CONSTITUTIONAL LAW: DUE PROCESS AS GROUND FOR REFUSING TO TESTIFY BEFORE CONGRESSIONAL INVESTIGATING COMMITTEE—A NOVEL APPROACH REJECTED

THE expanding role of congressional investigating committees has raised constitutional questions as to the rights of witnesses who appear before such bodies under compulsory process. In a recent case of first impression, *Hutcheson v. United States*,[1] the United States Supreme Court considered the efficacy of the due process clause of the fifth amendment as a ground for a witness' refusal to answer questions propounded by an investigating committee.

Petitioner, President of the Carpenters Union,[2] was subpoenaed by the McClellan Committee[3] and asked whether union funds had been used to "fix" an Indiana grand jury investigation of a scheme by petitioner and others to defraud the state. At the time of his appearance before the committee, petitioner was under indictment in an Indiana court for bribing a state official in furtherance of the scheme. He refused to answer the committee's questions concerning the alleged "fix," solely on the ground that the questions related to the state prosecution and thus were in denial of due process of law.

Petitioner was thereafter indicted for contempt of Congress and convicted in a federal district court.[4] The Court of Appeals for the District of Columbia Circuit affirmed, without opinion.[5] Certiorari

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[1] 369 U.S. 599 (1962).

[2] United Brotherhood of Carpenters and Joiners of America.

[3] The committee is properly known as the Select Senate Committee on Improper Activities in the Labor or Management Field. It was established pursuant to S. RES. 74, 85th Cong., 1st Sess. (1957), to investigate the extent to which criminal practices had been carried on in the labor-management field, and to determine whether any changes were required in the laws of the United States to protect against such practices. Following an investigative pattern which had disclosed misuse of union funds for the personal benefit of union officials, the committee, on June 27, 1958, sought to inquire into the personal financial interests of petitioner and various other officials of the Carpenters Union.

[4] After a trial without a jury, petitioner was found guilty of having violated 2 U.S.C. § 192 (1958), which provides: "Every person who having been summoned as a witness . . . refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor . . . ." Petitioner was sentenced to six months' imprisonment and ordered to pay a fine of $500. The District Court did not render a written opinion.

[5] Hutcheson v. United States, 285 F.2d 280 (D.C. Cir. 1960), *aff'd* 369 U.S. 599 (1962).

was granted by the Supreme Court, which affirmed the conviction in a split decision.[6]

The investigative power of Congress is not enumerated in the Constitution, but is an implied power, inherent in the lawmaking process.[7] In an early decision, *Kilbourn v. United States*,[8] the Supreme Court defined the outer limits of this power, holding that the due process clause of the fifth amendment prohibited congressional committees from usurping judicial functions. In subsequent cases, the Court has further required that all questions be pertinent to valid authorizing resolutions,[9] and has limited the scope of inquiry to areas related to legitimate legislative purposes.[10]

Even within the realm of relevant inquiry, the Bill of Rights affords congressional witnesses certain safeguards.[11] For example, a witness may invoke the privilege against self-incrimination and refuse to testify, if he can show that his answers would constitute a

[6] 369 U.S. 599 (1962). Mr. Justice Harlan announced the judgment of the Court in an opinion joined by Justices Clark and Stewart. Mr. Justice Brennan wrote a concurring opinion. Mr. Chief Justice Warren and Mr. Justice Douglas wrote separate dissenting opinions. Justices Black, Frankfurter, and White took no part in the decision of the case. For a discussion of Mr. Justice Black's views, see Knapp v. Schweitzer, 357 U.S. 371, 382 (1958) (dissenting opinion); and Feldman v. United States, 322 U.S. 487, 494 (1944) (dissenting opinion).

[7] Anderson v. Dunn, 19 U.S. (6 Wheat.) 93 (1821).

[8] 103 U.S. 168 (1880). The *Kilbourn* case involved a congressional inquiry into the settlement of a claim against the bankrupt firm of Jay Cook & Company. Since the settlement threatened depletion of the bankrupt estate to the injury of the United States as a creditor, Congress sought to protect the Government's interests. The Supreme Court held that the due process clause and the doctrine of the separation of powers prohibited Congress from investigation of this matter, since it was a matter inherently for adjustment by the judicial branch of the Government.

