Special Double Issue

Text and Comment: Cain's Attack on the Attorney General's List, Pages 2 and 8

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Full Text of the Historic Emspak, Quinn and Bard Contempt Decisions Inside

The Supreme Court Strikes A Blow at The Witch Hunt

The Supreme Court's decision in the Emspak, Quinn and Bart cases is another indication that the tide is turning against the witch hunt in America. In reversing these convictions for contempt of the House Un-American Activities Committee, Chief Justice Warren and a majority of the Court were not dealing with any of those easy, politically innocuous cases on which our more timorous liberals like to take their stand. Julius Emspak is General Secretary-Treasurer, and Thomas Quinn was a field representative, of the United Electrical Radio & Machine Workers (UE), one of the unions expelled by the CIO and long hounded by the Committee. Philip Bart was summoned before the committee in another investigation in 1950 as general manager of the *Daily Worker.* By cold war standards, all three men were therefore fair game.

Had they invoked the Fifth amendment, decision would have been easy. The privilege against self-incrimination is the one constitutional right the courts have consistently upheld. The witch hunters are content to have it so. Why go to the trouble of trying to convict a man of a crime when you can make him seem a criminal by forcing him to invoke the privilege? Had Emspak, Quinn and Bart in their different hearings clearly invoked the Fifth, they would not have been cited for contempt. The Committee would have achieved its purpose, which was to smear them and the UE in the public mind.

Evasive in Self-Protection

The three ended up in court because they evaded clear invocation of the Fifth. They refused to answer questions, and they refused to admit they were refusing to answer. Emspak and Quinn insisted that the Committee had no right to inquire into their associations and beliefs. When they entered any plea at all, it was usually on the grounds of "the First amendment, supplemented by the Fifth." The Fifth was thrown in, as if on counsel's advice that it must be mentioned to stay out of jail for contempt. The government argued before the Supreme Court that the defendants had been deliberately vague about the Fifth in order "to obtain the benefit of the privilege without incurring the popular opprobrium which often attaches to its exercise." This is so clear from the record that on appeal in the circuit courts even the liberal judges did not go further than to suggest that the cases ought to be re-tried to determine whether the defendants did or did not invoke the Fifth.

What makes the Supreme Court's decision so striking is that the Chief Justice and his colleagues of the majority met this issue head-on. "If it is true, as the government contends," the Chief Justice said, "that petitioner feared the stigma that might result from a forthright claim of his constitutional right not to testify," then bare mention of the Fifth was enough to obtain its protection. "No ritualistic formula," the Chief Justice ruled, "is necessary to invoke the privilege." The burden was on the Committee rather than the witnesses to clarify the basis on which they were refusing to answer. If the committee wasn't sure, it was up to the committee to ask the witness whether he was invoking his privilege.

New Liberal Trend Foreshadowed

These decisions show that our new Chief Justice is determined to write into law the liberal attitudes expressed in his recent speeches on the Bill of Rights. They also show that revulsion against the excesses of the witch hunt has grown considerably when it is possible in such cases to weld together a firm majority of six for acquittal. Three Justices, Reed, Minton and Harlan, seem to be all the right can count upon for certain on this court and in this atmosphere. The lineup and the circumstances may foreshadow a new liberal trend.

The Chief Justice is an experienced judge of public opinion and a skilful practitioner of politics. We believe the cause of reviving liberty is in good hands when he takes it over. There is reason to hope that having marshalled a majority for so broad an interpretation of the Fifth, he may be preparing the ground for action on the First. The Court declared that having decided these contempt cases on Fifth amendment grounds, it did not feel it necessary to pass upon the defense contention that the House Un-American Activities Committee was itself unconstitutional under the First amendment.

First Amendment Next?

But the majority hints that it may be preparing the ground for this wider issue. "The power to investigate," the Chief Justice said in the Quinn decision, "broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs. . . . Nor does it extend to an area in which Congress is forbidden to legislate. Similarly the power to investigate must not be confused with any of the powers of law enforcement. . . . Still further limitations . . . are found in the specific individual guaranties of the Bill of Rights."

These observations may spell a showdown for the pretensions of Congressional committees to act as roving public grand juries, to determine what is "subversive" or "Un-American" and to pillory those who dare dissent from these standards. In this respect the Emspak, Quinn and Bart cases may prove to have prepared the way for fundamental decisions by the court in the prosecutions of Corliss Lamont and Harvey O'Connor, both fighting citations for contempt after invoking the First amendment alone against McCarthyite inquisition.

"Of 125 Blacklisted Organizations, Not More Than 30 Are Communist Fronts"

Cain of the SACB Debunks the Attorney General's Subversive List

Because the Attorney General's list is being used so widely, the attack made upon it by former Senator Harry P. Cain of the Subversive Activities Control Board is useful as defense ammunition. We are here reprinting the text of what he had to say about the list in his speech last Monday night before the B'nai B'rith at Lake Kiamesha, N. Y. Turn to page eight for our own reactions.—IFS

"The Attorney General's list was authorized by Executive Order of the President in 1947. The Attorney General was directed to compile a list of organizations which he considered to be Fascist, totalitarian, Communistic or subversive in their purposes. The resulting list was to be employed by the Civil Service Commission in checking the loyalty of civil servants and applications for the federal establishment.

"The Attorney General did not provide nor was he required to grant a hearing to any organization which he saw fit to place on the list. It becomes important to remember that organizations listed before 1953 were never permitted to be heard in their own defense.

