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Communist Registration and the Fifth Amendment

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COMMUNIST REGISTRATION AND THE FIFTH AMENDMENT

In September 1950, feeling against Communists within the United States was running high. Ten months previously, Alger Hiss had been convicted on two counts of perjury after a full year of charges, countercharges, and libel suits. In October 1949, the eleven top leaders of the Communist Party of the United States had been found guilty of violating the Smith Act. In March of that same year, Judith Coplon and Valentin Gubichev, the latter a Soviet consular official, were convicted of conspiracy and attempted espionage; and Klaus Fuchs, a well-known German-born physicist, was convicted of atomic espionage for the Soviet Union and sentenced by a British court to fourteen years in prison.[1] Against this background of revealed sedition, it was not surprising that Congress cocked a wary eye at the approaching Congressional elections and took action.

The resulting legislation was the Internal Security Act of 1950.[2] Title I of this statute — the Subversive Activities Control Act — requires any Communist-action or Communist-front organization to register with the Attorney General. It enumerates penalties for failure to register, and restrictions on those who do register. According to Zechariah Chafee:[3]

> "If American Communists and fellow-travelers are as dangerous as the supporters of the McCarran Act made out, then there are enough other statutes with teeth to take ample care of these people; so this Act is not needed.
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> "If, on the contrary, those other statutes are not violated by what these people are saying and doing, then they can't be very dangerous; so the McCarran Act is not needed."

Chafee's point is well taken. The United States in 1950 was already amply protected against internal threats.[4] But more important than the necessity of the McCarran Act are the difficult and extremely

1. MORRIS, ENCYCLOPEDIA OF AMERICAN HISTORY 399 (1953).

2. 64 Stat. 987 (1950), 50 U.S.C. §781 (1958). Better known as the McCarran Act, this statute was amended by the Communist Control Act of 1954, 68 Stat. 775, 50 U.S.C. §841 (1958), but the changes were minor and affect none of the fifth amendment issues discussed here.

3. CHAFEE, THE BLESSINGS OF LIBERTY 126 (1956).

4. Laws are presently in effect pertaining to treason, misprision of treason, and seditious conspiracy (18 U.S.C. §§2381-84 (1958)), and to advocating overthrow of the government (18 U.S.C. §2385 (1958)), based on the Smith Act, 54 Stat. 670, (1940). Others require registration of foreign agents (based on the Foreign Agents Registration Act, 52 Stat. 631 (1938), 22 U.S.C. §611 (1958)), and registration of political and civilian military organizations subject to foreign control (18 U.S.C. §2386 (1958), based on the Voorhis Act, 54 Stat. 1201-04 (1940)). These are certainly laws "with teeth."

complex fifth amendment questions raised by the registration provisions. An attempt will be made in this note to explain these difficulties and to show what steps the Supreme Court must take to reconcile them with previous Court decisions and interpretations of the fifth amendment.

COMMUNIST PARTY v. S.A.C.B.

The McCarran Act was passed despite the disapproval of President Truman, who in a strongly worded veto message gave some eminently practical reasons for his opposition. First, section 5 (b) of the statute means that any saboteur would have a free guidebook to many United States defense facilities.[5] Second, because the Communist Party would refuse to register voluntarily, evidence would have to be presented against it and witnesses called; thus the F.B.I. would lose the use of many of its sources, whose chief worth is their anonymity. Third, Truman said: "It is almost certain that from two to four years would elapse between the Attorney General's decision to go before the board with a case, and the final disposition of the matter by the courts."[6] Truman certainly had more foresight than Congress (assuming that Congress tried to look beyond the 1950 elections), but even he was far off. After twelve full years the matter is still not disposed of by the courts.

On November 22, 1950, after the Communist Party had failed to register voluntarily, the Attorney General petitioned the newly formed Subversive Activities Control Board for an order requiring registration of the Party as a Communist-action organization. A long stream of litigation was immediately instituted by the Party, a stream which

5. 64 Stat. 987, 992 (1950), 50 U.S.C. §784 (1958). "(a) When a Communist organization . . . is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful — (1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final — (A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or (B) to hold any nonelective office or employment under the United States; or (C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or (D) if such organization is a Communist-action organization, to engage in any employment in any defense facility . . . . (b) The Secretary of Defense is authorized and directed to designate and proclaim . . . a list of facilities . . . with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall cause such list . . . to be promptly published in the Federal Register, and shall promptly notify the management of any facility so listed . . . . [which shall notify its employees and applicants for employment]."

6. N.Y. Times, Sept. 23, 1950, p. 6, col. 1. Truman included many other reasons for opposing the bill other than the three mentioned here.

both preceded and followed the Board's ultimate order that the Party register according to section 7 of the McCarran Act.[7] Not until October 1960, however, did a case appear before the Supreme Court actually raising the issue of the constitutionality of the statute. That case was *Communist Party of the United States v. Subversive Activities Control Board.*[8]

The Party had attacked the constitutionality of nearly every section of the statute but the Court initially limited consideration to the constitutionality of the registration provisions for the Party — those in section 7. Nor was this the extent of the Court's limitations. The Party had attacked section 7 on six distinct grounds as: (1) a bill of attainder, (2) a restraint on freedom of expression and association in violation of the first amendment, (3) forcing party officers to incriminate themselves in violation of the fifth amendment, (4) a denial of due process, (5) unconstitutionally vague, and (6) bias in the Board such as to preclude the possibility of a fair hearing.[9] The Court refuted or dismissed five of these charges and found the third — the fifth amendment question — to be premature. In a 5-4 decision,

7. 64 Stat. 987, 993 (1950), 50 U.S.C. §786 (1958). "(a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization. (b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization. (c) [The registration shall be made within thirty days of the date of enactment of this statute or of the date on which the organization comes under subsection (a) or (b)]." See also note 33 *infra.*

Following the Board's order, the Party based its appeals on §14(a) of the act: "The party aggrieved by any order entered by the Board under subsection (g), (h), (i), or (j) of section 13 may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of services upon it of such order, a written petition praying that the order of the Board be set aside. . . . [T]he court may order . . . additional evidence to be taken before the Board. . . . [The court may affirm or set aside the order of the Board.] The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari . . . ."