[9] Watkins v. United States, 354 U.S. 178 (1957). On the general subject, see, *e.g.*, Boudin, *Congressional and Agency Investigations: Their Uses and Abuses*, 35 VA. L. REV. 143 (1949); Cousens, *The Purposes and Scope of Investigations Under Legislative Authority*, 26 GEO. L.J. 905 (1938); Driver, *Constitutional Limitations on the Power of Congress to Punish Contempts of Its Investigating Committees* (pts. 1-2), 38 VA. L. REV. 887, 1011 (1952); Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153 (1926); Tunstall, *The Investigating Power of Congress: Its Scope and Limitations*, 40 VA. L. REV. 875 (1954).

[10] McGrain v. Daugherty, 273 U.S. 135 (1927).

[11] The United States Supreme Court reaffirmed this principle in Slagle v. Ohio, 366 U.S. 259, 265 (1961): "Surely traditional notions of fair play contemplate that a person summoned to testify before any adjudicatory or investigatory body, including a legislative investigatory committee, may object to any question put to him upon any available ground, however tenuous." This pronouncement involved no new departure. Two years earlier, in Barenblatt v. United States, 360 U.S. 109, 112 (1959), the Court said: "Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly . . . the relevant limitations of the Bill of Rights."

link in the chain of evidence needed to prosecute.[12] However, a congressional committee need not honor a claim of the privilege against self-incrimination if a witness faces incrimination solely under state law.[13] In recent years, witnesses have further been discouraged from invoking the privilege, because of possible private sanctions and opprobrium resulting from such a claim.

With the advent of congressional investigation into areas of political thought and association, some witnesses have based their refusal to answer questions on the ground that the interrogation violated the first amendment guarantee of freedom of speech. In such cases the Court has determined the validity of such a violation by balancing the public interest in disclosure against the right of the individual to remain silent. In applying this "balancing test," the Court has consistently upheld contempt convictions of uncooperative witnesses, and thereby rejected the first amendment as an absolute defense.[14]

In the present case, petitioner disclaimed reliance upon the privilege against self-incrimination and did not invoke the first amendment. Instead, he adopted a unique approach, and based his refusal to testify upon due process grounds. Petitioner contended that the committee's inquiry into the subject matter of the state indictment was fundamentally unfair, and thus violative of due process, in two respects: first, it amounted to a public "pretrial" of a criminal prose-

[12] Hoffman v. United States, 341 U.S. 479 (1951). For a review of situations in which the privilege against self-incrimination may be invoked, see, *e.g.*, BECK, CONTEMPT OF CONGRESS (1959); Goldfarb, *The Constitution and Contempt of Court*, 61 MICH. L. REV. 283 (1962); Kroner, *Self Incrimination: The External Reach of the Privilege*, 60 COLUM. L. REV. 816 (1960); 50 MICH. L. REV. 605 (1952).

[13] United States v. Murdock, 284 U.S. 141 (1931); Hale v. Henkel, 201 U.S. 43 (1906). Both of these cases rest upon misapplications of the English law. In holding that a witness before a federal agency could not refuse to testify on the ground that his answers would incriminate him under state law, the Supreme Court relied upon two English decisions: King of the Two Sicilies v. Willcox, 1 Sim. (N.S.) 301, 61 Eng. Rep. 116 (Ch. 1851); Queen v. Boyes, 1 Best & S. 311, 121 Eng. Rep. 730 (K.B. 1861). The decision distinguishing the two cases and correctly stating the existing English law, United States v. McRae, [1867] L.R. 4 Eq. 327, was not cited by the Supreme Court. The *McRae* case established the principle that a witness may refuse to make disclosures which would subject him to penalties under the law of another jurisdiction.

[14] See, *e.g.*, Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Barenblatt v. United States, 360 U.S. 109 (1959). These cases involved the refusal of witnesses to answer questions concerning alleged communist affiliations. In each instance it was held that the wide power of Congress to legislate in the field of subversive activity justified legislative investigation into areas of thought and association which ordinarily were protected from disclosure by the first amendment. For discussions of the problems raised by these cases, see, *e.g.*, *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 159 (1959); Comment, 11 HASTINGS L.J. 322 (1960).

cution; and second, it placed him in a dilemma wherein he was inescapably penalized solely because he was summoned and questioned by the committee. If he answered truthfully, his answers might aid the state prosecution and might possibly be admissible as evidence of "consciousness of guilt."[15] If he answered falsely, he could be convicted of perjury. Were he to invoke the privilege against self-incrimination, that fact could be used to his prejudice in the state trial.[16] On the other hand, by remaining silent, he faced punishment for contempt of Congress.