Still No Hearings

"Since 1953, the Attorney General has offered organizations previously listed an opportunity to be heard and provided that no organization would be added to the list without an opportunity for a hearing. The reasons have been several and the administrative difficulties have been apparent but no organization to my knowledge has ever actually had a hearing, which might result in de-listing the organization, nor has any hearing actually been given to an organization before it was listed.

"Unless we assume that an Attorney General, either Republican or Democrat, is infallible, as no human being ever is, we should not take for granted that every single proscribed organization has been listed for complete and sufficient cause. This is said without prejudice to any Attorney General. We must look for a better way to establish as being conclusively true that listed organizations have been found factually to be actually totalitarian or subversive.

Now 275 On the Blacklist

"Between 1947 and the last change of national administrations in 1952, 192 organizations were listed. Since 1952, 83 organizations have been added to the list and its published total is now 275. We can reasonably expect that other organizations are intended for listing. I will not hazard a guess as to the eventual number of organizations which may be proscribed in this free society of ours. I simply note that millions of citizens are now members of or were previously members in the listed organizations and these associations become an important factor in determining whether an individual is eligible for employment by the federal government and many other private employment areas.

"These memberships, past or present, are being exercised by states and municipalities in scores of different fashions to ostracize free citizens, to denounce and condemn them; to prohibit legitimate activities of individuals and to place other citizens outside the law. Much of what I charge has been unintended but my cry of alarm and warning is undeniably justified.

A Warning, Not A Finding

"The Attorney General has never suggested nor does he believe that mere membership in a listed organization is necessarily evil, bad or dangerous but many people in authority, both in and beyond the federal establishment, do so believe. In his own public words, the Attorney General states that 'membership is a red flag; it is a warning sign and gives an agency head something to go on so that he can examine the individual to find out more about the nature and extent of his contact with that organization.' The logic in this approach is that a member of a listed subversive organization may be anything but subversive in his own conduct. The Attorney General recommends only that unexplained or unsatisfactorily explained membership in a listed organization is a factor to be considered in security evaluations of employees and applicants for the federal service.

How It Works in Defense Plants

"Do you know that an applicant for a defense industry job requiring a clearance, and many plants are entirely classified, is denied employment if his application includes any derogatory information or if any derogatory information is filed against him by someone else? There is no pre-employment examination system within the Industrial Personnel Security Program. Derogatory information includes membership in any of the organizations listed by the Attorney General. In such cases, the greater loss is that of the government because on a simply unexamined charge, the government may have lost the services of the finest workers. Unless we find a way, and do it soon, to permit an applicant to face up to any allegations, we shall endanger and weaken our national security and we shall accelerate the spreading of the poison of distrust and suspicion and a lack of faith by the individual in his government everywhere. If this isn't an expression of common sense, of what does common sense consist?

"The Attorney General's list should be understood to represent nothing more than an attorney's advice to his client who started out to be the government but has become anybody and everybody else who makes use of the list. As a citizen, I object to the advice because in its present form, the advice is unintelligible, misleading and a threat to a continuing vitality and strength of your nation's internal security. . . .

Misleading Assumptions

"When the average citizen is confronted with the Attorney General's list of 275 subversive organizations, he quite naturally can be expected to assume that all of the listed organizations are working daily and nightly, too, against our common good.

"I tell you that the Attorney General's list is vastly misleading because it indicates that the United States is confronted by a far larger assault against our security by organized groups of Communists or fellow-travelers than is the fact.

"Permit me to tell you what I believe the facts to be which I can do without violating security in any manner.

More Than Half No Longer Exist

"Of the 275 listed organizations, approximately 150 of them have long since gone out of business. I derive some solid satisfaction from this knowledge that the list includes so many organizations which today offer no threat or danger of any kind to our Republic.

"The Internal Security Act of 1950 defined by statute what a Communist Front is. A Communist Front is dominated, directed and controlled by the Communist Party, USA, or by International Communism. When a Front does exist, it can be a menace to the security of this country and we ought to impose upon every Front which exists the onerous sanctions provided by the law and require that front to register so that you citizens know what it is, where it is, how it came into being and what it is doing.

"Of the approximately 125 organizations which are currently operating in one manner or another, how many would you guess can be established to be in fact an organization which as a Front is part and parcel of the Communist conspiracy? To the best of my knowledge, I can reasonably assume that as many as twenty but not more than thirty are in this category."

The Historic Contempt Decisions In Full Text

QUINN v. U. S.

Petitioner was convicted of contempt of Congress under 2 U. S. C. § 192 in the District Court of the District of Columbia. Section 192 provides for the punishment of any witness before a congressional committee "who . . . refuses to answer any question pertinent to the question under inquiry. . . ." On appeal, the Court of Appeals for the District of Columbia Circuit reversed the conviction and remanded the case for a new trial. *Claiming that the Court of Appeals should have directed an acquittal, petitioner applied to this Court for certiorari.* We granted the writ because of the fundamental and recurrent character of the questions presented.

Pursuant to subpoena petitioner appeared on August 10, 1949, before a subcommittee of the Committee on Un-American Activities of the House of Representatives. Petitioner was then a member and field representative of the United Electrical, Radio and Machine Workers of America. Also subpoenaed to appear on that day were Thomas J. Fitzpatrick and Frank Panzino, two officers of the same union. At the outset of the hearings, counsel for the committee announced that the purpose of the investigation was to inquire into "the question of Communist affiliation or association of certain members" of the union and "the advisability of tightening present security requirements in industrial plants working on certain Government contracts." All three witnesses were asked questions concerning alleged membership in the Communist Party. All three declined to answer.

