possible of the extent of the infiltration of Communism in all phases of our society." Statement of Chairman Walter, of the House Committee on Un-American Activities. U. S. News and World Report, August 26, 1955, p. 71.

²⁶ *Watkins v. United States*, 233 F.2d 681 (D. C. Cir. 1956).

²⁷ *Sinclair v. United States*, 279 U. S. 263, 296 (1929).

pected commies"²⁸ and/or that the committee chairman had a "truck load" of information about the replies he expected to receive from the witness.²⁹ Otherwise, the presumption of innocence yields to the presumption of congressional regularity; and the legality of congressional investigations, unlike the legality of congressional legislative activities, is immune from judicial review. Until the Supreme Court agrees to hear and decide the issue, however, witnesses like Mr. A will be advised not to rely upon the separation of powers doctrine when asked questions by congressional committees.

III. OTHER LEGAL GROUNDS

Mr. A might then ask if there is any way other than those already discussed and the Fifth Amendment by which he can refuse to answer the questions which probably will be asked him, and his lawyer must reply in the negative. The lawyer can add that the following additional

²⁸ "Rep. Francis E. Walter (D., Pa.) who will take charge in the new Congress of House activities against communists and their sympathizers, has a new plan for driving Reds out of important industries. He said today he plans to hold large public hearings in industrial communities where subversives are known to be operating, and to give known or suspected commies a chance in a full glare of publicity to deny or affirm their connection with a revolutionary conspiracy — or to take shelter behind constitutional amendments.

" 'By this means,' he said, 'active communists will be exposed before their neighbors and fellow workers, and I have every confidence that the loyal Americans who work with them will do the rest of the job.' " Washington Daily News, November 19, 1954.

²⁹ In the trial of the Watkins case, *supra* note 20, government counsel admitted that the committee had so much information about the thirty persons concerning whom Watkins refused to answer questions, that it would take at least three analysts two weeks to assemble the material and a truck to carry it to the court house. Transcript of Record, Joint Appendix, at 19.

In the trial of United States v. Singer, *supra* note 20, *appeal docketed*, No. 13,299, D. C. Cir., 1956, counsel for the committee admitted that the committee had "full information" about the questions which the witness refused to answer at the time the questions were asked. Transcript of Record, Joint Appendix, at 101-02.

arguments have been made in the cases already discussed for justifying refusal to testify; but that none of these arguments has been successful.

1. That congressional committees, when asking these types of questions, are exercising powers of law enforcement which under our Constitution are assigned exclusively to the executive and judicial branches of government.³⁰

2. That Congress is entering an area in which it is forbidden to legislate, and hence has no power to investigate.³¹

3. That the statute punishing contempt of Congress makes it illegal to refuse to answer only those questions "pertinent to the subject matter under inquiry" at the time of the testimony, and that, as the subject matter under inquiry is apt to be couched in such broad terms as "un-American" activities, the witness is unable to determine with any certainty what questions are and what questions are not pertinent thereto. Consequently, the defendant is deprived of "due process" in that there is no reasonably ascertainable standard of guilt.³²

4. That the implied power to investigate, conflicting as it does with an individual's right of privacy, is limited to the "least possible power adequate to the end proposed." It has been argued, therefore, that congressional committees, when attempting to obtain identical information for the tenth or fifteenth time, are exercising more than the "least possible power" and hence are acting illegally.³³

The lawyer could also add that certain defenses some-

³⁰ Cf. *Kilbourn v. Thompson*, 103 U. S. 168, 190 (1880).

³¹ Cf. *McGrain v. Daugherty*, 273 U. S. 135, 173 (1927).

³² Cf. *Kraus & Bros. v. United States*, 327 U. S. 614, 620 (1946).

³³ Cf. *Anderson v. Dunn*, 19 U. S. (6 Wheat.) 204, 230-31 (1821); *Marshall v. Gordon*, 243 U. S. 521, 541 (1917).

times become available after indictment which should be considered, but, in the absence of prescience, cannot be relied upon when planning the testimony. Among these defenses are (1) that the questions the witness refused to answer were not pertinent to the subject matter under inquiry at the time of the hearing;³⁴ (2) that the questions the witness refused to answer were not pertinent to any subject matter within the ambit of the resolution establishing the committee;³⁵ (3) that the various counts of the indictment duplicate previous counts and are therefore invalid;³⁶ (4) that the witness had not been directed to answer the question or, if so directed, was not apprised that his subsequent demurrer was not acceptable;³⁷ (5) that the indictment was defective in that it (a) failed to allege the subject matter under inquiry at the time of the hearing;³⁸ (b) failed to allege that the refusal was "will-full"; (c) failed to allege that the committee was empowered by Congress to conduct the particular inquiry and the source of such power; or (d) failed to allege that the inquiry being conducted was within the conferred power.³⁹

III

THE FIFTH AMENDMENT PROVISION AGAINST SELF-INCRIMINATION

In 1948 the Court of Appeals for the District of Columbia rejected most of the above mentioned legal arguments

³⁴ *Bowers v. United States*, 202 F.2d 447 (D. C. Cir. 1953).

³⁵ *United States v. Kamin*, 135 F. Supp. 382 (D. Mass. 1955).

³⁶ *United States v. Costello*, 198 F.2d 200 (2d Cir.), *cert. denied*, 344 U. S. 874 (1952).

³⁷ *Quinn v. United States*, 349 U. S. 155 (1955).

³⁸ *United States v. Metcalf*, Crim. No. 3052, S. D. Ohio. After the district court dismissed the indictment against Metcalf for error in form, the United States Attorney took the matter again before the grand jury and obtained a new indictment.

³⁹ *United States v. Lamont*, 18 F. R. D. 27 (S. D. N. Y. 1955).

in *Barsky v. United States*.⁴⁰ The court there noted that "The right to refuse self-incrimination is not involved,"⁴¹ and as that was the only legal ground not rejected, subsequent congressional committee witnesses sought reliance upon the Fifth Amendment as justification for refusal to answer questions designed to connect them or others with Communist activities and organizations. Before Mr. A decides to rely upon the Fifth Amendment, however, he will have many further questions to ask.