Mr. Justice Harlan, speaking for the plurality, refused to accept petitioner's arguments. According to the plurality opinion, contentions respecting the future use of incriminatory answers in a state court were foreclosed by *United States v. Murdock*,[17] which held that possible incrimination under state law is not a valid ground for refusing to answer questions in a federal inquiry. Since petitioner had not invoked the privilege against self-incrimination,[18] the Court would not grant its benefits under another label or reconsider the *Murdock* holding at this juncture. Mr. Justice Harlan concluded that the mere pendency of a state prosecution did not preclude the committee from questioning petitioner, even though the information elicited might be used to his prejudice in the state proceeding.[19] Any unfairness which might attend the state trial was

[15] Davidson v. State, 205 Ind. 564, 569, 187 N.E. 376, 378 (1933). Under Indiana law any admissions made by petitioner before the committee would have been admissible in the state trial. This was not disputed by the Government. Brief for Respondent, p. 41.

[16] Crickmore v. State, 213 Ind. 586, 592-93, 12 N.E.2d 266, 269 (1938); State v. Schopmeyer, 207 Ind. 538, 540, 194 N.E. 144, 146 (1935).

[17] 284 U.S. 141 (1931). It should be noted that in *Murdock*, the witness had not been indicted for any state offenses, but merely feared that state prosecution might occur as a result of his testimony. In the present case, however, petitioner was under indictment at the time of his appearance before the committee. Mr. Justice Harlan concluded that there was no difference in substance.

[18] Petitioner repeatedly disclaimed reliance on the privilege against self-incrimination. He stated his concern that there be no violation on his part of the provisions of the AFL-CIO Code of Ethics which provides for the possible expulsion of union members who invoke a plea of self-incrimination when questioned about their official conduct. *Hearings before the Select Committee on Improper Activities in the Labor and Management Field*, 85th Cong., 2d Sess. pt. 31, at 12115 (1958).

[19] Sinclair v. United States, 279 U.S. 263 (1929) was cited in support of this proposition. However, the pending suit in the *Sinclair* case was a civil action, not a criminal prosecution. The plurality opinion failed to recognize this significant distinction. For example, a defendant in a civil suit can be compelled to testify as an adverse witness at the trial, FED. R. CIV. P. 43(b) or in advance of trial, on depositions or interrogatories, FED. R. CIV. P. 26(a) and 33. Consequently, no fundamental unfairness results when his testimony is first elicited at a congressional hearing.

not ripe for adjudication and had to await review of the state conviction.

In dissenting,[20] Mr. Chief Justice Warren, joined by Mr. Justice Douglas, criticized the failure of the plurality opinion to recognize that largely *because* of the decision in *Murdock*, narrowing the privilege against self-incrimination, the committee's questions were in denial of due process of law. He concluded that the dilemma in which petitioner was placed constituted a fundamental unfairness sufficient to justify reversal.

Mr. Justice Brennan, although concurring in the judgment,[21] accepted the broad outlines of the rationale put forth by the dissent, and agreed that fundamental fairness would demand postponement of congressional inquiry in certain situations. He concluded, nonetheless, that the facts of the present case failed to show a serious likelihood of unfairness, and therefore did not warrant the thwarting of valid investigation.

The use of the due process clause as a limitation upon the power of investigation, is not without authority. When Congress made the federal judiciary the agency for enforcing the power to punish for contempt, it necessarily brought into play the restrictions under which the courts function.[22] Foremost among these restrictions is the refusal of the courts to inflict punishment on a witness where the committee proceeding was fundamentally unfair. For example, contempt convictions have been reversed where no quorum was present when the witness was charged with the offense,[23] where the form of questions and rulings on objections were obtuse,[24] and where the questions were so phrased that the witness was not fully informed of their pertinency to the subject matter of the investigation.[25]

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[20] 369 U.S. at 628.

[21] *Id.* at 622.

[22] Mr. Justice Frankfurter expressed this idea in his concurring opinion in Watkins v. United States, 354 U.S. 178, 216 (1957). The majority in *Watkins* adopted a similar view. *Id.* at 188, 192.

[23] Christoffel v. United States, 338 U.S. 84 (1949).

[24] Slagle v. Ohio, 366 U.S. 259 (1961). In Russell v. United States, 369 U.S. 749 (1962), a contempt conviction was reversed because the indictment failed to identify the question under inquiry at the time of the defendant's refusal to answer.