8. The entire history of litigation may be found in Communist Party of the United States v. S.A.C.B., 367 U.S. 1, 19-22 (1961). The preceding cases were Communist Party of the United States v. S.A.C.B., 223 F.2d 531 (D.C. Cir. 1954), *rev'd and remanded,* 351 U.S. 115 (1956); Communist Party of the United States v. McGrath, 96 F. Supp. 47 (D.D.C. 1951), 340 U.S. 950 (1951). Original hearings before the Board lasted well over a year (April 23, 1951 to July 1, 1952). Hearings were reopened twice in the light of subsequent Court findings. In all three hearings the Board came to the same conclusion and ordered the Party to register.

9. Communist Party of the United States v. S.A.C.B., 367 U.S. 1, 81-82 (1961).

delivered June 5, 1961, the Court ruled section 7 constitutional. Significantly, eight of the justices agreed that the registration provisions as applied to the party constituted neither a bill of attainder nor a violation of the first amendment. Only Justice Black dissented on these issues. The dissents of Chief Justice Warren and Justices Douglas and Brennan were based on procedural grounds and on their belief that the Court should have ruled on the fifth amendment question.

THE MCCARRAN ACT REGISTRATION PROVISIONS AND THE SMITH ACT

With the Court's decision that the registration provisions of the McCarran Act are constitutional under the first amendment, the question of their constitutionality centers about the fifth amendment. There are two separate registration provisions: section 7, that requires the registration of a Communist-action or Communist-front organization by its officers, and section 8, that requires the registration of individual members of Communist-action organizations. The chief statute under which a registering Communist would fear prosecution is the Smith Act.[10] This statute on its face makes membership in, organizing, or attempting to organize any society or group such as the Communist Party a crime. It prescribes as maximum penalties twenty years imprisonment, a $20,000 fine, or both. When the McCarran Act was passed in 1950 it appeared that the membership clause of the Smith Act had been repealed; for section 4 (f) of the McCarran Act reads:

> "Neither the holding of office *nor membership* in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section[11] *or of any other criminal statute.*" (Emphasis added.)

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10. 18 U.S.C. §2385 (1958), based on 54 Stat. 670, 671 (1940), as amended, 70 Stat. 623 (1956).

11. 64 Stat. 987, 991 (1950), 50 U.S.C. §783 (1958). These sections provide: (a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship . . . the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment. (b) It shall be unlawful for any officer or employee of the United States . . . to communicate . . . to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government or an officer or member of any Communist organization . . . any [classified] information . . . . (c) It shall be unlawful for any agent or representative of any foreign government, or any officer

But in *Scales v. United States*,[12] relying heavily on *Dennis v. United States*,[13] the Supreme Court decided that the membership clause of the Smith Act applies only to "active membership" — that is, membership with full knowledge of the illegal purposes of the organization and with specific intent to achieve those purposes as soon as possible. This type of membership is to be distinguished from nominal, inactive, or passive membership — the membership per se to which the McCarran Act grants immunity. The Smith Act, instead of being repealed had merely been "clarified."

On the basis of the *Scales* decision it may be argued that since registration necessarily implies only membership per se in a Communist organization while the Smith Act makes only active membership with knowledge and specific intent illegal, officers and members of the Communist Party would not incriminate themselves by registering. Such an argument, however, does not take into account the growing dimensions of the fifth amendment privilege.

The Supreme Court has been very liberal in its interpretation of the amendment since 1892. That year, in *Counselman v. Hitchcock*,[14] the Court extended the amendment's narrow language: — "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." — to include proceedings before a grand jury and stated:[15]

> "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. . . . The object was to ensure 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."

This interpretation of the fifth amendment not only has been reasserted by the Court many times, but broadened still further to cover civil cases[16] and Congressional investigations.[17] So at present the amendment means:[18]

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or member of any Communist organization . . . knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States . . . any information of a kind which shall have been classified by the President . . . as affecting the security of the United States, unless special authorization for such communication shall first have been obtained . . . ."

12. Scales v. United States, 367 U.S. 203 (1961).

13. Dennis v. United States, 341 U.S. 494 (1951).

14. Counselman v. Hitchcock, 142 U.S. 547 (1892).

15. *Id.* at 562.

16. McCarthy v. Arndstein, 266 U.S. 34 (1924).

17. Bart v. United States, 349 U.S. 219 (1955); Empspak v. United States, 349 U.S. 190 (1955); Quinn v. United States, 349 U.S. 155 (1955).

18. Pittman, *The Fifth Amendment: Yesterday, Today and Tomorrow*, 42

> "A witness in *any proceeding whatsoever* in which testimony is legally required may refuse to answer any question, his answer to which might be used against him in a future criminal proceeding, or which might uncover further evidence against him."