"That Is My Own Personal Belief"

Fitzpatrick was the first to be called to testify. He based his refusal to answer on "the First and Fifth Amendments" as well as the First Amendment to the Constitution, supplemented by the Fifth Amendment." Immediately following Fitzpatrick's testimony, Panzino was called to the stand. In response to the identical questions put to Fitzpatrick, Panzino specifically adopted as his own the grounds relied upon by Fitzpatrick. In addition, at one point in his testimony, Panzino stated that "I think again, Mr. Chairman, under the fifth amendment, that is my own personal belief." On the following day, petitioner, unaccompanied by counsel, was called to the stand and was also asked whether he had ever been a member of the Communist Party. Like Panzino before him, he declined to answer, specifically adopting as his own the grounds relied upon by Fitzpatrick.

On November 20, 1950, all three witnesses were indicted under § 192 for their refusals to answer. The three cases were tried before different judges, each sitting without a jury. Fitzpatrick and Panzino were acquitted. In Fitzpatrick's case, it was held that his references to "the First and Fifth Amendments" and "the First Amendment to the Constitution, supplemented by the Fifth Amendment" constituted an adequate means of invoking the Self-Incrimination Clause of the Fifth Amendment. Similarly, in Panzino's case, it was held that his reference to "the fifth amendment" was sufficient to plead the privilege. In petitioner's case, however, the District Court held that a witness may not incorporate the position of another witness and rejected petitioner's defense based on the Self-Incrimination Clause. Petitioner was accordingly convicted and sentenced to a term of six months in jail and a fine of $500.

In reversing this conviction, the Court of Appeals, sitting *en banc*, held that "No formula or specific term or expression is required" in order to plead the privilege and that a witness may adopt as his own a plea made by a previous witness. Thus the Court of Appeals viewed the principal issue in the case as "whether Fitzpatrick did or did not claim the privilege." On this issue, a majority of the Court of Appeals expressed no view. They agreed that a reversal without more would be in order if they "were of clear opinion that Fitzpatrick, and therefore Quinn, did claim the privilege."

Another Exclusive Service For Readers of The *Weekly*

Because the texts were not printed even in the New York Times, we are, as a public service, publishing a special double issue this week to make available the full text of Chief Justice Warren's decisions in the Quinn, Emspak and Bart cases. Since these widen the protection afforded witnesses before Congressional investigating committees and may prove to mark a turning point in the temper of the Court and the country, we believe they deserve careful study and wide circulation. Extra copies are available as long as they last at our regular price of 15 cents, or at 5 cents each in bulk orders of 1,000 or more.

But they were "not of that clear opinion." The Court of Appeals therefore ordered a new trial for determination of the issue by the District Court. The Court of Appeals also directed the District Court on retrial to determine whether petitioner "was aware of the intention of his inquirer that answers were required despite his objections." In that regard, however, it rejected petitioner's contention that a witness cannot be convicted under § 192 for a refusal to answer unless the committee overruled his objections and specifically directed him to answer.

It is from that decision that this Court granted certiorari.

I.

There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate. Without the power to investigate—including of course the authority to compel testimony, either through its own processes or through judicial trial—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively.

But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate. Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary. Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination which is in issue here.

"The Horror of Star Chamber"

The privilege against self-incrimination is a right that was hard-earned by our forefathers. The reasons for its inclusion in the Constitution—and the necessities for its preservation—are to be found in the lessons of history. As early as 1650, remembrance of the horror of Star Chamber proceedings a decade before had firmly established the privilege in the common law of England. Transplanted to this country as part of our legal heritage, it soon made its way into various state constitutions and ultimately in 1791 into the federal Bill of Rights. The privilege, this Court has stated, "was generally regarded then, as now, as a privilege of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions." Co-equally with our other constitutional guarantees, the Self-Incrimination Clause "must be accorded liberal construction in favor of the right it was intended to secure." Such liberal construction is particularly warranted in a prosecution of a witness for a refusal to

answer, since the respect normally accorded the privilege is then buttressed by the presumption of innocence accorded a defendant in a criminal trial. To apply the privilege narrowly or begrudgingly—to treat it as an historical relic, at most merely to be tolerated—is to ignore its development and purpose.

In the instant case petitioner was convicted for refusing to answer the committee's question as to his alleged membership in the Communist Party. Clearly an answer to the question might have tended to incriminate him. As a consequence, petitioner was entitled to claim the privilege. The principal issue here is whether or not he did.

It is agreed by all that a claim of the privilege does not require any special combination of words. Plainly a witness need not have the skill of a lawyer to invoke the protection of the Self-Incrimination Clause. If an objection to a question is made in any language that a committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected both by the committee and by a court in a prosecution under § 192.

Here petitioner, by adopting the grounds relied upon by Fitzpatrick, based his refusal to answer on "the First and Fifth Amendments" and "the First Amendment to the Constitution, supplemented by the Fifth Amendment." The Government concedes—as we think it must—that a witness may invoke the privilege by stating "I refuse to testify on the ground of the Fifth Amendment." Surely, in popular parlance and even in legal literature, the term "Fifth Amendment" in the context of our time is commonly regarded as being synonymous with the privilege against self-incrimination. The Government argues, however, that the references to the Fifth Amendment in the instant case were inadequate to invoke the privilege because Fitzpatrick's statements are more reasonably understood as invoking rights under the First Amendment. We find the Government's argument untenable. The mere fact that Fitzpatrick and petitioner also relied on the First Amendment does not preclude their reliance on the Fifth Amendment as well. If a witness urges two constitutional objections to a committee's line of questioning, he is not bound at his peril to choose between them. By pressing both objections, he does not lose a privilege which would have been valid if he had only relied on one.