Mr. A might ask his lawyer about the background and origin of the self-incrimination clause. He could be told the following. When Elizabeth succeeded Bloody Mary as Queen of England, she established a national church, and her parliament aimed a number of legislative acts at those "sundry wicked and seditious persons, who terming themselves Catholicks, and being indeed Spies and intelligencers . . . hiding their most detestable and devilish purposes under a false pretext of religion and conscience, do secretly wander and shift from place to place within the realm, to corrupt and seduce her Majesty's subjects, and to stir them at sedition and rebellion."⁴²

Catholics and, subsequently, non-conformist Protestants who regularly failed to attend Anglican services were barred from serving as judges, ministers, government employees, university students, schoolmasters, lawyers, sheriffs, court officers, executors, guardians, physicians, or apothecaries. The right of these non-conformists to prosecute suits in court was practically abolished, and it was made treason to convert or be converted to Catholicism.

Additionally, no person was allowed to depart the country without taking an oath repugnant to conscientious

⁴⁰ 167 F.2d 241 (D. C. Cir.), *cert. denied*, 334 U. S. 843 (1948).

⁴¹ *Id.* at 246.

⁴² 35 ELIZ. c. 2.

Catholics and other non-conformists.⁴³

These laws, stringent as they were, were augmented by another statute authorizing the Queen to issue high commissions to persons learned in religious matters. These persons, the "High Commissioners," were directed to investigate the administration of the laws pertaining to religious matters, and to "visit, reform, redress, order, correct and amend all such heresies, errors, schisms, abuses, offenses, contempts and enormities whatsoever, which by any manner of spiritual or ecclesiastical power . . . can or may lawfully be reformed."⁴⁴ The High Commissioners, who adopted the practice of sitting together and became known as the Court of High Commission, had authority to correct and amend heresies only by means of "spiritual or ecclesiastical power". These heresies, errors and schisms which could not be corrected through the use of spiritual means, were referred to the Court of Star Chamber, a body of high ranking ecclesiastical and lay persons to whom matters of special legal import had historically been referred.⁴⁵ The activities of these two bodies,

⁴³ 1 ELIZ. c. 1; 5 ELIZ. c. 1; 35 ELIZ. c. 1,2; see also, Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination*, 21 VA. L. REV. 763, 771-72 (1935).

⁴⁴ JOHN SOUTHERDEN BURN, *THE HIGH COMMISSION, NOTICES OF THE COURT AND ITS PROCEEDINGS* (1895). Mr. Burn says in his preface that "the whole course of the High Commission from its first arrest or summons, to the ultimate ruin, or death of its unfortunate victim, was a series of unconstitutional and illegal cruelties — refusing a copy of the charges, insisting on the oath *ex-officio*, suspending, depriving, degrading, and ruining the poor wretch — occasionally sending to prison even the lawyer who dared to defend the accused, or to question the power of legality of the Court."

⁴⁵ BURN, *THE STAR CHAMBER — NOTICES OF THE COURT AND ITS PROCEDURE* (1870). This court originated "to bridge such stout noblemen and gentlemen who would offer wrong by force to any meaner man; who cannot be content to demand and defend the right by order of law." The local English judges found it impossible to enforce the law when powerful lords waged war on one another or deprived lesser men of their property. Accordingly, it was early decreed that "the chancellor and treasurer of England . . . and keeper of the King's privy seal . . . calling to them a bishop and a temporal lord of the King's most honourable council, and the two chief justices of the King's bench and common pleas" should exercise jurisdiction over those

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the Court of High Commission and the Court of Star Chamber, largely account for the privilege against self-incrimination. Typically, a subpoena was issued to one suspected of heresy, error or schism, and the unfortunate victim, generally a leading Catholic, Quaker, Methodist, or other religious dissenter, was required to answer interrogatories concerning these matters. If he admitted to unorthodox religious views or activities, he was effectively

legal matters which were beyond the power of local judges. Statute of 3 HEN. 7 c. 1. These gentlemen conducted their legal business in a "place which is called the Star Chamber, either because it is full of windows, or because at the first all the roof thereof was decked with images of stars gilded," and which became known as the Court of Star Chamber.

The early reported cases show that this court confined itself to handling matters above and beyond the power of local magistrates. Thus, there are records of punishments:

a. Against Sir John Redcliffe for carrying away the prioress of Michell Kynton, and taking away the goods of that Priory;

b. Against Sir Thos. Lucas for inciting riots and wasting the goods of the Monastery of Langley;

c. Against Sir Rewland Egerton for failing to keep the peace with the inhabitants of Brownacres; and

d. Against Sir Robt. Constable, Knt. for ravishing and taking away the body of Agnes Crisacre, the King's ward.

Gradually, however, the court moved into other areas and in the course of time sent three poor fiddlers to the whipping post for playing on Sunday; punished the sword-bearer of York for stopping in the street to laugh at a libelous song; and punished one Barnard Nicholas for "fortune telling." Eventually the court concerned itself almost exclusively with things religious.

This court's most famous case, for purposes of the Fifth Amendment, was the proceeding against John Lilburne, a leading Quaker minister who was accused of printing and publishing a libelous and seditious book entitled "News from Ipswich".

In the common law courts of that day the criminal proceedings began with an indictment by a grand jury. The Court of Star Chamber and the Court of High Commission, however, staffed as they were with experts in the field of religious matters, instituted suits *ex officio promotio* (upon presentment regarding the crime by informers), or *ex officio mereo* (by virtue of their office of judge), but in any event, *ex officio* and without the aid of a grand jury. When the court called John Lilburne to take an oath to answer interrogatories concerning the publishing of the alleged heretical book, he refused and said it was "the oath *ex officio*, and that no free born Englishman ought to take it, not being bound by the law to accuse himself"; whence he was called ever after "Free-born John".

