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# CONSTITUTIONAL LAW-DUE PROCESS-USE OF TELEVISION AT CONGRESSIONAL HEARINGS

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CONSTITUTIONAL LAW—DUE PROCESS—USE OF TELEVISION AT CONGRESSIONAL HEARINGS—Defendant, not claiming constitutional protection against self-incrimination, refused to testify before a Senate committee on grounds that

his "constitutional rights" would be violated if compelled to give testimony while being televised, photographed, etc. Cited for willfully and without justification refusing to testify on matters pertinent to the purpose of the inquiry,[1] defendant was tried for contempt of Congress. *Held,* not guilty; defendant's refusal was justified. The court, after stating that there were no precedents,[2] and that no constitutional issue was involved, seemed to rest its decision on the fact that the atmosphere of the forum did not lend itself to the purpose of the inquiry. If truthful disclosures of fact were being sought, then the publicity apparatus may so distract the witness as to induce him to make mistakes and thus defeat the legislative purpose in calling the witness to testify. *United States v. Kleinman,* (D.C. D.C. 1952) 107 F. Supp. 407.

It is generally thought that there are four grounds for refusing to answer a question posed by a congressional committee;[3] it may be claimed, though at the witness' peril, that the question is not pertinent,[4] that answering may incriminate the witness,[5] that the answer is self-degrading,[6] or that the answer concerns the witness' private affairs.[7] The second is not here invoked, and the third has long been held not to justify a refusal to answer.[8] In the plethora of literature dealing with congressional committees, and especially since the televised Crime Committee hearings, it has frequently been thought that there was involved a possible invasion of the witness' right of privacy.[9] Probably the association of the two concepts has risen as a result of the Court's promulgation of the thesis that a congressional committee may not inquire into the private affairs of a citizen.[10] However, since Congress may make its own rules of procedure, the only basis[11] for the Court's interference would appear to be denial of due process,[12] though

[1] 52 Stat. L. 942 (1938), amending §102 of the Revised Statutes, 2 U.S.C. (1946) §192.

[2] In United States v. Moran, (2d Cir. 1952) 194 F. (2d) 623, cert. den. 343 U.S. 965, 72 S.Ct. 1058 (1952), the witness objected to the competency of the committee because of the use of television and other apparatus. On the record the court found no such lack of decorum as to warrant finding the committee incompetent.

[3] See comment, 35 MARQ. L. REV. 282 (1952).

[4] Sinclair v. United States, 279 U.S. 263, 49 S.Ct. 268 (1929).

[5] Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195 (1892).

[6] Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644 (1896).

[7] McGrain v. Daugherty, 273 U.S. 135, 47 S.Ct. 319 (1927); see also, Interstate Commerce Commission v. Brimson, 154 U.S. 447 at 478, 14 S.Ct. 1125 (1894).

[8] Brown v. Walker, supra note 6.

[9] Dealing with this question prior to the advent of television, see, Landis, "Constitutional Limitations on the Congressional Power of Investigation," 40 HARV. L. REV. 153 at 219ff. (1926); after television, see e.g., comment, 26 TEMPLE L.Q. 70 at 74ff. (1952).

[10] McGrain v. Daugherty, supra note 7 at 173.

[11] An early case sought to require that there be a reasonable relation between the rule of procedure and the result sought. United States v. Ballin, 144 U.S. 1, 12 S.Ct. 507 (1892).

[12] "The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body." Wong Yang Sung v. McGrath, 339 U.S. 33 at 49, 70 S.Ct. 445 (1950).

due process here would not imply the standards of judicial due process since the Court has been unwilling to find that a congressional committee is a judicial body.[13] Despite an early effort strongly tending to limit the power of congressional investigations,[14] the Court has followed a contrary path and it is almost an academic question as to how far into the witness' private life the inquiry need go before he would be justified in refusing to answer. This result is really a consequent not of any question as to what is private, but rather results from a consideration of the question of what is pertinent. If the question asked is pertinent, then the information sought is not private,[15] and the courts have indicated no more willingness to find the questions not pertinent[16] than they have to say the investigation exceeds the legislative power.[17] Although no case has expressly held that an investigation may be made merely to inform the public, it would appear that as a practical matter such is the case. In light of these conditions the pertinency requirement loses any efficacy it may have had as a criterion for judging what is an invasion into a witness' right of privacy. Even if the prohibition of the Fourth Amendment against unreasonable search is substantively conceived, it would offer no basis for finding a "federal right of privacy."[18] This is so since "search" has not been given an interpretation that suggests the Court's willingness to include a mental search within the purview of the prohibition, despite suggestive language to the contrary where the Court does speak of an unreasonable search as an invasion of the right of privacy.[19] Hence if there is to be constitutional protection for this right of privacy it will probably be in due process.[20] Due process decided on a case to case basis[21] is the constitutional provision wide enough to encompass the concept if it becomes necessary in order to protect individual liberty.[22] Although the Court found no invasion in a case explicitly involving privacy and not concerned with any issue of search and seizure, the right of privacy was tacitly assumed to be within the Fifth Amend-

[13] McGrain v. Daugherty, supra note 7.