An essential element in any prosecution for active membership rests on the presumption of passive membership — membership per se. Active and passive membership are not separate and distinct; the one is an extension of the other. Thus an officer or member who is forced to reveal his membership — even though he be revealing nothing more than membership per se — may be providing the Government with a clue whereby he may eventually be prosecuted under the Smith Act. The Court said in *Blau v. United States*: "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial."[19] Later, in *Hoffman v. United States*, it was stated that the fifth amendment privilege extends to answers "which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[20] Clearly, the fact that the first sentence in section 4 (f) of the McCarran Act forbids prosecutions for membership per se, does not mean that the revealing of such membership cannot lead to a prosecution under the Smith Act.[21]

The Immunity Provision

The next question is whether the second sentence of section 4 (f), in light of the Court's elaboration of the fifth amendment privilege, provides officers and members of the Communist Party with adequate immunity from prosecution under the Smith Act. That sentence reads:

A.B.A.J. 509, 593 (1956). In the light of such stretching by the Court of language in the Constitution, which would seem to admit of no ambiguity, it is difficult to see how the Court could piously state in Ullman v. United States, 350 U.S. 422, 428 (1956): "Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process." Pittman's article offers historical evidence to prove that the Court that decided *Counselman* was utterly unjustified in attributing to the framers of the fifth amendment the intention to cover witnesses "in any investigation."

19. Blau v. United States, 340 U.S. 159, 161 (1950).

20. Hoffman v. United States, 341 U.S. 479, 486 (1951).

21. An interesting explanation of the Court's refusal to rule in *Scales* that §4 (f) repealed the membership clause of the Smith Act is given in Bickel, *The Supreme Court, 1960 Term*, 75 Harv. L. Rev. 40, 112 n.158 (1961): "The Court may have been influenced by the consideration that repeal of the membership clause might not in fact have saved the registration provisions of the Subversive Activities Control Act from unconstitutionality. The advocacy clause of the Smith Act or provisions of other security statutes might still be held to make registration as an officer or member of a 'Communist-action organization' self-incriminatory."

> "The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any violation of any other criminal statute."

The answer definitely is *no.* As an immunity statute, section 4(f) fails to meet the requirements set down in *Counselman v. Hitchcock.* In that case Counselman was called before a grand jury investigating alleged violations of the Interstate Commerce Act.[22] Section 860 of the Revised Statutes provided that no evidence given in testimony could be used against the witness in future prosecutions under any criminal statutes (in the very same way that section 4(f) forbids further use of evidence). When Counselman refused to testify regarding his activities in the field of interstate trade, the Supreme Court struck down his resulting conviction for contempt, and ruled the immunity statute unconstitutional for its insufficiency.[23]

> "It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

And further:[24]

> "In view of the constitutional provision [the fifth amendment], a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates."

Brown v. Walker[25] was the first case in which the Court approved an immunity statute. Congress had passed a law[26] specifically intended to meet the *Counselman* requirements. It stated that witnesses could be required to testify before the Interstate Commerce Commission,[27]

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22. 25 Stat. 855 (1889), 49 U.S.C. §6 (1958).
23. Counselman v. Hitchcock, 142 U.S. 547, 564 (1892).
24. *Id.* at 586.
25. Brown v. Walker, 161 U.S. 591 (1896).
26. Legislation Supplementary to Interstate Commerce Act, 27 Stat. 443 (1893), 49 U.S.C. §46 (1958).
27. 27 Stat. 444 (1893), 49 U.S.C. §46 (1958).

> "[but] no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding."

This statute was held broad enough to render the requirement of testimony constitutional. In later cases[28] the Court has reaffirmed the *Counselman* rule that an "immunity against use" statute is not a constitutionally sufficient grant of immunity.[29]

It would seem consistent with these precedents to recognize that officers and members of the Communist Party have a valid claim of the fifth amendment privilege against self-incrimination when required to reveal information which the government might use as clues to begin investigations leading to their prosecutions under the Smith Act. However, the fact that the provisions of a given act require certain individuals to incriminate themselves does not necessarily mean that the act is unconstitutional. For the act to be invalidated, a situation must exist in which the individual is unable to claim the fifth amendment privilege without incriminating himself by the very act of filing the claim. The basis for this doctrine is *Boyd v. United States*.[30] There the Court held that if a statute compelling the production of potentially incriminating information in violation of the fifth amendment, allows the exercise of the fifth amendment privilege only under circumstances that effectively nullify the amendment's protection, then the statute may be held unconstitutional and void, and not merely unenforceable. The first case in which the Court found insufficient grounds for recognizing a general claim to the fifth amendment privilege was *United States v. Sullivan*.[31] The Court ruled that a man could not lawfully refuse to file an income tax return on the grounds that certain information required by the form would tend to incriminate him. The Court observed that the answers to some of the questions on the tax return would be entirely innocuous; therefore, Sullivan should have filled in as much of the return as he could and claimed the privilege on the rest.

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28. Adams v. Maryland, 347 U.S. 179 (1954); United States v. Bryan, 339 U.S. 323 (1950).

29. It could be argued that the Immunity Statute of 1954, 68 Stat. 745, 18 U.S.C. §3486 (1958), could be invoked by the Attorney General to grant officers or members in the Communist Party complete immunity before they registered. This statute was held constitutional in Ullman v. United States, 350 U.S. 422 (1956).