[25] Watkins v. United States, 354 U.S. 178 (1957). In *Watkins*, the Supreme Court held that the committee's authorizing resolution and questions were so vague that the witness was not afforded a fair chance to determine whether he was within his rights in refusing to answer. The vagueness of the interrogation was therefore a denial of due process. *Id.* at 208. The decision is discussed in *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 85, 141 (1957); Comment, 24 U. CHI. L. REV. 740 (1957).

Assuming the validity of the due process defense, as demonstrated in these prior cases, the alleged elements of fundamental unfairness in the present case should be examined to determine whether such a defense would be available. One element of unfairness cited by petitioner stemmed from the unfavorable publicity attaching to his appearance before the committee. By conducting investigation into the subject matter of the state indictment, the committee placed petitioner in a position where his answers to questions or his refusal to testify would be publicized in a manner that might adversely affect his pending trial. Although convictions have been reversed where prejudicial publicity prevented a fair trial,[26] such prejudice is extremely difficult to prove.

The most substantial element of unfairness alleged by petitioner was that he could not invoke the privilege against self-incrimination before the committee without prejudicing his defense at the state trial in Indiana. For example, under Indiana law, a claim of the privilege could have been used by the prosecution to draw adverse inferences against petitioner, and to impeach his testimony should he take the stand.[27] Such incriminatory inferences would not be barred by the fifth amendment, because the protection against self-incrimination afforded by that amendment has not been extended to proceedings in state courts.[28] In only one instance has a limitation been placed upon the permissible inferences which a state may draw from a prior plea of self-incrimination before a federal tribunal. In *Slochower v. Board of Education*,[29] the Supreme Court held that the due process clause of the fourteenth amendment was violated by an inference which presumed guilt, and resulted in the arbitrary dis-

[26] Janko v. United States, 366 U.S. 716 (1961) (per curiam); Marshall v. United States, 360 U.S. 310 (1959). In the instant case, the committee publicly proclaimed its opinion of petitioner's guilt. Such action might have affected the outcome of petitioner's state trial. Since it would be extremely difficult to ascertain precisely what effect the committee's activities had on the judgment of jurors, the prejudice, may have been incapable of substantiation sufficient to enable reversal upon review of the conviction. *Cf.* Beck v. Washington, 369 U.S. 541 (1962). Consequently, there is an element of unfairness in unnecessarily subjecting petitioner to such adverse publicity.

[27] Crickmore v. State, 213 Ind. 586, 592-93, 12 N.E.2d 266, 269 (1938); State v. Schopmeyer, 207 Ind. 538, 540, 194 N.E. 144, 146 (1935).

[28] Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908). See, *e.g.*, 2 CROSSKEY, POLITICS AND THE CONSTITUTION 1083-1118 (1953); Green, *The Bill of Rights, the Fourteenth Amendment and the Supreme Court*, 46 MICH. L. REV. 869 (1948); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949).

[29] 350 U.S. 551 (1956).

missal of a state official without hearing. Furthermore, the Court intimated in *Slochower* that a state could not vitiate the federal right against self-incrimination. The vitality of this decision has been weakened, however, by subsequent cases upholding inferences of incompetence, and the consequent firing of state employees who had previously invoked the privilege against self-incrimination.[30]

Because of the aforementioned decisions, which allow states to impose sanctions on witnesses who rely on the federal privilege against self-incrimination, it appears that fundamental unfairness was present in the instant case. As a witness, petitioner was unable to exercise a constitutional privilege without fear of penalty, and he was imprisoned for contempt when the privilege would have protected him against such a charge. The unjustified unfairness illustrated by the instant case constitutes one reason why the Court should, in a proper case, either revitalize the principle of *Slochower,* or overrule past decisions[31] and hold that a refusal to testify in a

[30] Lerner v. Casey, 357 U.S. 468 (1958); Beilan v. Board of Education, 357 U.S. 399 (1958). These cases involved officials who had invoked state privileges against self-incrimination before state agencies. However, in Nelson v. County of Los Angeles, 362 U.S. 1 (1960), the Court upheld the dismissal of a temporary state employee who had relied on the federal privilege against self-incrimination in refusing to answer questions propounded by the House Un-American Activities Committee.