[14] Kilbourn v. Thompson, 103 U.S. 168 (1881).

[15] Sinclair v. United States, supra note 4.

[16] Barsky v. United States, (D. C. Cir. 1948) 167 F. (2d) 241, cert. den. 334 U.S. 843, 68 S.Ct. 1511 (1948).

[17] Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783 (1951).

[18] At one time the Court said that no provision of the Constitution conferred a right of privacy upon a person or corporation. Prudential Insurance Co. v. Cheek, 259 U.S. 530, 42 S.Ct. 516 (1922). However, at present a tendency to the contrary is readily discernible. See, e.g., Brandeis' dissent in Olmstead v. United States, 277 U.S. 438 at 471, 48 S.Ct. 564 (1928); Public Utilities Commissioner v. Pollak, 343 U.S. 451, 72 S.Ct. 813 (1952).

[19] United States v. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420 (1932); Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359 (1949).

[20] In Nutting, "Freedom of Silence," 47 MICH. L. REV. 181 at 217ff. (1948), the writer concludes that freedom of silence before a congressional committee is not the correlative of freedom of speech and hence not protected by the First Amendment; rather it is a liberty which may be protected by the Fifth Amendment.

[21] Davidson v. New Orleans, 96 U.S. 97 (1877).

[22] See, e.g., Rochin v. California, 342 U.S. 165 at 169ff. and citations therein, 72 S.Ct. 205 (1952).

ment.[23] However, even if it is granted that there is a constitutional right of privacy for a congressional witness, it is clearly different from what is usually understood by the term.[24] As distinguished from the basis of tort liability for defamation, the basis of tort liability for invasion of the right of privacy lies in publication of something injurious to the individual's feelings,[25] but since a witness actually does the publishing himself and since he may not refuse to answer a pertinent self-degrading question, there must be some other meaning of privacy when used as justification for not answering an otherwise legitimate question. It is believed that, in effect, this meaning of privacy is nothing more than the requirement that the original rules of committee procedure may not be arbitrary, unreasonable, or capricious.[26] Once it is found that the committee is within the legislative power, and that the question is pertinent, the witness may not refuse to answer, since pertinency to the legislative purpose means legitimate public interest and, in the established hierarchy of values, public interest prevails over privacy.[27] The effect of this result is intensified when cognizance is taken of the fact that a congressional committee may have a legitimate status when its function is solely or primarily to inform the public.[28] In light of this analysis it is believed that the desirable result in the principal case should have been reached on the basis of denial of due process to the witness by the committee's adoption of a procedure[29] which permitted an improper use of television and the other apparatus. This conclusion suggests that there is no constitutional basis for preventing the televising, broadcasting, or photographing of committee hearings,[30] though there may be if such equipment is improperly used.[31]

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[23] Public Utilities Commissioner v. Pollak, supra note 18.

[24] Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193 (1890).

[25] Id. at 197.

[26] See, e.g., Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505 (1934).

[27] This is of course also true in regard to the tort concept of privacy. Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193 at 214 (1890).

[28] In some instances it has been the exclusive intent of the investigator to inform the public. See, e.g., Carr, "The Un-American Activities Committee," 18 UNIV. CHI. L. REV. 598 (1951).

[29] Actually there is no formal adoption of any rules of procedure, 97 CONG. REC. 9768 (1951).

[30] It is believed that this conclusion would not be warranted were the court once to admit that some congressional committees do in fact exercise quasi-judicial functions. That some committees serve such a function is recognized by the public and the investigators. In regard to the general background of this case and the congressional concern and attitude towards the problem discussed herein, see, 97 CONG. REC. 9765 to 9802 (1951).

[31] As to the difference between proper and improper use of television, see, Taylor, "The Issue Is Not TV, But Fair Play," 12 FED. COMM. B.A.J. 10 (1951).