"No Ritualistic Formula . . . Necessary"

The Government, moreover, apparently concedes that petitioner intended to invoke the privilege. In its brief the Government points out "the probability that petitioner's ambiguous references to the Fifth Amendment . . . were phrased deliberately in such vague terms so as to enable petitioner . . . to obtain the benefit of the privilege without incurring the popular opprobrium which often attaches to its exercise." But the fact that a witness expresses his intention in vague terms is immaterial so long as the claim is sufficiently definite to apprise the committee of his intention. As everyone agrees, no ritualistic formula is necessary in order to invoke the privilege. In the instant case, Quinn's references to the Fifth Amendment were clearly sufficient to put the committee on notice of an apparent claim of the privilege. It then became incumbent on the committee either to accept the claim or to ask petitioner whether he was in fact invoking the privilege. Particularly is this so if it is true, as the Government contends, that petitioner feared the stigma that might result from a forthright claim of his constitutional right to refuse to testify. It is precisely at such times—when the privilege is under attack by those who wrongly conceive of it as merely a shield for the guilty—that governmental bodies must be most scrupulous in protecting its exercise.

This ruling by no means leaves a congressional committee defenseless at the hands of a scheming witness intent on deception. When a witness declines to answer a question because of constitutional objections and the language used is not free from doubt, the way is always open for the committee to inquire into the nature of the claim before making a ruling. If the witness unequivocally and intelligently waives any objection based on the Self-Incrimination Clause, or if the witness refuses a committee request to state whether he relies on the Self-Incrimination Clause, he cannot later invoke its protection in a prosecution for contempt for refusing to answer that question. Here the committee made no attempt to have petitioner particularize his objection. Under these circumstances, we must hold that petitioner's references to the Fifth Amendment were sufficient to invoke the privilege and that the court below erred in failing to direct a judgment of acquittal.

II.

There is yet a second ground for our decision.

Section 192, like the ordinary federal criminal statute, requires a criminal intent—in this instance, a deliberate, intentional refusal to answer. This element of the offense, like any other, must be proved beyond a reasonable doubt. Petitioner contends that such proof was not, and cannot be, made in this case.

"Not Every Refusal to Answer . . ."

Clearly not every refusal to answer a question propounded by a congressional committee subjects a witness to prosecution under § 192. Thus if he raises an objection to a certain question—for example, lack of pertinency or the privilege against self-incrimination—the committee may sustain the objection and abandon the question, even though the objection might actually be without merit. In such an instance, the witness' refusal to answer is not contumacious, for there is lacking the requisite criminal intent. Or the committee may disallow the objection and thus give the witness the choice of answering or not. Given such a choice, the witness may recede from his position and answer the question. And if he does not then answer, it may fairly be said that the foundation has been laid for a finding of criminal intent to violate § 192. In short, unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections there can be no conviction under § 192 for refusal to answer that question.

Was petitioner so apprised here? At no time did the committee specifically overrule his objection based on the Fifth Amendment; nor did the committee indicate its overruling of the objection by specifically directing petitioner to answer. In the absence of such committee action, petitioner was never confronted with a clear-cut choice between compliance and non-compliance, between answering the question and risking prosecution for contempt. At best he was left to guess whether or not the committee had accepted his objection.

This ambiguity in the committee's position is apparent from the transcript of the hearing. Immediately after petitioner stated that he was adopting Fitzpatrick's objection, the committee chairman asked petitioner: ". . . will you now answer the question whether you are now or ever have been a member of the Communist Party, or do you decline to answer?" In response to this, petitioner stated for the first time that he would not answer. He said: "I decline to discuss with the committee questions of that nature." Committee counsel thereupon stated that further questioning "relating to those matters" was "not necessary" and proceeded upon a new line of inquiry. There is nothing in this colloquy from which petitioner could have determined with a reasonable degree of certainty that the committee demanded his answer despite his objection. Rather, the colloquy is wholly consistent with the hypothesis that the committee had in fact acquiesced in his objection.

Our view that a clear disposition of the witness' objection is a prerequisite to prosecution for contempt is supported by long-standing tradition here and in other English-speaking nations. In this country the tradition has been uniformly recognized in the procedure of both state and federal courts. It is further reflected in the practice of congressional committees prior to the enactment of § 192 in 1857; a specific direction to answer was the means then used to apprise a witness of the overruling of his objection. Against this background § 192 became law. No relaxation of the safeguards afforded a witness was contemplated by its sponsors. In

explaining the bill in the House, Congressman Davis expressly stated that committee powers were not increased, that no added burden was placed upon the witness, and that a "mere substitution" of a judicial proceeding for punishment at the bar of Congress was intended. The reason for enacting § 192 went to the punishment and not the offense. It was recognized that the power of Congress to deal with a contemnor by its own processes did not extend beyond the life of any session. By making contempt of Congress a crime, a fixed term of imprisonment was substituted for variable periods of congressional custody dependent upon the fortuity of whether the contemnor had been called to testify near the beginning or the end of a session. But there is nothing to indicate that this change in the mode of punishment affected in any way the well-established elements of contempt of Congress. Since the enactment of § 192, the practice of specifically directing a recalcitrant witness to answer has continued to prevail. In fact, the very committee involved here, the House Un-American Activities Committee, originally followed this practice and recently resumed it.