30. Boyd v. United States, 116 U.S. 616 (1886).

31. United States v. Sullivan, 274 U.S. 259 (1927).

REGISTRATION OF OFFICERS

The opinion of the Supreme Court in *Communist Party v. S.A.C.B.* left the fifth amendment issues unresolved. They were discussed at great length however, not only by Justice Frankfurter in the majority opinion but also by Justices Douglas and Brennan in their dissents. Judge Bazelon also concentrated on the fifth amendment issues in his dissenting opinion when the case was before the court of appeals.[32] The discussions centered around the primary registration provisions of the McCarran Act, sections 7 (a), (b), (c), and (d) — those requiring registration of the organization by its officers.[33] During the period in which both courts decided the case, the registration form required by the Attorney General — mentioned in section 7 (d) — was Justice Department Form ISA-1. Item 11 of this form required the signatures of the "partners, officers, directors, and members of the governing body."[34]

Writing the opinion of the Court of Appeals, Circuit Judge Prettyman held that the officers could not claim the fifth amendment privilege since submitting the registration statement with authenti-

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32. Communist Party of the United States v. S.A.C.B., 223 F.2d 531 (D.C. Cir. 1954).

33. 64 Stat. 987, 993, 994 (1950), 50 U.S.C. §785 (1958). For §§7 (a), (b), and (c), see note 7 *supra*. "[Sec. 7] (d) The registration made under subsection (a) or (b) . . . shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization and the address of its principal office. (2) The name and last-known address of each individual who is at the time of filing of such registration statement, and of each individual who was at any time during the period of twelve full calendar months next preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer. (3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months next preceding the filing of such statement. (4) In the case of a Communist-action organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement. (5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been known by more than one name, each name which such officer or member uses or has used or by which he is known or has been known."

34. Justice Douglas in Communist Party of the United States v. S.A.C.B., 367 U.S. 1, 175 (1961). Whenever referring to Form ISA-1, Justice Douglas cites 28 C.F.R. §11.200, as do his colleagues. Why they do this is puzzling, since no outline of the form or of its requirements appears there. The form is simply designated.

cating signatures would not incriminate them.[35] He cited *United States v. White*,[36] in which the Supreme Court denied an officer of a labor union the right to withhold books and records of the union on grounds that he might be incriminated. In *White* the Court said:[37]

> "Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation. . . . Moreover, the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. . . . But . . . agents or officers . . . in their official capacity . . . have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally. . . ."

By agreeing to become officers, they in effect give up some of their constitutional privileges.

Justices Douglas and Brennan found grounds for distinguishing the *White* case in a 1957 decision of the Supreme Court – *Curcio v. United States*.[38] In *Curcio* the Court made clear that the *White* doctrine applies only to the production and identification of records. Communist registration under the McCarran Act, according to Justices Douglas and Brennan, is much more than such production. First, on the most obvious level, in preparation of the registration statement information must be included that probably would not appear in any of the records of the organization. Specifically, section 7 (d) (5)[39] requires that the officer or officers filling out the statement reveal any aliases they have ever used or are using. Almost inevitably some officer will have an alias he has not disclosed. To require that alias to appear on a record is to require him to reveal it and possibly incriminate himself out of his own mouth. Secondly, the requirement that the officers sign the registration statement raises registration above the level of simple production of records. Another obvious argument is that by signing, officers may make themselves responsible for the accuracy and completeness of the statement and thus subject to the penal-

35. Communist Party of United States v. S.A.C.B., 223 F.2d 531, 546 (D.C. Cir. 1954), *cert. granted*, 351 U.S. 930 (1956).

36. United States v. White, 332 U.S. 694).

37. *Id.* at 699.

38. 354 U.S. 118 (1957).

39. See text at note 33 *supra*.

ties provided in section 15 (b).[40] This latter argument is hardly mentioned, however, in the dissents of Justices Douglas and Brennan and Circuit Judge Bazelon. They felt that the signature requirement puts registration into the category of testimony. In the words of Judge Bazelon,[41]

> ". . . signing is a complete though tacit admission that he [the officer] knows the names of the Party's officers and members, and its organization; that he is himself a member or a confidential employee of the Party; and that he has access to Party books and records. *Blau v. United States* is decisive of this case. The Supreme Court there held[42] that an admission that one is 'employ[ed] by the Communist Party or [has] intimate knowledge of its workings' might furnish a 'link in the chain of evidence needed in a prosecution' under the Smith Act and therefore could not be required."

Neither Judge Bazelon nor Justices Douglas and Brennan pursued the argument any further than this statement that signing is an indication to the Government that the officer in quesion probably could be prosecuted under the Smith Act. What the three dissenters failed to mention is that a large number of Communist Party officers are well-known to the F.B.I. and some even to the public. If the F.B.I. or the Justice Department knows the name of a high officer of the Communist Party, that officer may still claim that he will incriminate himself if he reveals his aliases; but on the basis of Judge Bazelon's interpretation of the act of signing, he should have no claim to the fifth amendment privilege on the grounds that he would be revealing incriminating information by signing. Would the F.B.I. ever assume anything less about someone they knew to be an officer of the Communist Party than Judge Bazelon says that officer would admit by signing? Since section 4 (f) forbids use of the fact of registration in any prosecution[43]— and thus the use of any fact that appears on a registration statement — the officer has a valid claim only if the infor-

40. "[Sec. 15] (b) Any individual who, in a registration statement . . . willfully makes any false statement or willfully omits to state any fact which is required to be stated, or which is necessary to make the statement made or information given not misleading, shall upon conviction thereof be punished for each such offense by a fine of not more than $10,000, or by imprisonment for not more than five years, or by both such fine and imprisonment. For the purposes of this subsection — (1) each false statement willfully made, and each willful omission . . . shall constitute a separate offense; and (2) each listing of the name or address of any one individual shall be deemed to be a separate statement."