All of the above is taken from Burn's short treatise on the Star Chamber.

barred from earning a living. If he denied these views or activities, the courts had power to and often did summarily convict him of perjury. If he refused to answer, he was imprisoned for contempt. His only hope was that a strong "common law" judge would be persuaded that this quasi-criminal matter should begin with grand jury action, and issue a writ of habeas corpus or prohibition.⁴⁶

Gradually, as Catholic King followed Protestant Queen, and the instrumentality of the two courts was used alternately against Catholic and Protestant, the ecclesiastical courts and their procedure became obnoxious to all the people of England. This dissatisfaction was manifested in

⁴⁶ "The recognized means of formal communication between the common law and the High Commission courts were the writs of prohibition and consultation. Common law judges might issue a prohibition to stay proceedings in the ecclesiastical court on the grounds that they were dealing with matters not of ecclesiastical cognizance. The decision as to the proper jurisdiction was made at a hearing in the common law court after the writ had been returned by the officer making service on the ecclesiastical judge. If the common law judges decided that the matter properly belonged to the ecclesiastical court, they issued a second writ of consultation, which allowed the case to continue at ecclesiastical law; but if they determined that it contained matters of temporal cognizance, the prohibition stood. To the dismay and fury of the bishops, Coke proceeded to issue an amazing series of prohibitions, not on the basis of lack of jurisdiction, but on the ground of illegal procedure, viz., the use of the oath *ex officio*." Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England*, in *ESSAYS IN HISTORY AND POLITICAL THEORY* 21 (1936).

Miss Maguire had reference to the early years in the seventeenth century.

Modern courts have refused to enjoin congressional committees from holding hearings even when it is alleged and admitted for purposes of argument that the committee intends to utilize and publicize information it received illegally, *Hearst v. Black*, 87 F.2d 68 (D.C. Cir. 1936); even when it is alleged and admitted that the subpoena commanding the witness to appear does not notify him of the subject matter under inquiry, *Mims v. McCarthy*, 209 F.2d 307 (D. C. Cir. 1953); and even when it is alleged that the committee is acting beyond the scope of its authority and in an area exclusively assigned by the Constitution to the executive department of the government, *Fischier v. McCarthy*, 117 F. Supp. 643 (S. D. N. Y. 1954). The rationale of these cases is that the courts will not presume that congressional committees will act illegally, and that if the committees do act illegally, witnesses need not cooperate and can raise this issue as a matter of defense if indicted for contempt.

the Act of 16 CAR. c. 11 (1640) which repealed the statutes authorizing and establishing the Courts of High Commission and Star Chamber. The statute provided that:

. . . no archbishop, bishop . . . exercising spiritual or ecclesiastical power, authority or jurisdiction, by any grant, license or commission of the King's majesty . . . shall . . . give or administer . . . any corporal oath, whereby he or she shall or may be charged or obliged to make any presentment of any crime or offense, or to confess or accuse himself or herself of any crime

It is to be noted that the above statute did not altogether nullify the practice of requiring persons to accuse themselves; it merely prohibited those courts where the practice existed under the oath *ex officio* from continuing to punish persons for refusing to accuse themselves of "any crime, neglect, matter, or thing". Nevertheless, the statute reflected the spirit of the times, and it soon became a firmly embedded principal in those courts following the common law that no man need accuse himself of any crime.⁴⁷

If the doctrine was embedded in the common law, Mr. A might ask, why did the founding fathers consider it necessary to insert it into the Constitution. His lawyer might give this reply. The doctrine against self-incrimination was recognized by the common law and followed by the common law courts in England and America; but there were other courts, such as Admiralty courts, that did not follow the common law and consequently did not recognize this right. It was the Admiralty court that was given jurisdiction to enforce the Stamp Act, the Townsend Act, and other laws of trade to which the colonists ob-

⁴⁷ "You are not bound to answer me, but if you will not, we must prove it." Trial of Scroop, 12 CAR. II, 5 STATE TRIALS 1034, 1039 (Howell 1816); "It is a maxim in your own law, '*Nemo temetur accusare seipsum*,' which if it be not true Latin, I am sure it is true English; 'That no man is bound to accuse himself.'" Trial of Penn and Mead, 22 CAR. II, 6 STATE TRIALS 951, 957 (Howell 1816); see also, WIGMORE, EVIDENCE § 2250 (3d ed. 1940).

jected. The Admiral and his officers followed the practices of the old Court of High Commission in that, without referring the matter to a grand jury, they issued subpoena to merchants who were directed to answer, under pain of contempt, whether or not they had paid the hated taxes. The renewal of inquisitorial judicial methods at the eve of the American Revolution is in part responsible for the provision in the Fifth Amendment that "no man shall be compelled in any criminal case to be a witness against himself". This time, the method and procedure of inquisitorial proceedings were abolished, not, as in 1651, merely the instrumentalities currently utilizing this method and procedure of operation.⁴⁹

Mr. A then might ask his lawyer if the self-incrimination clause is not intended to protect the guilty as, in Elizabethan England it was designed to protect the religious non-conformist, and in immediate pre-revolutionary days, the tax delinquent. The lawyer might reply that the self-incrimination clause has a much deeper purpose: to protect the guilty and innocent alike from arbitrary govern-

⁴⁸ Pittman, *supra* note 20, at 783.

⁴⁹ See *Counselman v. Hitchcock*, 142 U. S. 547, 562 (1892). This was one of the earliest Supreme Court cases which interpreted the Fifth Amendment. A witness was called before a grand jury investigating the alleged violation of the Interstate Commerce Act by three identified railroads. The witness was asked if he had received secret rebates from any of these railroads, and refused to answer on grounds of the Fifth Amendment. The Government argued before the Supreme Court that the witness had no right to rely upon the Fifth Amendment as the witness had not been asked to testify against himself in "a criminal case". To this contention the Court replied:

"It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. 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. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard." 142 U. S. 562 (Emphasis added.)

mental procedure.

The founders of our federal government were too close to oppressions and persecution of the unorthodox to trust even elected officials with unlimited powers of control. From this distrust emerged the first ten Amendments. The First Amendment was designed to shelter the people's liberties of religion, speech, press, and assembly from frontal attack by the federal government. Other amendments were designed to shelter those who spoke or wrote in an unorthodox or unpopular vein from secret arrest and trial, unlawful detentions, arbitrary punishment, and forced confessions—the indirect methods of restraining the rights protected by the First Amendment. In short, the “compulsory testimony” and other clauses of the Fifth Amendment, as well as the provisions of the Fourth, Sixth, and Eighth Amendments, are designed to reinforce and augment the First Amendment in preventing would-be tyrants from exercising any of the historic methods of abridging freedom. Consequently, it is no more logical to point the finger of guilt at one who relies upon the “compulsory testimony” clause of the Fifth Amendment than it is to point the finger of guilt at one who demands his rights under the Fourth Amendment to be free from illegal search and seizure, or at one who demands his rights under the Sixth Amendment to a speedy and public trial.⁵⁰

⁵⁰ The most recent judicial determination that the law permits no inference of guilt from a plea of the Fifth Amendment is *Noto v. United States*, 76 Sup. Ct. 255 (1955). Noto was indicted under the Smith Act, and charged with membership in the Communist Party from 1946 until November 8, 1954, with knowledge of the Communist Party's alleged illegal purposes. The district court set bail at \$30,000 because Noto refused to disclose any information as to his whereabouts between September, 1951, and August, 1955, resting his refusal on the Fifth Amendment privilege against self-incrimination. Mr. Justice Harlan reduced the bail to \$10,000, and said at 257: “But it would seem that in fixing bail, as in a criminal trial, an unfavorable inference should not be drawn from the mere fact that the Fifth Amendment privilege has been invoked.”