"So Long as the Witness Is Not Forced to Guess"

Giving a witness a fair apprisal of the committee's ruling on an objection recognizes the legitimate interests of both the witness and the committee. Just as the witness need not use any particular form of words to present his objection, so also the committee is not required to resort to any fixed verbal formula to indicate its disposition of the objection. So long as the witness is not forced to guess the committee's ruling, he has no cause to complain. And adherence to this traditional practice can neither inflict hardship upon the committee nor abridge the proper scope of legislative investigation.

III.

Petitioner also attacks his conviction on grounds involving novel constitutional issues. He contends that the House Resolution authorizing the committee's operations is invalid under the First Amendment. In addition, petitioner contends that the trial court erred in denying a hearing on the alleged bias of the indicting grand jury. Our disposition of the case makes it unnecessary to pass on these issues.

The judgment below is reversed and the case remanded to the District Court with directions to enter a judgment of acquittal. *Reversed.*

EMSPAK v. U. S.

This is a companion case with *Quinn* v. *United States, ante,* p. —. Challenged in each proceeding is a conviction under 2 U. S. C. § 192 in the District Court for the District of Columbia. The two cases arose out of the same investigation by the Committee on Un-American Activities of the House of Representatives. Because of the similarity of the legal issues presented, the cases were consolidated for argument in this Court.

Pursuant to subpoena petitioner appeared on December 5, 1949, before a subcommittee of the Committee on Un-American Activities. The subcommittee consisted of a single member, Rep. Morgan M. Moulder. Petitioner was then the General Secretary-Treasurer of the United Electrical, Radio & Machine Workers of America as well as Editor of the *UE News*, the union's official publication. The subcommittee's hearings had previously been announced as concerning "the question of Communist affiliation or association of certain members" of the union and "the advisability of tightening present security requirements in industrial plants working on certain government contracts."

"A Total of 239 Questions"

Petitioner was asked a total of 239 questions. Most dealt with the structure of the union, the duties of its officers, the scope of its membership and bargaining commitments, the alleged similarity in policies of the *UE News* and the Communist Party, the non-Communist affidavit that petitioner had filed with the National Labor Relations Board, and related matters. Petitioner answered all of these questions. He declined, however, to answer 68 of the 239 questions. These 68 questions dealt exclusively with petitioner's associations and affiliations. He based his refusal on "primarily the first amendment, supplemented by the fifth." Of the 68 questions, 58 asked in substance that he state whether or not he was acquainted with certain named individuals and whether or not those individuals had ever held official positions in the union. Two of the questions concerned petitioner's alleged membership in the National Federation for Constitutional Liberties and the Civil Rights Congress. Eight questions concerned petitioner's alleged membership and activity in the Communist Party.

On November 20, 1950, petitioner was indicted under § 192 for his refusal to answer the 68 questions. Sitting without a jury, the District Court held that petitioner's references to "primarily the first amendment, supplemented by the fifth" were insufficient to invoke the Fifth Amendment's privilege against self-incrimination. The District Court accordingly found petitioner guilty on all 68 counts and sentenced him to a term of six months and a fine of $500. The Court of Appeals for the District of Columbia Circuit, three judges dissenting, affirmed *en banc.* From that decision this Court granted certiorari.

I.

As pointed out in *Quinn* v. *United States, ante,* no ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination. All that is necessary is an objection stated in language that a committee may reasonably be expected to understand as an attempt to invoke the privilege. In the *Quinn* case we hold that Quinn's references to "the First and Fifth Amendments" and "the First Amendment to the Constitution, supplemented by the Fifth Amendment" were sufficient to meet this standard. It would be unwarranted, we think, to reach a different conclusion here as to petitioner's plea based on "primarily the first amendment, supplemented by the fifth."

"A Stigma May Somehow Result"

The Government does not even attempt to distinguish between the two cases in this respect. Apparently conceding that petitioner as well as Quinn intended to invoke the privilege, the Government points out "the probability" that his references to the Fifth Amendment were likewise deliberately phrased in muffled terms "to obtain the benefit of the privilege without incurring the popular opprobrium which often attaches to its exercise." On this basis the Government contends that petitioner's plea was not adequate. The answer to this contention is threefold. First, an objection that is sufficiently clear to reveal a probable intention to invoke the privilege cannot be ignored merely because it is not phrased in an orthodox manner. Second, if it is true that in these times a stigma may somehow result from a witness' reliance on the Self-Incrimination Clause, a committee should be all the more ready to recognize a veiled claim of the privilege. Otherwise, the great right which the Clause was intended to secure might be effectively frustrated by private pressures. Third, it should be noted that a committee is not obliged to either accept or reject an ambiguous constitutional claim the very moment it is first presented. The way is always open for the committee to inquire into the nature of the claim before making a ruling. If the witness intelligently and unequivocally waives any objection based on the Self-Incrimination Clause, or if the witness refuses a committee request to state whether he relies on the Self-Incrimination Clause, he cannot later invoke its protection in a prosecution for contempt for refusing to answer that question.