41. Communist Party of the United States v. S.A.C.B., 223 F.2d 531, 577 (D.C. Cir. 1954).

42. 340 U.S. 159, 161 (1950).

43. See notes 21-22 *supra* and accompanying text.

mation on the statement provides the Government with new clues or "leads." For a known officer, the mere fact of signing certainly provides none.

The Unknown Officer

The situation is entirely different for an unknown officer of the Communist Party. However many officers the F.B.I. may know, the possibility will always remain that there are some who have preserved their anonymity. If such an officer is forced to reveal his identity as an officer, he may very well be aiding the government with the first step towards an eventual prosecution under the Smith Act. The *Sullivan* decision[44] requiring the filing of an income tax return does not apply to such an officer, for he has no way to claim the fifth amendment privilege on the grounds that he would incriminate himself by registering, without revealing his identity and promptly incriminating himself. Almost certainly, no one who is not an officer would have any reason to claim the privilege since only officers are required by law to register the Party. Here the arguments of the dissenters would seem to apply in full, and the signature requirement would have to be ruled unconstitutional under the decision in *Boyd v. United States*.[45] But the dissenters have overlooked the obvious. Although their argument is that signing should not be required because unknown officers may thus be revealing their identities, section 7 (d) (2) of the McCarran Act requires the names of all officers of the organization to appear on the registration statement.[46] This officer-list requirement makes the arguments about signatures utterly irrelevant. If the registration statement were handed in, the F.B.I. would discover the identity of the unknown officer and make the obvious assumptions about him, whether or not he had signed the statement. Referring to the signature requirement, Judge Bazelon said in his dissent: "The vice of the present statute is not that it compels someone to produce incriminatory documents, but that *it compels someone to identify himself as a Communist Party functionary*."[47] This statement illustrates the misconception. As much as the signature, the officer-list reveals the individual as a Communist Party functionary.

The Justice Department itself apparently realizes how unimportant the signature requirement is. The most recent edition of the registration form for Communist-action or Communist-front organizations was published on July 28, 1961, less than two months after the Court's

44. See note 31 *supra* and accompanying text.
45. See note 30 *supra* and accompanying text.
46. See text at note 33 *supra*.
47. 223 F.2d 531, 579 (D.C. Cir. 1954), *cert. granted*, 351 U.S. 930 (1956).

decision in *Communist Party v. S.A.C.B.*[48] Probably noting the attention given to the signature requirement in the dissents, the Justice Department made this requirement entirely optional. The officer-list requirement, however, remains essentially unchanged.[49]

The Unknown Member

The list is the crucial provision with regard to registration of a Communist organization by its officers. But another provision of the McCarran Act has a similar yet also unreasonable effect upon individual members (non-officers) of Communist-action organizations. This provision is section 7 (d) (4), which requires that the registration statement of a Communist-action organization include a list of all who were members during the previous year.[50] In the new registration form — Form IS-51 — this requirement appears as Item 11 (b). To understand the paradoxical effect of this provision on members of Communist-action organizations, it is necessary to look at section 8 of the McCarran Act.

Section 8 (a) requires that members of Communist-action organizations register after a certain time if their organization fails to register through its officers; section 8 (b) requires the members to register if the organization has registered but neglected to include their names in its membership list.[51] The form on which members of Communist-action organizations are required to register is, at present, Justice

48. June 5, 1961.

49. Copies of this present registration form, Justice Department Form IS-51 and others mentioned in this note, Forms IS-52 and IS-53, may be obtained by writing the United States Department of Justice, Internal Security Division, Washington 25, D.C. This change in the signature requirement has the added advantage of avoiding any issues over whether this requirement makes the officers directly responsible for the accuracy and completeness of the registration statement. The willingness of the Justice Department to make this change may be attributed to §7 (h) of the Act. This subsection requires designated officers to register the Party if the Party itself fails to register pursuant to §7 (a) or (b) within thirty days of the order of the Board. Here responsibility for failure to register is pinned squarely on individuals. The designated officers will be subject to the penalties of §15 (a) (2) and §15 (b). (See text at note 40 *supra*, and text at note 56 *infra*.) Of course, it may happen that an officer, such as a secretary, is designated when his identity is unknown. In such a case, the arguments given in the text with respect to the fifth amendment and the officer-list requirement apply fully to these officers.

50. See text at note 33 *supra*.

51. "Sec. 8 (a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring . . . [registration] as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered . . . as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member . . .

Department Form IS-52 (Ed. August 28, 1961). This form requires the following information:[52]

"1. Name of the Communist-action organization of which Registrant was a member within the preceding twelve months.
2. (a) Name of Registrant.
(b) All other names used by Registrant during the past ten years and dates when used.
(c) Date of birth.
(d) Place of Birth [*sic*].
3. (a) Present business address.
(b) Present residence address.
4. If the registrant is now or has within the past twelve months been an officer of the Communist-action organization listed in response to question number 1:
(a) List all offices so held and the dates when held.
(b) Give a description of the duties or functions performed during tenure of office.