Mr. A might ask if this laudable purpose has been recognized and could be told that the Supreme Court has described the self-incrimination clause of the Fifth Amendment in these terms:

. . . any compulsory discovery by extorting the party's oath, or compelling the production of his private books or papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.⁵¹

Forty-six of the forty-eight states have adopted "self-incrimination" clauses in their constitutions; the two remaining states, New Jersey and Arkansas, have accepted the doctrine by statute and judicial decision.

Should Mr. A ask if the doctrine has been construed in a manner to effectuate its purpose, he could be told that the privilege against self-incrimination generally has received sympathetic treatment by the courts. It has been extended beyond those answers which would in themselves support a conviction and has been made applicable to answers which would merely furnish a link in the chain of evidence needed to prosecute. Accordingly, the Supreme Court has sustained the right of witnesses to refuse to answer questions concerning (1) employment of the witness by the Communist Party,⁵² (2) the attendance of others at Communist Party meetings in the long past,⁵³ and (3) even concerning associations with persons or organizations charged with Communist leanings and affiliations.⁵⁴ Answers to these questions would not serve to

⁵¹ *Boyd v. United States*, 116 U. S. 616, 631-632 (1886).

⁵² *Blau v. United States*, 340 U. S. 159 (1950).

⁵³ *Brunner v. United States*, 343 U. S. 918 (1952).

⁵⁴ *Emspak v. United States*, 349 U. S. 190 (1955).

support a conviction under a federal criminal statute,⁵⁵ but the answers might serve as clues leading to other facts which might so serve. The witness is given the privilege of refusing to answer, even though "the witness if subsequently prosecuted could perhaps refute any inference of guilt arising from the answer."⁵⁶

However, even though the self-incrimination clause of the Fifth Amendment has been broadly construed, and is designed to protect the innocent as well as the guilty, a witness need not avail himself of its protection. If he desires to cooperate with a congressional committee, he may do so, even though his testimony might serve to incriminate him. Furthermore, as will be discussed more fully hereafter, once the witness so thoroughly incriminates himself that additional information would be harmless to him, he is not then permitted to stop short in his testimony, but must disclose those facts which might be

IV

PLEADING THE FIFTH AMENDMENT TO CONCEAL THE IDENTITY OF OTHERS AFTER TELLING ABOUT OWN ACTIVITIES: RISK OF INDICTMENT.

Mr. A then might say to his lawyer that he will rely upon the Fifth Amendment, but, to counteract the harmful publicity that might result, he would like to make it clear during his public testimony that he ceased all connections with the Communist Party over fifteen years ago, and that there was nothing illegal about the activities

⁵⁵ The Internal Security Act of 1950 STAT. 987, 992 (1950), 50 U.S.C. § 783 (1952), expressly provides: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation . . . of this section or of any other criminal statute."

⁵⁶ *Emspak v. United States*, 349 U. S. 190, 201 (1955).

of his group. He might also add that he is not ashamed of his college-day membership in the Communist Party, and, while not publicizing the fact, has never tried to conceal it from his employers and close associates. He then asks if he can testify about his own activities and still claim the protection of the Fifth Amendment when asked about the identity of his old associates.

Mr. A's lawyer would tell him that the committee takes the view that any witness who admits participation in a Communist group thereby loses the right to rely upon the Fifth Amendment when asked about the identity of others.⁵⁷ Mr. A's lawyer might express the opinion that the

⁵⁷ The position of the committees is demonstrated by the colloquy which occurred on June 3, 1953, between a witness and the chairman of the senate subcommittee investigating subversive influence in the educational processes. The following took place after the witness testified that he had joined the Communist Party in 1936 while a student at the University of Pennsylvania and resigned from the Communist Party in 1943 when he left a research post at Yale University to accept a governmental position.

Mr. MORRIS (Committee Counsel). "Mr. [Witness] will you tell us who the senior faculty member of the unit at the University of Pennsylvania was?"

Mr. [WITNESS]. "I regret to say that I must decline to answer this question on three grounds:

"One, on the ground of my privilege against self-incrimination under the Fifth Amendment of the Constitution; secondly, a moral ground, that it is deeply repugnant to one of my strongest convictions to play the role of informer; and thirdly, because I challenge the authority of this committee to conduct this inquiry."

(There was a demonstration by the audience.)

The CHAIRMAN. "We will have order or we will have to clear the room. Now, Mr. Reporter, what was the first ground?"

(The record was read by the reporter, as follows: "On the ground of my privilege against self-incrimination.")

The CHAIRMAN. "Very well. The Committee recognizes your right to refuse to answer this question under the Fifth Amendment of the Constitution of the United States, and that is the policy of this committee, but in this particular case you have opened up this field of inquiry. You have stated that you were a member of the Communist Party; that you belonged to a cell at the University of Pennsylvania; and when you went to Yale you joined there, you belonged to a cell there. . . .

"Now, you have attorneys here. You have opened up this field and I do not believe you are allowed to be the judge when you pull the curtain down and refuse to give this committee testimony. You have opened the field up. We are entitled to know."

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committees are wrong in believing that Mr. A, by telling about his own activities, would thereby waive his right to refuse to identify others on grounds of the Fifth Amendment. Mr. A's lawyer would have to add that Mr. A must be prepared for an indictment, trial, and possibly conviction and appeal before the matter could be finally resolved.⁵⁸

Mr. A's lawyer would outline the argument on this point somewhat as follows. Society, as a general proposition, is entitled to the testimony of every man on matters of public concern.⁵⁹ Society, on the other hand, also believes that the value of obtaining a man's testimony does not outweigh the individual right of a person to remain free from giving testimony that might actually and fac-

(Witness confers with attorneys.)