The Government argues that petitioner did in fact waive the privilege, at least as to one count of the indictment, and that the conviction can be sustained on that count alone. In response to a question concerning his associations, petitioner expressed apprehension that the committee was "trying to perhaps frame people for possible criminal prosecution" and

added that "I think I have the right to reserve whatever rights I have. . . ." The following colloquy then took place:

"No . . . Right to Pry"

"Mr. Moulder. Is it your feeling that to reveal your knowledge of them would subject you to criminal prosecution?

"Mr. Emspak. No. I don't think this committee has a right to pry into my associations. That is my own position."

Petitioner's reply, it is contended, constituted an effective disclaimer of the privilege. We find this contention without merit. As this Court declared in *Smith v. United States*, 337 U. S. 137, 150: "Although the privilege against self-incrimination must be claimed, when claimed it is guaranteed by the Constitution. . . . Waiver of constitutional rights . . . is not lightly to be inferred. A witness cannot properly be held after claim to have waived his privilege . . . upon vague and uncertain evidence."

The *Smith* case, we believe, is controlling here. The witness in that case, at the outset of questioning by an OPA examiner, stated "I want to claim privilege as to anything I say." The examiner accepted this statement as a plea of possible self-incrimination and a request for the immunity afforded to involuntary witnesses by the Price Control Act of 1942. The questioning proceeded on that basis. In response to one question, however, the witness made a statement that appeared to the examiner to be voluntary. This colloquy then ensued:

"Q: This is a voluntary statement. You do not claim immunity with respect to that statement?

"A: No."

In a subsequent prosecution of the witness for violation of the Price Control Act, it was held that his "No" answer waived his immunity at least as to the one statement. This Court unanimously reversed, stating (337 U. S., at 151): "Without any effort to clarify the "No," the examiner went ahead and had the witness restate the substance of the long answer . . . without any further intimation that the subsequent answers were considered by the examiner to be voluntary. We do not think under these circumstances this equivocal "No" is a waiver of the previous definite claim of general privilege against self-incrimination." Similarly, in the instant case, we do not think that petitioner's "No" answer can be treated as a waiver of his previous express claim under the Fifth Amendment. At most, as in the *Smith* case, petitioner's "No" is equivocal. It may have merely represented a justifiable refusal to discuss the reasons underlying petitioner's assertion of the privilege; the privilege would be of little avail if a witness invoking it were required to disclose the precise hazard which he fears. And even if petitioner's "No" answer were taken as responsive to the question, the answer would still be consistent with a claim of the privilege. The protection of the Self-Incrimination Clause is not limited to admissions that "would subject [a witness] to criminal prosecution"; for this Court has repeatedly held that "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial" and that the privilege also extends to admissions that may only tend to incriminate. In any event, we cannot say that the colloquy between the committee and petitioner was sufficiently unambiguous to warrant finding a waiver here. To conclude otherwise would be to violate this Court's own oft-repeated admonition that the courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights."

Throughout this entire proceeding—in the trial in the District Court, on appeal in the Court of Appeals, and here on certiorari—the Government has never denied that petitioner would be entitled to the protection of the privilege if he did in fact invoke it. And during argument in this Court the Government expressly conceded that all 68 questions were of an incriminatory character. In addition, neither the District Court nor the Court of Appeals saw fit to introduce the issue into the case. We are therefore reluctant to do so now. But doubts on the issue by some members of the Court make its consideration necessary.

"To sustain the privilege," this Court has recently held, "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." And nearly 150 years ago Chief Justice Marshall enunciated a similar test: "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself." Applying this test to the instant case, we have no doubt that the eight questions concerning petitioner's alleged membership in the Communist Party fell within the scope of the privilege. The same is true of the two questions concerning petitioner's alleged membership in the National Federation for Constitutional Liberties and the Civil Rights Congress; both organizations had previously been cited by the committee as Communist-front organizations. There remains for consideration the 58 questions concerning petitioner's associations. This Court has already made abundantly clear that such questions, when asked in a setting of possible incrimination, may fall within the scope of the privilege.

"What Was the Setting . . .?"

What was the setting—as revealed by the record—in which these questions were asked? Each of the named individuals had previously been charged with having Communist affiliations. On October 14, 1949, less than two months prior to petitioner's appearance before the committee, eleven principal leaders of the Communist Party in this country had been convicted under the Smith Act for conspiring to teach and advocate the violent overthrow of the United States. Petitioner was identified at their trial as a Communist and an associate of the defendants. It was reported that Smith Act indictments against other Communist leaders were being prepared. On November 23, 1949, two weeks prior to petitioner's appearance, newspapers carried the story that the Department of Justice "within thirty days" would take "an important step" toward the criminal prosecution of petitioner in connection with his non-Communist affidavit filed with the National Labor Relations Board.

Under these circumstances, it seems clear that answers to the 58 questions concerning petitioner's associations "might be dangerous because injurious disclosure could result." To reveal knowledge about the named individuals—all of them having been previously charged with Communist affiliations—could well have furnished "a link in the chain" of evidence needed to prosecute petitioner for a federal crime, ranging from conspiracy to violate the Smith Act to the filing of a false non-Communist affidavit under the Taft-Hartley Act. That being so, it is immaterial that some of the questions sought information about associations that petitioner might have been able to explain away on some innocent basis unrelated to Communism. If an answer to a question may tend to be incriminatory, a witness is not deprived of the protection of the privilege merely because the witness if subsequently prosecuted could perhaps refute any inference of guilt arising from the answer.