The old registration form — Justice Department Form ISA-2 — required a great deal more information.[53] However, the yielding of this information would tend to incriminate any unknown, active member of the Communist Party. The *Sullivan* decision has no application here, as it had none to officers who are unknown. To file the registration statement and claim the privilege, an unknown, active member would still have to put his name on the form; filing a form anonymously cannot properly be termed registration.[54] Since no person who is not a member of a Communist-action organization is required by law to register, the very fact that some person does register, even though claiming the fifth amendment privilege for all but his name, could be incriminating.[55]

The constitutionality of section 8, however, is saved by the other provisions of the act. Section 15 (a), which provides penalties for

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whichever is later, register with the Attorney General as a member of such organization. (b) Each individual who is or becomes a member of any organization which he knows to be registered as a Communist-action organization under section 7 (a) of this title, but to have failed to include his name upon the list of members thereof filed with the Attorney General . . . shall, within sixty days after he shall have obtained such knowledge, register with the Attorney General as a member of such organization. (c) The registration made by any individual . . . shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe."

52. See text at note 49 *supra*.

53. 28 C.F.R. §11.207 (Supp. 1961).

54. On Form IS-52 there is no provision for anonymous claims of the fifth amendment privilege or for an authorized person to make the claim for an individual. Anyway, could a blank registration statement with only the words "I claim the fifth amendment privilege" typed on it have any significance at all?

55. See also Justice Frankfurter in the opinion of the Court, Communist

failure to register, becomes operative only "if there is in effect with respect to any organization or individual a final order of the [Subversive Activities Control] Board requiring registration under section 7 or section 8 . . . ."[56] Before there can be such an order, the Attorney General must offer evidence before the Board, proving that the individual is in fact a member.[57] The final order of the Board must be directed specifically toward the individual in question.[58] Thus any member of a Communist-action organization who is in doubt about his anonymity need only wait. If the Attorney General files a petition with the Board that an order be issued requiring him to register, he need not even appear before the Board. The Board will still enter the order,[59] and this order will automatically become final unless the member files for review.[60] Knowing that the Attorney General is already aware of his membership, the member now has no reason not to register. He may still, of course, claim the fifth amendment privilege and omit everything except his name. If the Justice

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Party of the United States v. S.A.C.B., 351 U.S. 115, 116 (1956).

56. "Sec. 15 (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title — (1) such organization shall, upon conviction of failure to register . . . or to keep records as required by section 7, be punished for each such offense by a fine of not more than $10,000, and (2) each individual having a duty under subsection (h) of section 7 of this title to register or to file any registration statement . . . on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to register or to file any such registration statement . . . be punished for each such offense by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense."

57. "Sec. 13 (a) Whenever the Attorney General shall have reason to believe that any organization [or individual] which has not registered . . . is in fact required to register . . . he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register. . . ."

58. See Bickel, *The Supreme Court, 1960 Term,* 75 HARV. L. REV. 40, 109-10 (1961); Note, 51 COLUM. L. REV. 606, 619-20 (1951).

59. "[Sec. 13 (d)] (2) Where an organization or individual declines or fails to appear at a hearing accorded to such organization or individual . . . the Board may . . . enter an order requiring [registration] . . . ."

60. "[Sec. 14] (b) Any order of the Board issued under section 13 . . . shall become final — (1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or (2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Board has been affirmed or the petition for review dismissed by a United States Court of Appeals, and no petition for certiorari has been duly filed; or (3) upon the denial of a petition for certiorari, if the order of the Board has been affirmed or the petition for review dismissed."

Department rejects his claim, saying that it already knows everything about him that is required by the registration form, and proves to him that it does, he will have no reason not to complete the entire form. Of course, when registration reaches this stage it is utterly worthless. If members only can be required to report that which the government already knows about them, why bother with registration at all?

The above extreme stage of registration is reached only under section 8 (a) if the officers fail to register the organization pursuant to section 7. Section 8 (b)[61] concerns a different situation and illustrates the paradox involved in a constitutional interpretation of both section 8 (a) and the membership list requirement, section 7 (d) (4).[62] Assume that a man joins a Communist-action organization after the Party has already registered for that year. If he remains unknown, no final order of the Board will ever become attached to him, so he is under no obligation to register. If he does register, he will incriminate himself. If he does not register, the organization will have to register him the next year in its annual report.[63] In short, either he incriminates himself, or the Party will do it for him.

The White Doctrine

The odious provisions of the McCarran Act are the membership list requirements — one for officers, applicable to both Communist-action and Communist-front organizations, and one for members, applicable only to Communist-action organizations. With the present registration form for the Party — Form IS-52 — a known officer could fill out the entire form himself and file it in person. In this situation no unknown officer would be incriminating himself by personally revealing his identity. Or let us assume that the act is amended so that officers need not list their own names unless they are already known to the Government. In either of these cases the provisions of the act would remain no less unreasonable.[64]

61. See text at note 51 *supra*.

62. See text at note 33 *supra*.

63. Section 7 (e) requires that the registered organization file annual reports containing the same information as the initial registration statement. With specific regard to officer lists, membership lists, and signatures, the form for the annual reports, Justice Department Form IS-53, is in fact identical to the initial registration form — Form IS-51.

64. It might be argued that even known officers of the Communist Party would incriminate themselves by submitting membership lists, since they would be revealing their co-conspirators. Thus the officers could refuse to submit a complete membership list by claiming the fifth amendment. This argument, however, seems to have been refuted in Rogers v. United States, 340 U.S. 367 (1951). There the Court denied the right of petitioner, an officer in the Communist Party, to withhold the names of other Party officers on the grounds that she would be

To quote Justice Douglas in his dissent:[65]

> "If Congress can through use of the registration device compel disclosure of people's activities that violate federal laws, the Fifth Amendment is cast into limbo.
>
> "As I have said, each person required to be listed in the registration statement, were he to be brought before his interrogators, could not be compelled to admit what the statute here requires petitioner [the Communist Party] to set forth at length. The only difference between compelling each member and officer and between compelling petitioner is the thin 'veil' of petitioner's fictitious juridical personality . . . .
>
> "The present requirement for the disclosure of membership lists is not a regulatory provision, but a device for trapping those who are involved in an activity which, under federal statutes, is interwoven with criminality . . . . I do not see how the Government that has branded an organization as criminal[66] through its judiciary, its legislature, and its executive, can demand that it submit the names of all its members — unless it grants immunity for the disclosure."