The CHAIRMAN. "So I direct you to answer the question."

Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, Subversive Influence in the Educational Process, 83d Cong., 1st Sess., pt. 12 at 1085 (1953).

⁵⁸ During 1953 and 1954 some fifteen witnesses testified before the House Committee on Un-American Activities, the Senate Judiciary Subcommittee Investigating the Administration of the Internal Security Act, or the Senate Governmental Operations Permanent Subcommittee on Investigations, concerning their own associations with the Communist Party, and then refused to identify others. At least ten of these were cited for contempt. See cases cited note 20, *supra*.

⁵⁹ "What then? Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves — are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary — they and everybody. . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a halfpenny worth of apples, and the chimney-sweeper or the barrow-woman were to think it proper to call upon them for their evidence, could they refuse it? No, most certainly."

Bentham, *Draft For a Judicial Establishment*, in 4 WORKS 320 (Bowring's ed. 1827), as quoted in 8 WIGMORE, EVIDENCE § 2191 (3d ed. 1940).

tually tend to increase the risk of prosecution.⁶⁰ These two conflicting societal interests have been resolved in the following way. The recalcitrant witness is not required to prove how the testimony sought would actually incriminate him, for disclosure of these facts would strip him of the privilege which the law allows, and which he claims. On the other hand, it is not for the recalcitrant witness to decide whether the testimony would actually incriminate, for this would place in his hands the power to deprive society of necessary information which is actually harmless to him. The decision is that of the judge. If the judge decides that the testimony would actually and factually reveal evidence detrimental to the witness, he is not required to answer. If the judge decides that the testimony could not be detrimental to the witness, either because it does not tend to link him with a crime, or because the witness has so incriminated himself by prior testimony that additional harmful testimony would be *de minimus* then the witness must testify or suffer the consequences. This general proposition was established by Mr. Chief Justice Marshall in the celebrated case of *United States v. Burr*,⁶¹ and has been followed ever since. A few illustrations make this clear.

In *McCarthy v. Arndstein*,⁶² the Supreme Court held that a bankrupt, merely by testifying as to the location of some of his assets did not waive his Fifth Amendment right to refuse to answer further questions concerning those assets. The court said that “. . . where the previous

⁶⁰ “. . . it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person . . . is bound to perform upon being properly summoned. . . . The duty, so onerous at times . . . is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself, entitling the witness to be excused from answering anything that will tend to incriminate him. . . .” *Blair v. United States*, 250 U. S. 273, 281 (1919).

⁶¹ 25 Fed. Cas. 38, No. 14,692 (e) (C. C. D. Va. 1807).

⁶² 262 U. S. 355 (1923).

disclosure by an ordinary witness is not an actual admission of guilt or incriminating facts, he is not deprived of the privilege of stopping short in his testimony wherever it may fairly tend to incriminate him.”⁶³

In *Rogers v. United States*,⁶⁴ the Supreme Court held that a witness who had admitted to being the treasurer and custodian of the books for the Communist Party in Denver, Colorado, could not refuse on grounds of the Fifth Amendment to disclose acquaintance with her successor. The court said this:

As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a “real danger” of further incrimination. After petitioner’s admission that she held the office of Treasurer of the Communist Party of Denver, disclosure of acquaintance with her successor presents no more than a “mere imaginary possibility” of increasing the danger of prosecution.⁶⁵

In *Bart v. United States*,⁶⁶ the court of appeals held that a witness who had admitted to having been the recent head of the Communist Party in Illinois and Pennsylvania could not rely upon the Fifth Amendment when asked to name the officials of the Ohio section of the Communist Party fourteen years previously. The additional information, said the court, “. . . could not increase the danger of incrimination already incurred in his prior testimony.”⁶⁷

In *United States v. Nelson*,⁶⁸ the district court, distinguishing the *Rogers* case, held that a witness, by identifying himself as a “well known Communist,” did not thereby waive his Fifth Amendment right to refuse to answer

⁶³ *Id.* at 359.

⁶⁴ 340 U. S. 367 (1951).

⁶⁵ *Id.* at 374.

⁶⁶ 203 F.2d 45 (D. C. Cir. 1952), *rev'd on other grounds*, 349 U. S. 219 (1955).

⁶⁷ *Id.* at 52.

⁶⁸ 103 F. Supp. 215 (D.D.C. 1952).

thirty-five questions relating to activities and associations within the Communist Party. A conviction under the Smith Act cannot rest upon membership in the Communist Party alone; knowledge that the Communist Party teaches the advocacy of the overthrow of the government by force and violence is also required. The questions the witness refused to answer were designed to show that he had such knowledge, and therefore the plea of further and real incrimination was held to be factually tenable.

All of the above and other cases turn on this single question: is the claim that additional testimony would increase the danger of prosecution factually tenable? If the answer is yes, then the claim must be respected.

Mr. A, by testifying that he had been a member of the Communist Party unit during four college years in the late 1930's, does not thereby incriminate himself. Membership in a Communist organization is not per se a violation of the Smith Act or any other act. The Internal Security Act of 1950 states this in express terms.⁶⁹ The acquittal of two New York so-called "second string Communists," accused of a Smith Act violation, was a vivid demonstration that the law recognizes a distinction between innocent membership in a Communist organization on the one hand, and knowing membership in an organization that teaches the advocacy of overthrowing the government by force and violence on the other hand.⁷⁰ When Mr. A testifies to his own activities, he admits nothing more than "innocent" membership in the Communist Party. As Mr. A's testimony about his own activities is not "incriminating" in the sense that it constitutes an admission of guilt under any federal law, he can still refuse to name others, provid-

⁶⁹ See note 56 *supra*.