II.

There is here, as in the *Quinn* case, a second ground for our decision. At no time did the committee specifically overrule petitioner' objection based on the Fifth Amendment, nor did the committee indicate its overruling of the objection by specifically directing petitioner to answer. In the absence of such committee action, petitioner was never confronted with a clear-cut choice between compliance and non-compliance, between answering the question and risking prosecution for contempt. For the reasons set out in the *Quinn* opinion, we believe the committee—by failing to meet these minimal procedural standards, originally recognized by the committee and recently re-adopted—did not adequately ap-

prise petitioner that an answer was required notwithstanding his objections. And without such apprisal, there is lacking the element of deliberateness necessary for a conviction under § 192 for a refusal to answer.

III.

Our disposition of the case makes it unnecessary to pass on petitioner's other contentions as to the First Amendment and the grand jury. The judgment below is reversed and the case remanded to the District Court with directions to enter a judgment of acquittal. *Reversed.*

BART v. U. S.

On November 20, 1950, the petitioner was indicted under 2 U. S. C. § 192 for refusing to answer thirty-two questions put to him by a subcommittee of the Committee on Un-American Activities of the House of Representatives. During the trial in the District Court for the District of Columbia, the Government abandoned twenty-four of these counts. The District Judge, sitting without a jury, found Bart guilty of the remaining eight charges. On appeal, the Court of Appeals for the District of Columbia reversed the judgment upon three of the counts and, one judge dissenting, affirmed as to the others. From that decision, we granted certiorari and set the case down for argument along with the two companion cases. *Quinn* v. *United States*, *ante*, p. ——, and *Emspak* v. *United States*, *ante*, p. ——.

In response to a subpoena, petitioner appeared before the subcommittee on June 21, 1950. He was then general manager both of Freedom of the Press Co., Inc., which publishes the *Daily Worker*, and of the *Daily Worker* itself. During the course of the interrogation, members of the committee and the committee counsel posed various questions dealing with Bart's background, his activities, and alleged associates. Among these were the five questions, which, because of petitioner's refusal to answer, led to the convictions now under scrutiny. The particular inquiries involve petitioner's name when he came to this country as a child, his name before it was changed years ago to Philip Bart pursuant to a New York court order, his father's name, and the identity of officials of the Ohio section of the Communist Party in 1936. To the questions concerning name or family background, he raised objections of pertinency; to the other, he unequivocally pleaded the privilege against self-incrimination.

In finding petitioner guilty, the trial court rejected these defenses as without merit. Before the Court of Appeals, petitioner abandoned his defense as to lack of pertinency. The majority thought that this abandonment in effect erased petitioner's objections from the committee record and that they were thus faced with "naked refusals to answer" which did not require affirmative rulings from the committee. We cannot agree. The objections were in fact made before the committee and the witness was entitled to a clear-cut ruling at that time, even though the claims were later abandoned or found to be invalid. *Quinn v. United States, supra.* Without such a ruling, evidence of the requisite criminal intent to violate § 192 is lacking. An abandonment made two and one-half years after the objections were raised cannot serve retroactively to eliminate the need for a ruling. If the requirement of criminal intent is not satisfied at the time of the hearing, it cannot be satisfied *nunc pro tunc* by a later abandonment of petitioner's objection. Therefore, the issue before us is, upon the record as it stood at the completion of the hearing, whether petitioner was apprised of the committee's disposition of his objections.

At no time did the committee directly overrule petitioner's claims of self-incrimination or lack of pertinency. Nor was petitioner indirectly informed of the committee's position through a specific direction to answer. At one juncture, Congressman Case made the suggestion to the chairman that the witness "be advised of the possibilities of contempt" for failure to respond, but the suggestion was rejected. The chairman stated:

"No. He has counsel. Counsel knows that is the law. Proceed, Mr. Travenner."

"We Don't Rule on Objections"

A few moments later, when committee counsel inquired as to certain details of petitioner's marriage, the following colloquy took place:

"Mr. Unger [Counsel for petitioner]: Mr. Chairman, what concern is it of anybody here——

"Mr. Walter: We permit you to appear with your client for the purpose of advising your client. You apparently are old enough to have had some experience in court.

"Mr. Unger: Yes, indeed.

"Mr. Walter: Of course, you know there are many preliminary questions asked witnesses, leading up to some point. As they are propounded you will readily learn what the purpose is. Just advise your client and don't argue with the committee, *because we don't rule on objections.*"

The questioning proceeded on this basis.

Because of the consistent failure to advise the witness of the committee's position as to his objections, petitioner was left to speculate about the risk of possible prosecution for contempt; he was not given a clear choice between standing on his objection and compliance with a committee ruling. Because of this defect in laying the necessary foundation for a prosecution under § 192, petitioner's conviction cannot stand under the criteria set forth more fully in Quinn v. United States, supra.

Our disposition of the case makes it unnecessary to consider petitioner's other contentions. The judgment below is reversed and the case remanded to the District Court with directions to enter a judgment of acquittal. *Reversed.*

Harlan Says Emspak Simply Didn't Want to "Stoolpigeon"

"In the last analysis the Court's holding seems to rest on the premise that the questions put to Emspak became automatically incriminatory once it was shown that he and those about whom he was interrogated were under suspicion of Communism. This is painting with too broad a brush.