In spite of Justice Douglas's plea, the "thin 'veil' of petitioner's fictitious juridicial personality" of which he speaks has more the appearance of a stone wall; the principle that associations, whether corporate or not, are not protected by the constitutional privilege against self-incrimination is well established. It was first applied to a corporation in *Hale v. Henkel*[67] and to an unincorporated association — a labor union — in *United States v. White*.[68] Taken out of context, the quotation from *White* — "Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization. . ."[69] — seems to be an absolute and

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incriminating herself by revealing co-conspirators. The Court said, at 375: "Of course, at least two persons are required to constitute a conspiracy, but the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown." Thus petitioner could not withhold other officers' identities on the grounds which she claimed. For further comment on *Rogers*, see text at note 74 *infra*.

65. 367 U.S. 1, 182-83 (1961).

66. See Barenblatt v. United States, 360 U.S. 109, 128 (1959); [judiciary]. Communist Control Act of 1954, 68 Stat. 775, 50 U.S.C. §841 (1958); [legislative]. List of Organizations, App. A, 5 C.F.R., pt. 210 (1949 ed.); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 124-29 (1951); [executive].

67. 201 U.S. 43 (1906). See also Essgee Co. v. United States, 262 U.S. 151 (1923); Wilson v. United States, 221 U.S. 361 (1911).

68. 322 U.S. 694 (1944). See also Curcio v. United States, note 38 *supra* and accompanying text; Shapiro v. United States, text at note 74 *infra*.

69. See the quotation from *White*, notes 36-37 *supra* and accompanying text.

irrefutable denial that the Communist Party, as an organization, can ever claim the fifth amendment privilege for itself. However, the Court's further remarks show that the *White* doctrine was originated only to prevent *officers of legal organizations that are subject to government regulation* from refusing to produce records of the organization on the grounds that they or the organization might be incriminated. In ruling that labor unions cannot invoke the fifth amendment privilege, the Court concluded:[70]

> "The test . . . is whether one can fairly say under all circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common group interests only."

The fact that organizations must meet a specific test at all clearly implies that some organizations *may* claim the fifth amendment privilege.

The Court's applications of the *White* doctrine to deny the fifth amendment privilege to organizations have rested on the presumption that mere membership in the organization is entirely free of any implications of guilt, and that when the officers (and therefore the members) commit a criminal act, they do so individually and independently of their legal association with the organization. Judge Bazelon said: "The 'impersonal' criterion as discussed by the Court [in *White*] clearly indicates that unions, other lawful associations, and corporations are to be distinguished from criminal conspiracies."[71] He added in a footnote that the Court in *White* enumerated other features common to both unions and corporations, which are clearly inappropriate to criminal conspiracies. For example:[72]

> "[1] Duly elected union officers have no authority to do or sanction anything other than that which the union may lawfully do . . . [2] the members are not subject to either criminal or civil liability for the acts of the union or its officer as such unless it is shown that they personally authorized or participated in the particular acts."

Compare this latter point with what the Court said in *Scales v. United States*:[73]

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70. 322 U.S. 694, 700-01 (1944).
71. 223 F.2d 531, 579 (D.C. Cir. 1954).
72. 322 U.S. 694, 702 (1944).
73. 367 U.S. 203, 278 (1961).

> "[The Communist Party] is an organization which engages in criminal activity, and we can perceive no reason why one who actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities, should be any more immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act."

On the basis of this quotation alone it could be argued that the Communist Party does not meet the test in *White* because it does indeed "embody the personal interests" of the members; members are responsible for specific acts of the organization, acts of which they might be entirely ignorant. More importantly, the quotation from *Scales* shows that the Court itself recognizes that membership in the Communist Party contains by its very nature an element of criminality. Thus the *White* doctrine, the application of which was extended from corporations to labor unions because the Court said that members of neither are subject to criminal liability for the acts of the organization "unless it is shown that they personally authorized or participated in the particular acts," cannot be applied to the Communist Party.[74]

CONCLUSION

A major pitfall the Supreme Court will have to avoid when it finally gets around to deciding the important fifth amendment questions raised by the McCarran Act, is the number of precedents of

74. Two observations are necessary at this point. (a) Bernard D. Meltzer in *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI L. REV. 687 (1939), tries to show that the fifth amendment questions raised by this Act may fall under the required records doctrine of Shapiro v. United States, 335 U.S. 1 (1948). In that case the Court ruled that the records of a private, non-corporate business, which were required to be kept by law, could not be withheld by an individual on a fifth amendment claim. On the basis of this decision it may be argued that the government can require the Communist Party to produce its membership lists, which §7 (f) of the McCarran Act requires the Party to keep. But the *Shapiro* doctrine is merely an extension of the *White* doctrine, so the former is inapplicable to Communist Party registration for the same reasons as the latter. Throughout *Shapiro* there was the presumption that the organization was not a criminal one. (b) Rogers v. United States, 340 U.S. 367 (1951), would seem to bring the Communist Party directly under the *White* doctrine. Citing *White* specifically as the precedent (at 372), the Court held that petitioner, an officer in the Party, could not withhold Party records on the grounds that she would be incriminating herself. But at 372, note 12, the Court added: "Membership in the Communist Party was not, of itself, a crime at the time the questions in this case were asked. And Congress has since expressly provided, in the Internal Security Act of 1950 . . . §4 (f), that 'neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other