⁷⁰ *Flynn v. United States*, 216 F.2d 354, 358, n. 1 (2d Cir. 1954). "An Ohio jury, after 57 hours of deliberation, acquitted four 'second-string' leaders of the Communist Party, while finding that six others had conspired to advocate and teach violent overthrow of the Government." *St. Louis Post Dispatch*, February 11, 1956.

ed that admitted past participation with the others would increase the possibility of a criminal prosecution. Testimony by Mr. A concerning the identity of the other members of his unit, and especially his acquaintance with the secretary of the state-wide party organization, who recently had been convicted under the Smith Act, would subject him to more than a "mere imaginary possibility of increasing the danger of prosecution." This testimony might very well provide evidence with which the Government would have a better chance of convincing a jury that Mr. A had not been an "innocent" member of a legitimate political party, but, to the contrary, had been a member of a Communist group with knowledge that it advocated what was prohibited by the Smith Act.

But, concludes Mr. A's lawyer, an indictment is almost certain if one takes this course.⁷¹

V

WAIVER OF THE FIFTH AMENDMENT BY DENIAL OF ESPIONAGE, SABOTAGE, OR CONSPIRACY TO OVERTHROW THE GOVERNMENT

Mr. A might ask what he may do if the committee asks if he ever engaged in espionage, sabotage, or con-

⁷¹ Professor Marcus Singer appeared in response to a subpoena and testified before the Committee on Un-American Activities that he had been a member of a "Communist Party" study group that had met during the early 1940's to debate the classics of Marxism. He additionally testified that he had "considered" himself a Communist, although he did not remember having a membership card or paying dues. He consistently denied that he or the group had done anything illegal. He refused to say whether or not other designated persons had attended meetings of this group, relying in part upon the Fifth Amendment. He was cited for contempt, indicted, and convicted after the district court ruled that his earlier admissions about participation in a Communist study group "waived" his right to rely upon the Fifth Amendment when asked to identify himself with other persons, some of whom were previously identified before the committee as "a hard corps" members of the Communist Party. *United States v. Singer*, 139 F. Supp. 847 (D.D.C. 1956). An appeal from this conviction is now pending. *Singer v. United States*, appeal docketed, No. 13,299, D.C. Cir.

spiracy to overthrow the government. He tells his lawyer that he had never done such things or heard of such things when he was a member of the Communist Party. Why, he asks, have others relied upon the Fifth Amendment when asked such questions.

The position taken by the committees is as follows: membership in the Communist Party is not illegal, it is merely a clue which might be used in a trial involving the crimes of espionage, sabotage, or conspiracy to overthrow the government. Therefore, when a witness denies having engaged in any of the criminal activities, the clue of membership in the Communist Party could not hurt him in any serious way and he is therefore obligated to answer questions on this score.

Senator McCarthy on many occasions has told witnesses who denied espionage and other criminal activities that they were wrong in relying upon the Fifth Amendment when asked about Communism, and that he was going to recommend that they be cited for contempt.⁷² Such statements, made in the presence of witnesses waiting to testify, must have had some effect on the tenor of their testimony.

Mr. A's attorney might tell him that the committees are wrong, that a mere protestation of innocence does not deprive a witness of the right to refuse to answer questions designed to prove that his innocence is feigned, not real. He can refer to the leading case of *People ex rel.*

⁷² During the testimony of one witness Senator McCarthy said the following:

"For counsel's benefit and so he will understand the position of the Chair, I think the committee has discussed this often enough. I believe the members of the committee substantially agree with me. My position is, just for counsel's benefit, when the witness says she never engaged in espionage, then she waived the Fifth Amendment, not merely as to that question but the entire field of espionage . . . Therefore the witness is ordered to answer." *Hearings Before the Permanent Investigations Subcommittee of the Senate Committee on Government Operations, Subversion and Espionage in Defense Establishments and Industry*, 83d Cong., 2d Sess., pt. 6, at 284-85 (1954).

Taylor v. Forbes,⁷³ where the court held that the president of the Cornell University sophomore class had not waived his right to plead the Fifth Amendment when asked detailed questions concerning the injection of gas into a room where the freshman class was holding a banquet even though he had earlier denied any connection with the unfortunate incident. Mr. A's lawyer could also refer him to the case of *United States v. Costello*,⁷⁴ wherein Augustus Hand held that Costello, by testifying that he had "always upheld the Constitution and laws" and by offering to furnish the congressional committee with a complete financial statement did not by this testimony and offer, thereby lose or waive his right to claim the privilege when asked questions concerning his net worth and total indebtedness.

In addition, one district court recently held that a witness, by denying espionage in general terms, did not thereby "waive" the right to rely upon the Fifth Amendment when asked about specific acts of espionage.⁷⁵ Hoag appeared as a witness before the Senate Permanent Subcommittee on Investigations. She was asked if she would commit sabotage if so ordered by the Communist Party in the event of a war with Russia. She replied: "I have never engaged in espionage nor sabotage. I am not so engaged. I will not so engage in the future. I am not a spy nor saboteur." She then was asked a number of other questions about espionage, and relied upon the Fifth Amendment. For this she was cited for contempt, and indicted. The district court, per Judge Pine, dismissed the indictment, holding that her denial of espionage was non-incriminating in character and did not constitute a "waiver" of the right to rely upon the Fifth Amendment

⁷³ 143 N.Y. 219, 38 N.E. 303 (1894).

⁷⁴ See note 36 *supra*.

⁷⁵ *United States v. Hoag*, 25 U.S.L. WEEK 2028 (D.D.C. July 6, 1956).

when asked specific questions on the same subject matter. Whether or not the congressional committees will recognize this decision remains to be seen.

VI

DENIAL OF COMMUNIST ASSOCIATION IN RECENT YEARS AND SUBSEQUENT REFUSAL TO TESTIFY ABOUT ACTIVITIES IN MORE REMOTE YEARS

Mr. A probably will tell his lawyer sometime during the interview that he would like very much, for public relations purposes, to make it clear that he has not been a member of the Communist Party for the past fifteen years. Can he do this safely? Mr. A's attorney might tell him that the committees have often threatened to cite witnesses for contempt when they deny membership in the Communist Party for a period of years and refuse to answer questions concerning the Communist Party at a prior time. The position of the committees is that the three year statute of limitations protects the witness for all crimes committed prior to that time, and that consequently the witness, by testifying that he has not had association with the Communist Party for a period exceeding three years, has put himself beyond all possible danger and therefore is not entitled to rely upon the Fifth Amendment.