[31] In order to grant a congressional witness the right to invoke the federal privilege against self-incrimination when his testimony would incriminate him under state law, it would be necessary to overrule United States v. Murdock, 284 U.S. 141 (1931). See note 13 *supra.*

Presumably, a congressional witness invoking the federal privilege against self-incrimination could be protected from adverse inferences in a state prosecution by overruling the *Adamson* decision and holding that the fourteenth amendment prohibits such inferences. At present, four Justices have accepted this interpretation of the fourteenth amendment, while two members of the Court, Justices White and Goldberg, have not yet passed upon the issue. See, *e.g.,* Cohen v. Hurley, 366 U.S. 117, 154 (1961) (Brennan, J., joined by Warren, C.J., dissenting); Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., joined by Douglas, J., dissenting). The *Adamson* case however, involves the broad issue of whether the fourteenth amendment provides a right against self-incrimination in state courts, and thereby prohibits state sanction when a witness invokes a state privilege against self-incrimination. On the other hand, the present case raises the narrower problem of state sanction against a witness who invokes the federal privilege. Therefore, it might not be necessary to overrule *Adamson* in order to enable a congressional witness to invoke the federal privilege without fear of penalty in a state court. State sanction could be prohibited on the ground that a state cannot deprive a witness of federal rights by vitiating the federal privilege or making it less meaningful by applying sanctions. See Slochower v. Board of Education, 350 U.S. 551 (1956). Although subsequent cases have limited the effectiveness of *Slochower,* such cases have merely involved dismissal from employment as a result of invoking the privilege against self-incrimination. In the instant case, however, the claim of the federal privilege could have resulted in adverse inferences in a state criminal prosecution. This significant distinction would seemingly justify the prohibition of state sanction in the present situation.

federal inquiry cannot be used against a witness in a state prosecution.[32] Until that step is taken, it is difficult to see how the Court can, consistently with fundamental fairness, sustain a conviction for contempt of Congress in a situation such as the present.

The acceptance of fundamental fairness as an affirmative limitation on the power of congressional investigation, by three of the six Justices participating in the present decision, represents a significant development in the law. This novel approach would also be applicable to other situations. For example, it would be unfair for an investigating committee to interrogate a witness in order to deliberately affect a state trial,[33] or to subject him to punishment in the state courts by exposing his illegal acts and publicly pronouncing his guilt.[34] In such cases, where obvious unfairness is involved and no immunity has been granted, due process may emerge in the future as a legitimate ground for refusing to testify.

[32] There are other methods which might be employed to protect a congressional witness from incrimination in the state courts. Testimony could be taken in executive session where serious unfairness to the witness would result if taken publicly. Moreover, Congress could enact legislation which would prevent testimony given under compulsion from being used in any court, state or federal. Adams v. Maryland, 347 U.S. 179 (1954); *accord,* Reina v. United States, 364 U.S. 507 (1960). Since Congress has the power to grant immunity and thereby compel testimony under circumstances in which even a plea of self-incrimination would ordinarily be applicable, it cannot be argued with persuasion that legitimate investigation would be thwarted by applying standards of fundamental fairness to congressional committees.

[33] If a congressional committee were to assist a state prosecution in acquiring evidence, the analogy of various search-and-seizure decisions would be applicable. Before Mapp v. Ohio, 367 U.S. 643 (1961), excluded all illegally seized evidence from use in any prosecution, evidence illegally acquired by federal officers was, at least by orders *in personam,* made unavailable in a subsequent state prosecution. Rea v. United States, 350 U.S. 214 (1956). A similar analogy has been held applicable in the area of self-incrimination. In discussing the converse situation of interplay between state and federal authorities to avoid the Bill of Rights, the United States Supreme Court said, in Feldman v. United States, 322 U.S. 487, 494 (1944): "If a federal agency were to use a state court as an instrument for compelling disclosures for federal purposes, the doctrine of the *Byars* case [273 U.S. 38 (1927)], *supra,* as well as that of *McNabb v. United States,* 318 U.S. 332, [1943], affords adequate resources against such an evasive disregard of the privilege against self-crimination." [*sic*].

[34] The legislative power of inquiry is not an end in itself. Investigations conducted solely to expose or punish those investigated exceed the congressional power. Watkins v. United States, 354 U.S. 178, 187 (1957). Arguably, a pronouncement of guilt by legislative action without and in advance of a judicial trial is in the nature of the prohibited bill of attainder. *Cf.* United States v. Lovett, 328 U.S. 303 (1946).