questionable relevancy.[75] For example, in *United States v. Kahriger*[76] and *Lewis v. United States*,[77] the Court upheld an act that made it a federal offense to engage in the business of accepting wagers without registering and paying a tax. The Court rejected the fifth amendment argument on the grounds that the gambling statute referred only to acts that may be committed in the future, but the fifth amendment refers only to past acts.[78] There can be no question that the McCarran Act registration provisions refer to past acts. It has been seen that the main issue in Communist registration is whether a Communist *organization* can be required to yield a membership list, even if the McCarran Act is amended so that the officers who make up these lists do not incriminate themselves. Judge Prettyman cited *People of State of New York ex rel. Bryant v. Zimmerman*[79] as establishing the proposition that Congress can require Communist-action organizations to keep membership lists for the Government.[80] But that case concerned a state law, not a federal law, and the fifth amendment was not so much as mentioned in the entire case. The decision was based on considerations of the police power of the state and the privileges and immunities clause of the fourteenth amendment.

No explicit precedents exist for the fifth amendment questions raised by the McCarran Act.

The Court must also realize that it is not being asked to overrule any of its earlier decisions — not *Hale v. Henkel*, not *White*, and not *Kahriger* and *Lewis*.[81] The Court is asked only to look at the fifth amendment itself and the liberal interpretations of it since 1892, and to recognize that in every case in which an association was denied

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criminal statute.' We, of course, express no opinion as to the implications of this legislation upon the issues presented by these cases." Thus the Court left itself the opportunity of making a different decision at a later date. In view of what the Court said in *Scales* (see note 73 *supra* and accompanying text) and the fact that the Communist Party is now defined by the Legislature as a criminal organization this note has tried to show that a different decision is indeed warranted.

75. In view of the Court's apparent reluctance to date, prosecutions against the Communist Party for failure to register may occupy the Court for another five to ten years.

76. 345 U.S. 22 (1953).

77. 348 U.S. 419 (1955).

78. Similar reasoning may explain why the fifth amendment was not so much as mentioned when the Court upheld the Foreign Agents Registration Act (see text at note 4 *supra*) in Viereck v. United States, 318 U.S. 236 (1943).

79. 278 U.S. 63, 72 (1928).

80. 223 F.2d 531, 547 (D.C. Cir. 1954).

81. With regard to Rogers v. United States, 340 U.S. 367 (1951) (see text at note 74 *supra*), the present Court is asked merely to recognize what the Court there recognized without comment — that the fact situation has changed.

the right to claim the fifth amendment privilege against self-incrimination, the presumption was that membership alone in the association was entirely free of any possible connotations of guilt and that members were considered in no way responsible for the actions of their officers. These distinctions do not apply to the Communist Party; therefore, either the membership-list requirements must be ruled unconstitutional, or the Communist Party as an organization must be allowed the right to refuse to submit the membership lists on a fifth amendment claim.[82]

The Court would do well on the one hand to listen to Justice Douglas' strong words:[83]

> "I do not see how the Government that has branded an organization as criminal through its judiciary, its legislature, and its executive, can demand that it submit the names of all its members . . . ."

On the other hand, it may also note the words of Bernard Meltzer:[84]

> "[Under one view] the privilege at the trial stage is today not the bulwark of the innocent, not the barrier against torture, and not the spur of the police. It is a reflection of the law's unwillingness to command the impossible, of its respect for the law of self-preservation invoked by Lilburn."

After twelve years not one Communist has registered under the McCarran Act. Getting a Communist to reveal anything the Government does not already know may well be "commanding the impossible."

The fifth amendment as interpreted today means that no man can be forced to incriminate himself by his own words or personal records. In preparing a prosecution, the Government must find its

82. Chances are excellent that at least one more Justice will side with Justices Black, Warren, Douglas, and Brennan in a decision reaching the arguments discussed in this note. Recently retired Justice Frankfurter, as judicially modest a Justice as one could desire, not only dissented in the cases of *Kahriger* and *Lewis* (see notes 76-77 *supra* and accompanying text) but also wrote a very long dissent in *Shapiro v. United States* (see text at note 74 *supra*) espousing a liberal interpretation of the fifth amendment. Furthermore, in the majority opinion he wrote in *Communist Party v. S.A.C.B.*, *supra* note 9, while taking pains to offer no official opinion on the fifth amendment questions, he did mention that *Sullivan* may "perhaps" be distinguished from registration in the case of Communist Party members. Justice Frankfurter's colleagues may pursue this line of thought and find §8(a) constitutional; but when they reach §8(b), they should recognize the trap a member is caught in between §§8(b) and 7(d)(4). (See notes 61-63 *supra* and accompanying text.)

83. Quoted at note 65, *supra*.

84. Meltzer, *supra* note 74, at 692.

own clues and build its own case. If the Communist Party is required to register, file a membership list, and thus incriminate its own members, the government will find that when prosecuting individuals it must prepare its own case, but when prosecuting a group of individuals – for example, members of a criminal organization – it may require those individuals to give substantial aid to their own prosecutions. The fifth amendment if not "cast into limbo," would surely take on a paradoxical meaning.

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