If a witness says that he is not then a member of the Communist Party, and says that he has not been a member of the Communist Party for a period of, say, five years, and that during this five-year period, he has not had association with any member of the Communist Party, and further testifies that he has not engaged in espionage, sabotage, or any other illegal activities, it is difficult to see how, in the light of a three year statute of limitations, he could incriminate himself by answering questions concerning membership in the Communist Party in the long

past.

But consider this approach. The Supreme Court has held that a witness is entitled to claim the protection of the Fifth Amendment when asked about Communist activities that occurred over fifteen years previously.⁷⁶ The Courts

⁷⁶ *Brunner v. United States*, 343 U.S. 918 (1952). Brunner was a witness at a trial in 1950 and refused to answer the following two questions:

- (1) "Between the years 1937 and 1938 were you a member of the Communist Party in Pasadena, California?"
- (2) "Did you, during that same period of time, ever see the defendant at meetings of the Communist Party?"

The lower courts, which were reversed by the Supreme Court, held that Brunner was obligated to answer these questions as an affirmative answer could not incriminate him in any way. The Supreme Court reversed without opinion.

In *United States v. Rosen*, 174 F.2d 187 (2d Cir. 1949), the court sustained the right of a witness before a grand jury in the late 1940's to refuse to answer any questions which might connect him with an automobile which Alger Hiss allegedly had transferred to the Communist Party in 1936. The Court rejected the government's argument that what might have happened in 1936 could not incriminate a man in 1949, and said the following, 174 F.2d at 191-192:

"Granted that the statute of limitations had already run on any substantive crime he may have committed in 1936 when the title to this car was of record transferred to him, he is nevertheless not immune from possible prosecution. The evidence which tends to show that Hiss was guilty of criminal conspiracy may also show, or be supplemented to show, that such conspiracy has continued to exist and to be carried out ever since, or at least to a date not now affected by any statute of limitations. Such evidence may show that appellant was, and perhaps is, a co-conspirator in that or related conspiracies for which he may be prosecuted."

In *United States v. Zwillman*, 108 F.2d 802 (2d Cir. 1940), the Court held that a witness called before a grand jury in 1939 was justified in refusing to disclose the identity of his business associates from 1928 to 1932. The witness had admittedly been in the liquor business until 1933 and argued that the identity of his former associates might involve him in a conspiracy to violate the liquor laws. The court, in sustaining his right to plead the Fifth Amendment, said the following, 108 F.2d at 803:

"If a conspiracy was shown in those earlier years it would continue unless abandoned and the defendant would have to prove abandonment in order to take advantage of the statute of limitations. The defendant claims, and we think with fair reason, that the answers sought would be a link in the chain of incriminating testimony and that he ought not to be compelled to give them — at least if he could show that he was likely to be endangered by answering."

The above three cases clearly support the right of Mr. A to refuse to answer questions relating to his experience and associations in the Communist Party in the late 1930's.

have also held that a protestation of innocence does not waive the right to plead the privilege when asked questions designed to refute such protestations. It could thus be argued that a witness can rely upon the Fifth Amendment when asked about activities in the 1930's, even though he has denied any illegal activities in the late 1940's and 1950's. The theory of the argument would be that the protestations of recent innocence might be false, and the questions relating to activities in the past might be incriminating as designed to obtain clues by which the claimed innocence can be exposed.

But, concludes Mr. A's lawyer, witnesses have been threatened with contempt citations for pleading the Fifth Amendment as to past Communist activities after denying recent Communist activities, and there is a certain risk in taking this course.⁷⁷

VIII

PLEADING THE FIFTH AMENDMENT WHEN ASKED IF INNOCENT MAN HAD BEEN MEM- BER OF ADMITTED COMMUNIST GROUP

Mr. A might tell his lawyer that he had heard about a

⁷⁷ If a witness denies any recent connection with the Communist Party but relies upon the Fifth Amendment when asked about recent espionage and sabotage, he clearly would have the right to rely upon the Fifth Amendment when asked about Communist activities in the past. This course, however, would nullify any "public relations" benefit flowing from denial of recent Communist Party membership.

A witness might also state that he is not now a member of the Communist Party, was not a member one, five, or ten years ago, and rely upon the Fifth Amendment when asked about a prior period. This would convey the impression that he has not been a member for at least ten years; but, if indicted, the witness could argue that he has not denied membership in the Communist Party two, four, or nine years ago; and that the questions relating to past Communist Party membership are incriminating as designed to show this "intermittent" membership. A witness who follows this course, however, will antagonize the Committee members, which is not good for public relations or other purposes.

newspaper man who relied upon the Fifth Amendment when asked if Haywood Broun had been a fellow member of his Communist cell. Mr. A would ask why the witness had done this, as his refusal to answer the question reflected credit on neither the witness nor on Haywood Broun, a well known anti-Communist. The lawyer might reply as follows. Mr. A, the committee now knows the names of the other nine members of your group. Suppose the committee counsel asks you if B was a member of your group, if C was a member of your group, and so on through the complete list of all the other nine members. Suppose that you refuse to answer on grounds of the Fifth Amendment. Suppose further that the committee counsel then asks you if the president of your college was a member of your group. If you answer "no" about him, after pleading the Fifth Amendment when asked about all the others, you would disclose indirectly the information you previously attempted to conceal. You must decide for yourself whether you would rather discredit the name of the president of your college by pleading the Fifth Amendment when asked whether he was in your group or, alternatively, disclose by indirection the membership of your group.

VIII

RELYING UPON THE FIFTH AMENDMENT TO AVOID INFORMING ON OTHERS

Mr. A will have at least one more question for his lawyer — is he legally justified in relying upon the Fifth Amendment when his purpose is to avoid the necessity of informing on others? His lawyer will tell him that an answer to this question is not easy, and probably has several parts.

Almost two hundred years ago Chief Justice Marshall stated the following in answer to Mr. A's problem:

... if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact. If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath⁷⁸

In short, the issue of legality depends on whether the answer tends to incriminate. A witness commits perjury when he pleads the Fifth Amendment to a question which *cannot* incriminate him.⁷⁹

Mr. A is legally justified in refusing to answer all questions concerning his own Communist activities and the identity of his associates. Mr. A might not think candid answers to these questions concerning the long past would tend to incriminate, but the Supreme Court has held otherwise. Moreover, once, as here, it is determined that the questions call for incriminating answers, his reasons or motives for pleading the Fifth Amendment are as immaterial as would be his reasons or motives for answering these questions. Mr. A has a right to answer these questions and *implicate* others; he has a right to refuse to answer and *shield* others.⁸⁰

⁷⁸ United States v. Burr, 25 Fed. Cas. No. 14,692(e) at 40 (C. C. D. Va. 1807).