"It is true that under the rule as it exists a witness may sometimes have to walk a tightrope between waiver of his privilege, if he answers a question later held to be incriminatory, and contempt, if he refuses to answer a question later held to be nonincriminatory. And it may be that in some circumstances the privilege should be held to extend to questions which are not in themselves incriminatory, but which seem likely to lead to other questions which are. But in my view any such doctrine should be regarded as an exception to the general rule and should be confined to cases where special circumstances exist which make it unfair to apply the ordinary rule, such as where the witness is without counsel, is ignorant or confused, and the like. Some of the decisions of lower courts seem to suggest that in proceedings obviously designed to develop a case against a particular witness, the witness may be allowed to invoke the privilege as to all questions, as may a defendant in a criminal case. See Marcello v. United States, 196 F. 2d 437 (1952); Maffie v. United States, 209 F. 2d 225 (1954). I think, however, that such a view is too sweeping, and also that where there is room for the application of an exception to the ordinary rule, it should be done openly, and not under the guise of holding nonincriminatory questions incriminatory. No circumstances are shown here which would call for the application of any such exception. Emspak was represented by counsel and was obviously an intelligent and shrewd witness. The inference most readily drawn from the record is that Emspak did not want to "stool pigeon" against his associates. While such a motive would not, in my opinion, vitiate an otherwise valid claim of the privilege, it certainly furnishes no legal excuse for refusing to answer nonincriminatory questions."

—Harlan dissenting in Emspak case.

The Fallacy in Cain's Campaign Against the Attorney General's List

You Can't Have Thought Control *and* Free Thought

Former Senator Harry P. Cain has been campaigning since last winter against the Attorney General's list. His latest attack upon it was made last week before the B'nai B'rith. We print on page 2 those portions of the speech which dealt with the list. We believe it important ammunition for harassed government employees, teachers and defense workers.

Cain's campaign against the list is one of the anomalies of Eisenhower era Washington. Though a Truman appointee to the Subversive Activities Control Board, Cain is a Republican. Though the Attorney General's list originated with the Democrats, Eisenhower's Attorney General, Brownell, is an enthusiastic "lister." Indeed Brownell all but added the Democratic party to the Attorney General's list with his "twenty years of treason" speech attacking Harry Truman.

So we have a witch hunting Attorney General confronted with a series of attacks from a fellow Republican, serving on the board of an administrative agency set up for witch hunting purposes.

Why the conflict? In a sense, of course, the Attorney General and the SACB are rival "listers." The SACB is in process of compiling a list of its own under the terms of the Internal Security Act, which provides for the registration of Communists, Communist "action" organizations, Communist "fronts" and now of Communist "infiltrated" organizations. The excesses and follies of the Attorneys General in compiling their list helps to bring into disrepute any such blacklist, including that which the SACB has begun to compile. Cain may feel that without some reform and restraint, popular revulsion may sweep both away.

Like A Benevolent Despot

Cain has become a kind of Haroun Al-Raschid of the security world. Just as the legendary Sultan by personal intervention sought to alleviate the abuses of the despotic system he headed, so Cain has been making forays on behalf of victimized "security risks." His prestige and his sympathy have built up a circle of informal "clients" like the poor woman denied a passport whom he frightened the State Department into clearing for travel recently. He has learned much from these experiences.

But as yet Cain is only trying to reform the security system not to abolish it. He would not be the first reformer who ended up by becoming a revolutionary, but he is still to take a genuinely liberal position. He attacked the repressionist Broyles bills now up again in Illinois, but he praises New York's Feinberg law and the purge of teachers being carried on under it.

Cain would like to identify, label, ostracize and blacklist the Communists, and their fronts and fellow travellers, but without letting the witch hunt spread beyond them. This, as he will learn, is not possible. In the first place the U. S. Chamber of Commerce which fathered the Internal Security Act intended it to apply beyond the Communists. The Mundt-Nixon and McCarran bills were part of a deliberate campaign by the Chamber to drive radicals and liberals of any kind off the air, out of newspapers, libraries, teaching, government and every agency which had to do with the making of opinion and policy. What the Chamber wants is to prevent a new New Deal, and to create an Orwellized America in which dissent from "free enterprise" orthodoxy is dangerous.

Repression Creates Conspiracy

Another obstacle lies in the nature of men. If you make some kinds of thinking hazardous, the cautious will avoid thinking altogether. As for the others, the resistant few, if you do not let men speak freely, you force them to conspire. And when men conspire, how can you tell whether that liberal reformer might not secretly be a dangerous revolutionary? The abuses of the Attorney General's list are not accidental but spring from the momentum of any attempt to police men's thoughts and political associations. We must run the risks of freedom or those of repression. We cannot avoid both.

Cain said in his speech, "In recent years, we have done a remarkably shortsighted job in failing . . . to distinguish clearly between dissent and treason." We have done a shortsighted job because we have abandoned the only way to distinguish them which is compatible with a free society. That is the way chosen by the Framers of the Constitution. If Senator Cain will re-study the treason clause, he will see how they handled it. They did so by limiting treason to overt acts, and making it impossible to prosecute a man for treason merely on the basis of his political opinions or associations.

For *Compass* Fans

The *Weekly* is pleased to announce that Mr. Ted O. Thackrey, formerly editor and publisher of the New York *Daily Compass*, has launched a newsletter of his own, appearing twice monthly. The regular subscription will be $6 a year but the charter rate is $5. Mr. Thackrey's address is 225 Lafayette Street, New York 12, N.Y. We extend our best wishes to the new project.

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