⁷⁹ Perjury committed before a congressional committee which the witness honestly believes is usurping First Amendment freedoms is no better than perjury committed elsewhere.

⁸⁰ *Ex parte Irvine*, 74 Fed. 954 (C. C. S. D. Ohio 1896); *United States v. Herron*, 28 F.2d 122 (N. D. Cal. 1928); *United States v. St. Pierre*, 128 F.2d 979 (2d Cir. 1942). The Irvine case concerned the right of witnesses called by the prosecution and promised immunity if they would testify against erstwhile employers, to plead the Fifth Amendment when asked questions which might criminate both the witnesses and their old associates. William Howard Taft, then a United States circuit judge, said the following, 75 Fed. at 964-965:

At this point Mr. A might well terminate the interview. Being advised of the possible legal consequences of his various alternatives, he must now decide for himself what he will do when questioned by the congressional committee. He now knows that if he decides not to answer all questions likely to be asked, he must have a sound legal defense, as the committee is very unlikely to refrain from citing him should he refuse to answer on moral grounds alone. He also knows that neither the congressional committees nor the courts that have passed upon the issues have yet recognized any legal defense other than the Fifth Amendment's provision against self-incrimination. He also knows that should he decide to rely upon the Fifth Amendment, the "safe" thing to do is to rely upon the Fifth Amendment when asked about present membership in the Communist Party; when asked about espionage, sabotage or membership in an illegal conspiracy; and when asked about persons whom he has every reason to believe are not

"Finally, it is argued by counsel . . . that there was evidence before the trial court to show that the privilege was pleaded in bad faith, merely to save the defendants, and not to protect the witnesses from a prosecution of themselves. . . . We do not understand any of the American authorities to go so far as to hold that where . . . the court can definitely determine that the question, if answered in a particular way, will form a link in the chain of evidence to establish the commission of a crime by the witness, the court should inquire into the motive of the witness in pleading his privilege."

The Herron case concerned an indictment against Herron for advising a witness in a pending case to rely upon the Fifth Amendment. The Court dismissed the indictment, saying that the witness had a perfect right to rely upon the Fifth Amendment and that it was not illegal for Herron to persuade the witness to do that which he had a right to do.

The St. Pierre case concerned a witness who refused to answer questions before a federal grand jury investigating the commission of federal crimes. St. Pierre refused to answer the questions asked him because of "ninety-five percent fear of revenge and five percent fear of self-incrimination." The appellate court said the following:

"It is immaterial that appellant's chief reason for refusing to answer was his fear of foul play. The fact that he thought himself in greater danger from the man whose name he was asked to disclose than from prosecution for crime did not deprive him of his privilege, if any, though it may have made him firmly determined to claim it."

and never have been associated with the Communist Party. One additional thing is known: that if he relies upon the Fifth Amendment, his position will not be understood by the public generally, and the economic and social consequences may well be severe.

ADDENDUM

Stanley William Henrickson was subpoenaed to appear and did appear before the Committee on Un-American Activities, holding hearings in Seattle, Washington, to investigate Communist activities in the Pacific Northwest area.

Mr. Henrickson appeared without counsel, and in answer to a question, said that he wanted counsel but could not afford one. Thereupon Chairman Velde, after consultation with other members of the committee, said the following:

The Committee had decided to postpone your testimony until tomorrow morning, and the Chair would respectfully request the President of the Seattle Bar Association to ask, as the Courts, I am sure, do here, some competent attorney to confer with this witness and represent him free of charge.⁸¹

The following morning, June 17, 1954, the following occurred:

“Mr. TAVENNER: (Committee Counsel): Stanley William Henrickson will return to the witness stand. . . .

Mr. VELDE: (Committee Counsel): May I read this statement at this time regarding counsel for the witness?

Mr. MIKE COPASS, president of the Seattle Bar Association, talked with me yesterday and very graciously

⁸¹ *Hearings Before the House Committee on Un-American Activities, Investigation of Communist Activities in the Pacific Northwest Area*, 83d Cong., 2d Sess., pt. 5, at 6336 (1954).

agreed, beyond all the requirements of ethics among lawyers, to represent Mr. Henrickson and give him the benefit of legal advice. . . .

Mr. COPASS: I might just say this, Mr. Chairman. The Bar Association was asked yesterday to furnish counsel for a young man who was without funds to furnish his own counsel. . . . I thought it best not to delegate it to someone else, a duty which anybody might hesitate to perform, so I came myself. . . .

Mr. DOYLE: (Member of Committee): Mr. Chairman.

Mr. VELDE: Mr. Doyle.

Mr. DOYLE: Mr. Chairman, I think it is a fact that the distinguished President of the Seattle Bar Association came early this morning, some time ago, in order that Mr. Henrickson might have the benefit of counsel with him before appearing before us this morning. Knowing that is true, I want to compliment the President for doing so. . . .

Mr. VELDE: Proceed, Mr. Counsel.

Mr. TAVENNER: Mr. Henrickson, will you state your name?

Mr. HENRICKSON: Stanley William Henrickson.

Mr. TAVENNER: When and where were you born, Mr. Henrickson?

Mr. HENRICKSON: I was born on November 9, 1921, Everett, Washington.

Mr. TAVENNER: Where do you now reside?

Mr. HENRICKSON: I now reside in Everett, Washington.

Mr. TAVENNER: Have you at any time lived in Seattle?

Mr. HENRICKSON: I want to discuss this question with my counsel. (At this point Mr. Henrickson conferred with Mr. Copass.)

Mr. HENRICKSON: I have discussed this question with my lawyer — counsel, to ask his legal opinion. I asked him if by answering this question it could fall into that category of leading questions or a question which would involve

me in some way. He says it very well might, and I refuse to answer that question and use my privilege under the fifth amendment to the Bill of Rights of the Constitution of the United States. . . ."⁸²

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⁸² *Id.*, pt. 6, at 6380.

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